

The Peter A. Allard School of Law

## Allard Research Commons

---

All Faculty Publications

Allard Faculty Publications

---

2010

### The Psychology of Good Character

Alice Woolley

Jocelyn Stacey

*Allard School of Law at the University of British Columbia, stacey@allard.ubc.ca*

Follow this and additional works at: [https://commons.allard.ubc.ca/fac\\_pubs](https://commons.allard.ubc.ca/fac_pubs)



Part of the [Legal Profession Commons](#)

---

#### Citation Details

Alice Woolley & Jocelyn Stacey, "The Psychology of Good Character" in Kieran Tranter ed, *Re-affirming Legal Ethics* (Abingdon: Routledge, forthcoming in 2010).

This Working Paper is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in All Faculty Publications by an authorized administrator of Allard Research Commons.

## **The Psychology of Good Character** Alice Woolley<sup>1</sup> and Jocelyn Stacey<sup>2</sup>

### **I. Introduction**

Defying the improbability of time-travel, Dr. K, a forensic psychiatrist working in Toronto, Ontario in the 1990s, meets Justice H, the Chief Justice of British Columbia in the late 1940s. They meet to discuss the possible admission to a law society of Mr. P, who in 1994 falsified his resume and transcripts in applying for an articling position. In particular, they are there to determine whether Mr. P is of “good character”. To begin the discussion each makes an opening statement about what they think is primarily relevant to determining the character of the applicant and his possible admission to the bar:

Dr. K: “Behaviour flows from character. In 1994, the applicant displayed bad behaviour from which an inference could be drawn about bad character. In 1999, the applicant displayed good behaviour. The question [is] whether this was the result of a conscious decision on the part of the applicant to change his behaviour without an underlying change in character (in which case, his earlier behaviour was related to transient factors), or whether that good behaviour flowed from the applicant’s bad character as yet unchanged.”<sup>3</sup>

Chief Justice H: “The law student's training is not manual training, but is training of the mind, not only in law, but if he wishes to be something more than a mere legal mechanic, he must study logic, history, in particular constitutional history, political science and economics, a certain amount of philosophy and acquire a reasonable familiarity with English literature, and know something at least of the literature of other countries. The object of law training is to attract young men of high character, and to train them in a manner that they will be trustworthy, honourable and competent in the performance of their legal duties, and will use such influence as they have to maintain and improve but not destroy our Canadian constitutional democracy”<sup>4</sup>

In reading this exchange one could reasonably enough wonder whether Dr. K and Chief Justice H will ever find common ground, or even be able to recognize each other as talking about the same thing. Yet both these statements were made (though not made to each other) in the application of a common legal standard: whether an applicant for law society admission is of “good character”.

This paper explores the significance of the changing nature of the good character requirement for law society admission. It posits that good character has shifted

---

<sup>1</sup> Faculty of Law, University of Calgary

<sup>2</sup> LL.B candidate, Faculty of Law, University of Calgary

<sup>3</sup> *Law Society of Upper Canada v. Preyra* [2000] L.S.D.D. No. 60 at para. 33 (hereinafter *Preyra #1*).

<sup>4</sup> *Martin v. Law Society of British Columbia* [1950] 3 D.L.R. 173 at 189.

from a philosophical concept – a “cultural project”<sup>5</sup> of professionalism – into a psychological concept, with evidence of past bad acts claimed to be relevant for whether an applicant represents a future risk to the public.<sup>6</sup> We suggest, however, that this shifting conception of character has been only partial, and that the decision-making processes of Canadian law societies have not kept pace with it. Instead, the decision-making process defines character generally and generically, with only occasional emphasis on character as a relevant predictor of future behaviour. In addition, law societies only rarely employ psychological evidence<sup>7</sup> in their decision-making processes, and when they do employ such evidence they seem uncertain as to its relevance and utility.

