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Rethinking the Character and Fitness Inquiry

Leslie Levin

University of Connecticut School of Law

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office filed one brief to defend an Ohio law that makes it a crime to knowingly lie during an election campaign and another brief arguing that the law violates the First Amendment. The Attorney General argued that his dual constitutional obligations—to uphold the laws of Ohio and to protect the rights of its citizens—compelled his decision. Adam Liptak, *In Ohio, a Law Bans Lying in Elections. Justices and Jesters Alike Get a Say*, N.Y. TIMES, Mar. 25, 2014, at A16.

   48. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

   49. PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN BROWN V. BOARD OF EDUCATION 100-01 (Univ. Press of Kan. ed. 1995).

   50. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

   51. *Mayor of New York v. City Council of New York*, 451543/2013 (N.Y. Sup. Ct. 2013).

   52. *Patrolmen's Benevolent Ass'n of N.Y. v. City Council of New York*, 654550/2013 (N.Y. Sup. Ct. 2013). Mayor De Blasio subsequently reversed Mayor Bloomberg's position and withdrew the office's challenge to the racial profiling law. J. David Goodman, *De Blasio Drops Challenge to Law on Police Profiling*, N.Y. TIMES, Mar. 6, 2014, at A25.

   53. Henry M. Greenberg, *A Principled Discussion of Professionalism: Lawyer Independence in Practice*, 6 N.Y. JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW 21 (2013).

   54. Weinstein, *supra* note 5, at 172 (emphasis added).

Rethinking the Character and Fitness Inquiry

Leslie C. Levin

The bar's character and fitness inquiry has no shortage of critics.[1] The critiques are not aimed at its goal—public protection—but at the way in which it is conducted and its underlying assumptions. Bar authorities look at past conduct (e.g., crimes, academic misconduct, credit history), evidence of rehabilitation, and current conduct to assess the applicant's character.[2] The assumption is that it is possible to tell from this information whether the applicant possesses the requisite character and fitness to practice law. While this assumption is intuitively appealing, it has not been rigorously tested. A recent study of Connecticut bar applicants and their subsequent discipline history indicates that the factors that bar authorities consider when making admission decisions do not strongly predict who will later be disciplined.

For the vast majority of applicants, the character inquiry is just an inconvenience, as virtually all appli-
cants are eventually admitted to the bar.[3] Yet the inquiry has significant costs. Applicants must spend
time and money to gather the personal information and can be subject to substantial stress, inconve-
nience, and embarrassment if they are required to participate in hearings. Questions about credit his-
tory may disadvantage certain applicants based on their socio-economic backgrounds. The focus on
past criminal conduct may perpetuate racial and class biases, as people of color and the poor are sub-
jected to disparate treatment in the criminal justice system.[4] The questions about a bar applicant's
psychological history may deter law students from seeking much-needed psychological help.[5] Indeed,
the very existence of the character and fitness inquiry may deter some people from applying to law
school who would have made good lawyers had they done so.

Notwithstanding these criticisms, bar authorities claim that the inquiry is needed to protect the public
and the administration of justice.[6] This might be persuasive if there was evidence that bar authorities
can accurately determine which applicants possess the good character needed to be a trustworthy
lawyer. Unfortunately, there is not. Indeed, the very concept of "good character" comes from moral
philosophy and not from our growing understanding of the psychology of human behavior.[7] That
research reveals that even people who are honest in one situation are not necessarily honest in others.[8]
Lawyers are no exception. Moreover, their ethical behavior is affected by the offices in which they
work, the clients they serve, the issues they confront, and the norms of the communities in which they
practice.[9] This information is often not known until after bar admission occurs.

Moreover, most lawyer discipline is imposed on middle-aged males who practice in solo or small law
firms.[10] These lawyers tend to work in personal plight areas such as criminal law, family law and per-
sonal injury, where disputes are emotionally charged and clients are often vulnerable. Much of the dis-
cipline imposed on these lawyers is for neglect of client matters or failure to communicate with
clients.[11] This behavior often results from insufficient office support or from taking on too many mat-
ters. Neglect also occurs due to psychological problems or substance abuse. Indeed, disciplined lawyers
often report some depression related to work or life circumstances, such as family or financial crises.[12]
These problems typically arise several years after the character and fitness inquiry occurs.[13]