Finally, this paper explores whether law societies should embrace a more overt recognition of character as a psychological concept. Whether law societies should make determinations of character similarly to other legal contexts in which the relevant legal standard is psychological – what custody decision is in the “best interests” of the child and whether an offender is “dangerous.” We review how psychological evidence is used in the context of determinations of custody and dangerousness, and the success (or, as it turns out, the failure) of psychological evidence as an aid to fair and accurate decision-making in those circumstances. In the end, the paper concludes that while treating good character as a psychological standard is the only way to make the requirement logical and justifiable in light of the purposes it is said to fulfill, the employment of a psychological standard is fraught with difficulty. There is, in the end, no reason to believe that a psychology based approach will lead to more coherent and fair decision-making. Given that, and given the significant issues with a non-psychological concept of character, the case for retaining a good character requirement for bar admission is weak.

## **II. The Changing Conception of Character**

The requirement that Canadian lawyers be of “good character” has existed since the advent of any formal regulation of the profession. For example, the first legal standards for those seeking to act as lawyers within the North-West Territories were established in December 1885 by the Lieutenant-Governor. Other than lawyers who were already admitted to the bar or had practiced in another of the “Queen’s Dominions,” anyone seeking enrollment as an advocate had to be of “good character”. In 1888 these rules were expanded to require anyone seeking enrollment as an advocate (whether admitted elsewhere or not) to establish his

---

<sup>5</sup>W. Wesley Pue, “Cultural Projects and Structural Transformation in the Canadian Legal Profession” in *Lawyers and Vampires* (Oxford: Hart Publishing, 2003) at \* (hereinafter “Cultural Projects”).

<sup>6</sup> The test for good character is, of course, one of present good character. However, the trigger for a good character hearing is always a past bad act.

<sup>7</sup> The term “psychological evidence” will be used to describe both psychological and psychiatric evidence throughout this paper. We recognize that the terms are scientifically distinct, but note that for the purpose of this paper the way in which the courts use both types of evidence is essentially identical.

good character.<sup>8</sup> When the Law Society of Alberta was created in 1907, “A letter of good character was the entrance fee.”<sup>9</sup>

The good character requirement continues to apply to admission to provincial law societies of all prospective Canadian lawyers. All applicants must provide some documentation in support of their good character (letters of reference) and, as well, must disclose information related to past “bad acts” which might, in the law societies’ view, be indicative of bad character.<sup>10</sup>

Is today’s good character requirement oriented at fundamentally the same thing as that which concerned the Lieutenant-Governor of the North-West Territories in 1888 when he required that all those seeking enrollment be of good character? Answering this question requires identifying what good character would have meant in that earlier time frame: what, for example, would the original 144 members of the Law Society of Alberta in 1907 have understood to be encompassed by the requirement that they provide a letter of good character as the price of admission? What would a subsequent bencher of the Law Society of Alberta have felt was important in determining whether an applicant for admission was of good character?

Answering these questions is challenging. The only published Canadian good character decisions prior to 1989 are a 1922 decision in which the British Columbia Superior Court held that it had no jurisdiction to review whether or not sufficient proof of good character was provided,<sup>11</sup> and the previously cited *Martin* decision in which the British Columbia Court of Appeal affirmed the Law Society’s refusal to admit an applicant with communist beliefs. Some assessment can be made, however, by drawing on W. Wesley Pue’s extensive analysis of this early period of Canadian legal professionalism, including the use of character as part of the establishment of lawyers’ professional identity. Pue argues that the creation of the structures of lawyer professionalism in Canada was a deliberate act, a response by lawyers to cultural and social conditions, to their sense of Canada (especially western Canada) as a fundamentally egalitarian society, but also one threatened by disruptive forces of social change and radicalism. To those lawyers, professionalism, especially professionalism as it was developing in the United States, was “a social vision which held forth the promise of founding a better world on terrain mid-way between the Bolshevik abyss and a sort of *ancien regime* repression.”<sup>12</sup>

<sup>8</sup> Louis Knafla, “Frontier Lawyers: Origins of the Alberta Law, 1882-1914” in Law Society of Alberta, *Just Works: Lawyers in Alberta 1907-2007* (Toronto: Irwin Law, 2007) at 17-18.

<sup>9</sup> *Ibid.* at 22.

<sup>10</sup> See Alice Woolley, “Tending the Bar: The ‘Good Character’ Requirement for Law Society Admission” (2007) 30 Dal. L.J. 27 at 31-35 for a summary of how the good character requirement is administered in the various provinces.

<sup>11</sup> *Hagel v. Law Society of British Columbia* [1922] 31 B.C.R. 75

<sup>12</sup> “Cultural Projects” note 5 *supra* at \*. See also, W. Wesley Pue, “In Pursuit of a Better Myth” (1995) 33 Alta. L.R. 730; W. Wesley Pue, “Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada” (1991) 20 *Manitoba Law Journal*, 227-261; W. Wesley Pue, “British masculinities, Canadian Lawyers: Canadian legal education, 1900-1930”, in *Misplaced Traditions: The Legal Profession and the British Empire*, Symposium Issue, 16(1) *Law in Context*, 1999 (guest edited by Robert McQueen and W. Wesley Pue), 80-122.

Professionalism in this sense had three components: ensuring a particular form of lawyer education, one directed towards creating a better kind of person; establishing admission standards that would ensure that the right kind of people became lawyers; setting standards of lawyer behaviour and disciplining those lawyers who breached them. Through all three components ran a common thread: the emphasis was never on technical competence, it was on the type of person the lawyer was. As indicated by the quotation from *Martin*, legal education was designed to take men of “high character” and to develop them into individuals who were “trustworthy, honourable and competent”. Admission was also oriented towards the type of person the lawyer would be, focused on “centrally important questions regarding what sort of person from what sort of background could properly embody law in a new British dominion”.<sup>13</sup> And finally, discipline and conduct was oriented in part at behaviours which were undesirable, but more fundamentally at ridding the profession of bad people. As dramatically expressed by Sir James Aikins, President of the Canadian Bar Association, “If the legal profession refuses to ruthlessly rid itself of its barnacles and fungus, how can the public be expected to extend to the profession, as a profession, the high honor, the dignity and revenue which that profession rightly deserves”.<sup>14</sup>

When viewed in this context it seems likely that a lawyer in 1920, when asked what good character is, and how you know whether it is present or absent, would have drawn some connection between bad acts and bad character, and between good acts and good character. But that connection would not have been an exercise in psychological prediction. Sir James Aikins would not have viewed bad conduct as empirically or probabilistically relevant to whether the person engaging in that conduct was at heightened risk of behaving badly in the future (although he probably would have thought it quite likely); he would have viewed bad conduct as evidence of a bad nature, indicating a person as fundamentally unworthy of admittance to the profession. Moreover, as evidenced by the historical association in the United States of the good character requirement with denial of admission to whole groups of people, including women and minorities,<sup>15</sup> there was a perception of good character arguably entirely unrelated to how one had lived one’s life in a particular sense. Character was generic, general and related to the essential “truth” of a man, rather than to any particular acts he had committed (or might commit in the future).

---

<sup>13</sup> *Cultural Projects* note 5, *supra* at \*

<sup>14</sup> *Ibid.* at \*

<sup>15</sup> Deborah Rhode, “Moral Character as a Professional Credential” (1985) 94 *Yale L.J.* 491 at 499. The good character requirement does not appear to have a similar history in Canada, presumably because the existence of an articling requirement allowed for informal forms of social exclusion (Rhode notes that when there was an apprenticeship system this was the primary means of social exclusion). The Ontario legislature passed a special bill allowing the enrollment in the Law Society of Upper Canada of a Black man, Delos Rogest Davis, after was unable to obtain articles. Famously, in 1937 Bora Laskin, the first Jewish member of the Supreme Court of Canada and ultimately Chief Justice, was unable to find a job after graduating from Harvard Law School and upon returning to Toronto: “the brilliant legal scholar with two master’s degrees had to write headnotes for a law publisher at fifty cents a note”. It was not until 1960 that a Black woman was admitted to the Law Society of Upper Canada and not until 1976 that the first First Nations woman would “graduate from law.” Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society 1991) at 300 (re Davis), 324 (re Laskin) and 326 (re late admissions).