Studies on Character and Fitness Data
Only two studies have sought to explore whether there is, in fact, a relationship between bar applicants
who disclose "problem" behaviors during the character and fitness process and the subsequent imposi-
tion of discipline. The first, published in 1991, was based on a review of 52 disciplined attorneys'
records and their bar admissions files, and a comparison to the general population of Minnesota bar
applicants. The investigators found that disciplined lawyers were more likely to have revealed evidence
of certain types of conduct in their admissions files (e.g., arrests, possible substance abuse, involuntary
employment terminations, financial problems) than other bar applicants.[14] While the percentages of
disciplined lawyers who reported some of this history were elevated relative to non-disciplined
lawyers, the results were not analyzed for statistical significance or subjected to other statistical analy-
sis. As one of the investigators later noted, "[T]he study was not conducted scientifically and involved a
very small sample."[15]

A more recent systematic study was conducted of Connecticut lawyers. That study used information from the admissions files of lawyers admitted to the Connecticut bar from 1989 through 1992, in order to compare those who were disciplined (152 lawyers) with a random sample of 1,198 lawyers who were not disciplined up until 2010.[16] The study analyzed various information reported during the bar admissions process that might predict later lawyer misconduct including, *inter alia*, prior criminal history, problem credit history, prior employment history, academic misconduct, substance abuse, and psychological history. The study revealed that many of the responses on the admissions application are statistically associated with the subsequent imposition of discipline. Nevertheless, these variables are poor predictors of subsequent misconduct because the overall baseline likelihood of discipline is so low (only about 2.5% of all admitted lawyers). Thus, even if some variable (for example, having defaulted on a student loan) *doubles* the likelihood of subsequent disciplinary action, the probability of subsequent discipline for someone with a student loan default is still only 5%. It seems highly unlikely that a bar regulator would deny admission to an applicant who had only a 5% chance of subsequent discipline, especially when in many cases, that discipline would be no greater than a single reprimand.[17]

It is instructive to consider some of the categories in which differences were found. Consistent with the social deviance and criminology literature,[18] gender has a statistically significant effect ($p<.01$)[19] on the probability of being disciplined: being male raises the probability of discipline by approximately 2.5 percentage points. Put another way, women have a 1% chance of being disciplined, while men have about a 3.5% chance, other things equal. On the other hand, at 3.5%, the probability of discipline is still very low.

Among the academic history variables, higher law school rank is associated with a reduction in the probability of discipline. Relative to someone graduating in the fourth quartile of law schools, graduating from any higher tier school reduces the probability of discipline by about 2 percentage points, all with some level of statistical significance. Higher law school grades are negatively associated with discipline risk, and the effect is statistically significant ($p<.05$).

There is also some relationship between financial difficulties and discipline, but it is relatively modest. Each additional thousand dollars of student debt raises the probability of discipline by 0.04 percentage points, and this result is significant ($p<.01$). Higher non-student debt has no statistically significant effect on discipline. Having delinquent credit accounts increases the likelihood of discipline by about 2.3%, and the effect is statistically significant ($p<.01$). Somewhat surprisingly, having had a previous bankruptcy *lowers* the risk of future discipline.

Prior involvement with the criminal/civil justice system raises the chances that a bar applicant will be subsequently disciplined, but the effects are mostly small. Having a prior criminal conviction is associated with a roughly 1.2 percentage points greater chance of discipline. This is only half as large as the increment from being male, and is not statistically significant. Having been a party to a civil suit (as plaintiff or defendant), raises the discipline probability by almost the same amount as a criminal conviction, and this effect is statistically significant ($p<.05$). Traffic violations are associated with a higher discipline risk, with each additional violation adding about 0.3 percentage points to the likelihood of discipline. While quantitatively small, this effect is statistically significant ($p<.10$).

Finally, drug or alcohol problems reported at the time of bar admission are not associated with a higher discipline risk, but the presence of prior mental health problems is associated with a higher risk of discipline. The effect is about 3.5 percentage points and statistically significant ($p<.01$). But it remains true that someone who reports a mental health diagnosis or treatment is still overwhelmingly unlikely to be disciplined: The baseline probability of discipline for someone with no reported mental health problems is only about 2.5%, so having such problems only raises the probability of discipline to about 6%.

Efforts to create a statistical model by combining various factors to determine whether it was possible to predict which applicants will be disciplined and which will not were unsuccessful. The best model correctly predicted 100% of the 1,198 non-disciplined lawyers. But it correctly predicted only 3 of the 145 (2.1%) disciplined lawyers. (A prediction of discipline was deemed "correct" if it indicated a 50% or higher likelihood that a lawyer would be disciplined.) In other words, when all the available information was used in a statistically rigorous fashion, there were only three additional correct predictions for who would be disciplined (and no more correct predictions of who would not be disciplined).

It should be noted that the failure of the variables to strongly predict subsequent discipline was not due to the fact that those who were likely to be problematic lawyers were denied admission to the bar. Only 1-2 applicants to the Connecticut bar are denied admission each year. Three additional applicants withdrew at the hearing stage from 1989-1992, but they were all able to practice in another jurisdiction.

Of course, the Connecticut study only analyzed the information appearing in applicants' admissions files. While supporting documents from law schools, credit agencies, motor vehicle departments, and recommenders are included in the Connecticut application files to verify portions of the applicant's self-report, some applicants may have failed to disclose other hard-to-discover information, such as substance abuse. Thus, the study only reflects the predictive value of the information that is disclosed to bar examiners, and not the predictive value of applicants' true personal histories. In addition, discipline is an imperfect proxy for lawyers' misconduct, as much lawyer misconduct is never detected, reported, or sanctioned through formal channels.[20] Nevertheless, discipline sanctions include much of the serious detected misconduct—such as criminal convictions—and it is the best available measure of lawyers who engage in serious wrongdoing.

The Meaning of the Findings

The Connecticut study raises questions not only about the relevance of some of the information elicited from bar applicants, but about the meaning of the results. For example, one of the most powerful predictors of the likelihood that a lawyer would be disciplined is simply being male. The finding that male bar applicants were significantly more likely to be disciplined than female applicants replicates similar findings in the United States, Canada, and Australia.[21] This finding is interesting because women are more likely to work in solo practices than men[22] and more likely to suffer from depression,[23] and should therefore be *more* likely to be disciplined. The reasons for the gender differences are unclear. It is possible that women are more conscientious than men[24] or more risk-averse.[25] Female lawyers may have less contact with clients than their male counterparts, which may present fewer

opportunities for them to be grieved by clients. It is also possible that female lawyers are more concil-
iatory when clients become dissatisfied or distressed, making women less likely to be the subject of
grievances. Alternatively, something may be happening during the discipline process that makes it less
likely that women will be disciplined.

The reasons that certain other variables predict discipline may have less to do with poor "character"
than with other factors. For example, studies have shown that the law school attended affects students'
career options.[26] Law graduates who do well in law school and graduate from top-tier schools are more
likely to go to large firms; lawyers who graduate from lower-tier schools are more likely to work in solo
and small firm practice.[27] Solo and small firm lawyers are more likely to be disciplined, especially for
relatively low-level acts of omission (e.g., neglect of client matters, failure to return phone calls) that
may not be due to the poor "character" of the applicant, but rather, may be due to inadequate office
support.

The results indicating that bar applicants with delinquent credit accounts or with higher student debt
load are more likely to be subject to discipline may have a similar explanation. It may be that delin-
quent account holders have problems managing their paperwork or may not take their legal obligations
seriously. Such traits might lead to misbehavior and discipline. An alternative explanation, however, is
that bar applicants with delinquent credit accounts and higher student debt tend to come from less
affluent socio-economic backgrounds. We know that graduates of elite law schools are more likely to
come from higher status socio-economic backgrounds and to work in the largest firms.[28] These indi-
viduals may also need to incur less student debt in order to attend college and law school than other
applicants. Those with a problematic credit history or greater student debt may come from less affluent
backgrounds, and therefore may be more likely to attend local or lower-tier law schools. These individ-
uals are much more likely to work in solo or small law firms, where discipline is more likely to be
imposed.

Conclusion

Notwithstanding its limitations, the Connecticut study raises some obvious questions. For example, is
it fair to bar applicants—or a wise use of resources—to require them to produce information to bar
authorities that has little predictive value? Of course, the character and fitness inquiry also has sym-
bolic value, both as a sign to the public that lawyers are to be trusted and as a signal to the profession
that lawyers are supposed to comply with the law.[29] But this does not mean that *all* of the information
currently elicited during the character and fitness inquiry is needed in order to protect the public or to
promote the character and fitness requirement's other goals. About which conduct—and how deeply—
should bar authorities continue to inquire?