This summary of the historical conception of character is supported by Kronman, whose idea of the “lawyer-statesman” invokes the historical relationship between the lawyer-statesman and character:

By character I mean, broadly speaking, an ensemble of settled dispositions – of habitual feelings and desires. To have character of a certain sort is to possess a set of such dispositions that is identifiable and distinct being more calm or cautious than most people and better able to sympathize with a wide range of conflicting points of view the trait of prudence or practical wisdom calmness in his deliberations, together with a balanced sympathy the lawyer-statesman’s professional standing is as much to be explained by who he is as what he knows.

The ideal of the lawyer statesman was an ideal of character.<sup>16</sup>

How does that vision of character relate to the modern application of the requirement? There is much more information about the understanding of the good character requirement today, with law society decisions, guidelines, stated purposes, and a governing definition.<sup>17</sup> Based on that information, it appears that the current understanding of the meaning and significance of good character is somewhat confused. On the one hand, the justification for the requirement relates fundamentally to protection of the public; it is through character screening that the “high ethical standards” of the profession will be maintained.<sup>18</sup> Character is viewed as the “well spring of professional conduct in lawyers,”<sup>19</sup> and the general test for determining character is oriented towards indicating whether the past misconduct indicates an absence of current good character. The applicant must demonstrate that he or she is currently of good character taking into account:

**a.** the nature and duration of the [prior] misconduct; **b.** whether the applicant is remorseful; **c.** what rehabilitative efforts, if any, have been taken, and the success of such efforts; **d.** the applicant’s conduct since the proven misconduct.<sup>20</sup>

On the other hand, the definition for character adopted by the law societies is highly generic and general:

---

<sup>16</sup> Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993) at 15-16. In this quote Kronman is talking about the lawyer-statesman as the nineteenth century lawyers would have conceived it. See also: W. Wesley Pue, “Educating the Total Jurist”, (2006) 8 *Journal of Legal Ethics*, 208.

<sup>17</sup> For a general review and critique of the good character requirement’s current application in Canada see Woolley note 10,

<sup>18</sup> *Re Rajnauth and Law Society of Upper Canada* (1993), 13 O.R. (3d) 381 at 384.

<sup>19</sup> Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (Toronto: Thomson Carswell, 2007) at 23-3.

<sup>20</sup> *Law Society of Upper Canada v. Birman*, 2005 ONLHP 6, [2005] L.S.D.D. No. 13 at para. 6.

Character is that combination of qualities or features distinguishing one person from another. Good character connotes moral or ethical strength, distinguishable as an amalgam of virtuous or socially acceptable attributes or traits which undoubtedly include, among others, integrity, candour, empathy, and honesty.<sup>21</sup>

It may be that this definition – with its emphasis on “socially acceptable attributes and traits,” and its reference to “integrity, candour, empathy, and honesty” as examples of those traits – is more psychologically rooted, and also distinct from the description of character in *Martin*, with its emphasis on moral development and virtues such as “honour”. However, the definition is a far cry from a standard psychologist definition of character:

The enduring, patterned functioning of an individual. As perceived by others, it is the person’s habitual way of thinking, feeling, and acting. Understood psychodynamically, character is the person’s habitual mode of reconciling intrapsychic conflicts. Character stands beside, but may be differentiated from, other terms for global aspects of personality, such as identity, self, and ego.<sup>22</sup>