Further research is obviously needed. For example, it may be that certain information such as academic
misconduct or recent substance dependency predicts later misconduct, but is routinely under-reported
to bar authorities. Interviews with disciplined lawyers about their pre-application histories might help
shed light on this question. A larger study of lawyer applicants might make it possible to assess
whether there is a relationship between certain pre-application history (e.g., a problem credit history)
and later types of misconduct (e.g., theft of client money). The research required to make this assess-
ment can only occur if bar regulators make their admissions and discipline records available to

researchers. To date, with the exception of Connecticut, it has been extremely difficult to obtain coop-eration from regulators or courts for this purpose. Bar admission authorities cannot credibly claim that the character inquiry is needed to protect the public but then deny access to the information necessary to prove or disprove this claim.

Endnotes

1. *See, e.g.*, Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 124-25, 150-52 (2001); Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Appli-cants*, 40 AKRON L. REV. 255 (2007); Sonya Harrell Hoener, *Due Process Implications of the Rehabilitation Requirement in Character and Fitness Determinations in Bar Admissions*, 29 WHITTIER L. REV. 827 (2008); Carol M. Langford, *Barbarians at the Gate: Regulation of the Legal Profession through the Admissions Process*, 36 HOFSTRA L. REV. 1193 (2008); Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491 (1985); Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331 (1995); Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character*, 82 ST. JOHN'S L. REV. 1037 (2008).

2. *See* NATIONAL CONFERENCE OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2014, at viii-ix (Erica Moeser & Claire Huismann eds., 2014).

3. One study in the 1980s found that only .2% of applicants were denied bar admission on character and fitness grounds. Rhode, *supra* note 1, at 516. More recent figures reflect that denial rates range from .14% to 1% of all applicants. Telephone Interview with R. David Stamm, former Executive Direc-tor, Connecticut Bar Examining Committee (Jan. 8, 2008) (estimating that denial rates in Connecticut were 1-2 people per year or .014%); Missouri Board of Law Examiners, *Frequently Asked Questions* (FAQs) (2011), https://www.mble.org/faq#360; Supreme Court of Ohio & the Ohio Judicial System, *Character and Fitness Determinations*, http://www.supremecourt.ohio.gov/AttySvcs/admissions/cfstats/default.asp (last visited May 15, 2014).

4. Susan Saab Fortney, *Law School Admissions and Ethics—Rethinking Character and Fitness Inquiries*. 45 S. TEX. L. REV. 983, 991-92 (2004); Swisher, *supra* note 1, at 1064.

5. *See* Bauer, *supra* note 1, at 124-25, 150-52; Phyllis Coleman & Ronald A. Shellow, *Ask About Con-duct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and the Constitution*, 20 J. LEGIS. 147, 147 (1994).

6. NATIONAL CONFERENCE OF BAR EXAMINERS, *supra* note 2, at vii.

7. *See* Alice Woolley, *Tending the Bar: The "Good Character" Requirement for Law Society Admission*, 30 DALHOUSIE L.J. 27, 62 (2007).

8. *See* DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES 25-27 (2012); Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple in the Barrel*, 20 PSYCHOL. SCI. 393, 397 (2009); *see generally* ALDERT VRIJ, DETECT-ING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 25-26 (2d ed. 2008) (noting that the regularity with which people lie depends upon the situation).

9. JEROME CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 166-69 (1966); LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN,DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 6-7, 10-12 (2001); Lynn Mather & Leslie C. Levin, *Why Context Matters in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 4 (Leslie C. Levin & Lynn Mather eds. 2012).

10. RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM NEW YORK DISCIPLINARY PROCEEDINGS 54-55, 496 (2008); Patricia W. Hatamyar & Kenneth M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 832-34 (2004); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 51 n. 230 (1998).

11. *See, e.g.,*ABEL, *supra* note 10, at 57-58; Lynn Mather & Craig A. McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, LAWYERS IN PRACTICE, *supra* note 9, at 68-69.

12. ABEL, *supra* note 10, at 90-91, 265-67; Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 268-69 (1997); Carol M. Langford, *The Changing Structure of American Law Firms: Depression, Substance Abuse and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 876-77 (2005).