Further, in several cases the Law Society of Upper Canada has strongly rejected any suggestion that an applicant must demonstrate that she is a low risk to the public in the future.<sup>23</sup> In addition, there are only two reported cases in which significant weight was placed on psychological evidence with respect to the applicant.<sup>24</sup> In most cases no psychological evidence is introduced, and no significance is given to that fact by the decision-maker.<sup>25</sup>

This suggests some uncertainty in the current approach to good character. Decision-makers appear (largely) to recognize that, in the modern era, restricting the profession to those who meet some vaguely articulated notion of ethical character is not justifiable. At the same time, however, decision-makers have not embraced a fully psychological concept of character. The generic definition of character, the adamant refusal to focus attention on the likelihood of misconduct

<sup>21</sup> *Re P (DM)*, [1989] O.J. No. 1574 at 22 (QL) Please note that page references to this case are based on a 10-pt Times New Roman PDF downloaded from Quicklaw.

<sup>22</sup> W.W. Meissner, *The Ethical Dimension of Psychoanalysis: A Dialogue* (New York: SUNY Press, 2003) at 267, citing Moore and Fine. Meissner notes that this definition “circumvents any ethical connotations, as when we speak of someone as a person or character, or allude to someone’s good or bad character. Character in the latter sense refers more directly to characteristic ethical qualities and dispositions, virtues, vices, and values that persist in the individual’s patterns of thought, feeling, and action”. This distinction between ethical and psychological character is discussed in more detail below.

<sup>23</sup> *In the Matter of an Application for Admission to the Law Society of Upper Canada by Joseph Rizzotto*, Reasons of Convocation, September 14, 1992 at para. 32 and also *Preyra v. Law Society of Upper Canada*, [2003] L.S.D.D no. 25 (QL) [*Preyra #2*].

<sup>24</sup> *Re P*, note 21 *supra*; *Preyra #1* note 3, *supra* (and also *Preyra #2*). In two cases the panel took note of the fact that the applicant had had psychological counselling – *Miller v. Law Society of Upper Canada*, 2004 ONLSHP 4 and *Law Society of Upper Canada v. Birman* 2006 ONLSHP 32 – and in one case the panel noted that it would have been helpful to have had the assistance of psychological evidence – *Burgess v. Law Society of Upper Canada* 2006 ONLSHP 66.

<sup>25</sup> *Rizzotto*, note 23, *supra*; *Law Society of Upper Canada v. Schuchert*, [2001] L.S.D.D. No. 63 (QL); *Law Society of Upper Canada v. D’Souza* [2002] L.S.D.D. No. 62; *Law Society of Upper Canada v. Levesque* [2005] L.S.D.D. No. 38 (QL); *In the Matter of an Application by Michael John Spicer for Admission to the Law Society of Upper Canada*, Reasons of Convocation, May 1, 1994; *Law Society of Upper Canada v. Shore* 2006 ONLSHP 55.

in the future, and the lack of reliance on psychological evidence about the character of the applicant, suggest that law societies still view character as at least in part ethical or cultural, rather than strictly psychological. That is, the law societies do not talk in terms of an ethical conception of character, but the way in which they search for character amounts, in most cases, most of the time, to a search for ethical character.

Why does this matter? What is the difference between ethical and psychological character, and why might the law societies' continued regulation of ethical, as opposed to psychological, character be problematic?

The differences between ethical and psychological character can perhaps be best explained through articulating a distinction between the ethical concept of "character" and the psychological concept of "personality".<sup>26</sup> "Character" is, in essence, derived from the Aristotelian philosophy of virtue ethics, in which the combination of an individual's possession of virtues with the exercise of practical judgment will shape her decisions and result (ultimately) in *Eudaimonia* (flourishing).<sup>27</sup> It necessarily involves moral distinction, identification of aspects of character as good (virtues) or bad (vices). Character as understood by virtue ethics may be subject to the critique of empirical invalidity,<sup>28</sup> but its orientation fundamentally is not empirical or predictive; it is normative and philosophical.<sup>29</sup> Further, the traits of character may be understood as likely to result in behaviour consistent with those traits (honesty with truth telling, for example) but the correlation is not strong, if for no other reason than that virtue ethics understands behaviour as a combination of the aspects of a person's character and her exercise of practical judgment; conduct does not flow from character alone. A person who lies may or may not have the virtue of honesty; it depends what other virtues were implicated by the situation, and how the individual assessed what the facts required.

Personality, by contrast, is a concept of behavioural psychology, a discipline that expressly rejects the relevance of character:

Gordon Allport, the main personality trait theorist in 20<sup>th</sup> century United States psychology, explicitly banished the term *character* from academic discourse concerning personality. He argued that character was the subject matter of philosophy not psychology. The traits he urged psychologists to study were presumably objective entities (Allport dubbed them *neuropsychic structures*)

---

<sup>26</sup> The distinction between character and personality is one used in the academic literature. For example, to explain the concept of ethical character, Christine McKinnon does so through distinguishing it from the concept of personality. Some of the points made here, for example with respect to the moral neutrality of personality traits, are also made by McKinnon. Christine McKinnon, *Character, Virtue Theories and the Vices* (Peterborough: Broadview Press, 1999) at 59-61. See also: Ross Stagner, *Psychology of Personality* 3d ed. (Toronto: McGraw-Hill Book Company Inc., 1961). Although it also should be noted as is clear from the Meissner quotation (at note 22, *supra*) there is some inconsistency in this usage.

<sup>27</sup> McKinnon, *ibid.* at 61.

<sup>28</sup> And has been extensively critiqued on this basis by John Doris and others.

<sup>29</sup> "Virtue ethicists have eschewed any attempt to ground virtue ethics in an external foundation



stripped of moral significance and linked to “adjustment” but not imbued with inherent value.<sup>30</sup>

Personality constitutes, loosely, the empirically identified and measured dispositions of individuals, dispositions identified through assessment of individual behaviour, how individuals are perceived by others, and how individuals perceive themselves.<sup>31</sup> There are five general “factors” of personality that will have links to behaviour: I: Extraversion/introversion (or Surgency); II: Friendliness/hostility (or Agreeableness); III: Conscientiousness (or Will); IV: Neuroticism/emotional stability (or Emotional Stability); and V: Intellect (or Openness).<sup>32</sup> There is no necessary moral judgment associated with the possession of one personality trait over another,<sup>33</sup> and the relevance of personality traits is their correlation to certain patterns of conduct – patterns of conduct indicate personality,<sup>34</sup> and personality is predictive of patterns of conduct.<sup>35</sup>

Given that distinction, why is regulation of ethical character not justified? In brief, because it is non-empirical and because it potentially incorporates values that a modern lawyer should not be required to embrace as a condition of bar admission.

Character in the general ethical sense has no empirically demonstrated relevance to future conduct.<sup>36</sup> As John Doris and others have cogently argued, the overwhelming evidence of social psychology is that character writ large is non-predictive of conduct.<sup>37</sup> There may be temporal stability of behaviour, and locally identifiable character traits that can be linked to conduct, but general ethical character has little empirical validity as a predictor of future conduct, whatever its philosophical merit. Moreover, in analyzing behaviour in a particular situation, the general approach of virtue ethics has only marginal ability to relate particular behaviours to an individual’s possession (or not) of character. For example, one virtue ethicist defending virtue ethics from the critique of social

<sup>30</sup> Citations omitted. Christopher Peterson and Martin E.P. Seligman, *Character Strengths and Virtues: A Handbook and Classification* (Oxford: Oxford University Press, 2004) at 55. For some articles indicating the emersion of personality as a distinct concept from character, see: J.R. Kantor, “Character and Personality: Their Nature and Interrelations” (1938) 6 *Journal of Personality* 306; William McDougall “Of the Words Character and Personality” (1932) 1 *Journal of Personality* 3.