13. G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 241 (1990).

14. Carl Baer & Peg Corneille, *Character and Fitness Inquiry: From Bar Admission to Professional Discipline*, B. EXAMINER, Nov. 1992, at 5, 6-7.

15. Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S. C. L. REV. 609, 619 (2001).

16. A full description of that study can be found at Leslie C. Levin, Christine Zozula & Peter Siegelman, *A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline* (2013), http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-13-01.pdf. All references in this article to the results of that study can be found in that report.

17. In the Connecticut study, of the 152 lawyers who were disciplined, 72% were disciplined only once during their 17-20 years in practice. Almost 57% of that group received no sanction greater than a single reprimand.

18. *See, e.g.*, RITA J. SIMON & HEATHER AHN-REDDING, THE CRIMES WOMEN COMMIT: THE PUNISHMENTS THEY RECEIVE 53-54 (3rd ed. 2005) (reporting that in 2001, 22.5% of those arrested for crimes were women). *See also* Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System in*GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS (Barbara E. Bloom ed. 2003) (noting that "the rate of incarceration for women continues to be far lower than the rate for men").

19. In other words, the probability that this result is due to chance is less than 1%.

20. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 824, 830 (1992).

21. *See* Francesca Bartlett, *Professional Discipline Against Female Lawyers in Queensland: A Gendered Analysis*, 17 GRIFFITH L. REV. 301, 316–17 (2008); Debra Moss Curtis & Billy Jo Kaufmann, *A Public View of Attorney Discipline in Florida: Statistics, Commentary, and Analysis of Disciplinary Actions Against Licensed Attorneys in the State of Florida from 1988–2002*, 28 NOVA L. REV. 669 (2003–04); Hatamyar & Simmons, *supra* note 10, at 786, 800; Bruce Arnold, *A Life Course Dynamics Approach to Professional Deviance and Self Regulation: The Case of Ontario Lawyers*, PhD thesis, University of Toronto (1998).

22. CLARA N. CARSON, LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005, at 10 (2012).

23. R.C. Kessler et al., *The epidemiology of major depressive disorder: Results from the National Comorbidity Survey Replication*, JAMA, June 2003, at 3095, 3099-3100.

24. David P. Schmitt, *Why can't a man be more like a woman? Sex Differences in Big Five Personality Traits Across 55 cultures*, J. PERSONALITY & SOC. PSYCH., Jan. 2008, at 168.

25. James P. Byrnes, et al., *Gender Differences in Risk-Taking: A Meta-Analysis*, Psych. Bull., May 1999, at 367.

26. *See* RICHARD L. ABEL, AMERICAN LAWYERS 219 (1989).

27. *See id.* at 217-18; JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 57-59 (2005). FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 98-101 (1981); Ronit Dinovitzer et al., *After the JD II: Second Results from a National Survey of Legal Careers*, 42 (2009), *available at* http://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf.

28. *See* HEINZ ET AL., *supra* note 27, at 57-58, 65, 68.

29. Rhode, *supra* note 1, at 509.

Judges and Social Media: "Friends" with Costs and Benefits

Benjamin P. Cooper

Benjamin P. Cooper is the Jessie D. Puckett, Jr. Lecturer and Associate Professor of Law, University of Mississippi School of Law. This article expands on matters addressed in a talk to the Mississippi Trial and Appellate Judges Conference in October 2013.

Judges, like all Americans, are making increased use of social media, albeit at lower frequency than the average user. According to a 2012 Report of the New Media Committee of the Conference of Court Public Information Officers, 46.1% of judges report using social media, up from 40.2% in 2010.[1] Yet judges remain concerned about whether they may do so without running afoul of judicial ethics codes.[2]

Judges have good reason for concern, as examples of their colleagues using social media in ethically dubious ways abound. In North Carolina, a judge was reprimanded for using social media to conduct independent research on a party appearing before him and for engaging in ex parte communications with one of the lawyers.[3] In Alabama, a judge was reprimanded for making comments on his Facebook page about contempt proceedings in his courtroom against an Alabama lawyer.[4]

More and more bodies charged with regulating judicial conduct have observed that judges need guidance on how, and whether, to navigate social media, and several states[5] and the American Bar Association have now weighed in with ethics opinions on judges' use of social media. Recognizing, as the ABA opinion does, that judges should not become "isolated" from the community in which they live, and the undeniable reality that social media "has become an everyday part of worldwide culture,"[6] these