<sup>31</sup> Various studies measuring character are discussed in John M. Digman, “Personality Structure: Emergence of the Five-Factor Model” (1990) 41 *Ann. Rev. of Psychol.* 417 at 418-422.

<sup>32</sup> *Ibid.* at 420.

<sup>33</sup> Note 30, *supra* and McKinnon note 26 at 61: “We judge character along ethical dimensions. Preferences among personality-types are much more context-sensitive and have much less to do with ethical considerations than do judgments about character”.

<sup>34</sup> Icek Ajzen, *Attitudes, Personality and Behavior* (2d ed.) (2005) (Toronto: McGraw-Hill, 2005) at 2.

<sup>35</sup> “it is assumed by all trait theorists (despite their critics) that personality traits, however assessed have their links to behavior, a basic level is the specific response to a specific situation” Digman, *ibid.* at 424. The correlation between assessed personality and future conduct is imperfect. Digman discusses a study in which teachers assessed one measure of student personality in elementary and intermediate grades; the correlation with high school grade point average was 0.70. Digman at 435-436. Digman argues that situational psychologists ignored the evidence on correlation between personality and behaviour which existed prior to the various famous social psychology experiments such as Milgram’s, and ignored the fact that “situational variables usually failed to account for more than 15% of criterion variance” [in behavioural experiments]. Digman at 421.

<sup>36</sup> The social psychology critique of virtue ethics is discussed in Woolley note 17 at 63-65.

<sup>37</sup> John M. Doris, “Persons, Situations, and Virtue Ethics” (1998) 32:4 *Noûs* 504.

psychology, and in particular from the argument that the Milgram experiment showed the significance of situations over character, suggested:

Admittedly, Milgram's experiments show that a remarkable number of subjects administer electric shocks of considerable severity, in experimental situations of a certain type. The tendency to perform beneficent acts is arguably not as robust as one might hope. However, there was considerable variation in the mental states of those prepared to administer such shocks, and those differences may point to character traits of, for example, compassion, benevolence, respect for authority and commitments, which manifest themselves in various ways in dilemmatic situations.<sup>38</sup>

This observation may be descriptively valid from the vantage point of virtue ethics, but it does not do much work, empirically speaking, for explaining the character of the individuals in the experiment.

This lack of empirical foundation tends to lead to the result, documented elsewhere,<sup>39</sup> that law society determinations of character tend to rest largely on decision-makers' impressionistic assessment of an applicant as a witness. Decision-makers cannot draw satisfactory conclusions of character from past bad acts, they do not have any psychological evidence in most cases, and they have declined to engage in any type of predictive exercise as to the actual risk posed by this applicant. As a consequence, the decisions end up turning on whether the applicant provides evidence which is "unsatisfactory"<sup>40</sup> or lacking in "candour,"<sup>41</sup> whether the applicant "displays a certain caginess bordering on arrogance"<sup>42</sup> or by contrast is not "wishy-washy,"<sup>43</sup> provides self-reporting that is "full and frank"<sup>44</sup> or speaks "clearly, eloquently and without qualification state[s] that her actions were wrong."<sup>45</sup>

---

<sup>38</sup> Christine Swanton, "Virtue Ethics" *International Encyclopedia of the Social and Behavioral Sciences* at 16222. To be fair, these comments are talking about different individuals doing a particular act, and what could be said about their character as a result of the choice they made. It is fair to conclude that it would be difficult to say much about any one person from that type of data, whether viewing it through personality or through character. The quotation shows, though, that from a philosophical/virtue point of view, linking behaviour to "character" is almost impossibly difficult. This may be because virtue ethicists do not just have to link behaviour to the way a person is, they also have to link behaviour to a moral judgment about the way that a person is. So, here, Swanton has to characterize the behaviour in some moral way – "cruelty" or "obedience" – and then identify the relevant virtue which the behaviour may reflect. This is far more complicated than simply observing behaviour and observing the types of personality that may flow from it/cause it. In addition, the extensive research into personality and behaviour can be relied upon. The five factors are identified because over the course of behavioural research it is apparent that these are the five areas of relevant human variation. They are the traits people have, in one way or another, and that in combination are significantly predictive of human conduct. See Digman note 31, *supra*.

<sup>39</sup> See Woolley note 17, *supra* at 48-53, where she notes various grounds which would allow a reader to predict the result in the good character decisions, and the failure of any of the grounds to do so except the panel's impression of the witness.

<sup>40</sup> *D'Souza*, *supra* note 25 at para. 42.

<sup>41</sup> *Re P(DM)* note 21 *supra* at 5.

<sup>42</sup> *Rizzotto* *supra* note 23.

<sup>43</sup> *Law Society of Upper Canada v. Levesque* [2005] L.S.D.D. No. 38 (QL) at para. 23.

<sup>44</sup> *Schuchert* note 25, *supra* at para. 21.

<sup>45</sup> *Shore* *supra* note 25 at para. 50.

This result seems facially unfair. A prospective applicant is denied admission not because she poses any empirically demonstrable threat to the public, or presents an increased risk of not maintaining the high ethical standards of the profession, but rather because she doesn't fit within some inchoate, vague idea of the right type of lawyer. She is being denied admission because the decision-makers do not feel she has the right stuff to be a lawyer-statesman.

This leads to the second issue with ethical character as a basis of regulation – its potential incorporation of contested values such as honour, integrity and civility.<sup>46</sup> While the 144 original members of the Law Society of Alberta may have been in agreement as to the relevance and significance of those “virtues,” and while some modern commentators such as Kronman may endorse their continued importance, they cannot validly constitute a universal requirement for law society admission. Moreover, because the definition of “character” endorsed by the law societies is so general, and includes anything going to “moral or ethical strength,” there is no reason to be confident that decision-makers will limit the admission requirements to those virtues of character broadly accepted as relevant to the ethics of lawyering.

In sum, to the extent the current approach to good character is consistent with its historical antecedents it is impossible to justify. It denies an applicant admission to the law society for what amounts to not much of a reason at all, certainly not a reason based on any empirically plausible assertion regarding the particular applicant. At the same time, however, those antecedents appear to have prevented the full evolution of the good character requirement into an empirically grounded notion of character, in which character is viewed as something relevant to whether a particular applicant, *in fact*, poses a risk with which the law society is justifiably concerned. Good character is, as currently approached in Canada, neither wholly “ethical” and philosophical, nor wholly “psychological” and empirical.

Assuming that regulation of ethical character is not justifiable, the remainder of this paper considers whether it is possible for the law society to develop the good character requirement into an empirical measure of the risk a particular applicant poses to the public. Specifically, does identification of a self-consciously psychologically oriented determination of whether an applicant has personality traits or flaws which, in the circumstances of legal practice, pose a threat to the public or to the maintenance of ethical standards, present a viable regulatory option for law societies? Can character be psychologized?

The following section considers this question in three parts: 1) how successful have law societies been in employing psychological evidence in those cases where they have done so? 2) how have the courts used psychological evidence in contexts where a psychological standard is legally imposed – determinations of the “best interests” of a child in a custody dispute and of an offender's

---

<sup>46</sup> For a critique of civility see: Alice Woolley, “Does Civility Matter” (2008) 46 *Osgoode Hall L.J.* 175.

“dangerousness?” and 3) does psychological evidence work – can psychologists make valid empirical predictions of future behaviour from current facts?

### **III. Using Psychological Evidence**

#### *A. Psychological Evidence in Good Character Proceedings*

As noted, the good character hearings have not widely embraced the use of psychological evidence in assessing character. Only two of the published good character proceedings include the introduction and consideration of significant psychological evidence with respect to the applicants. This section will outline those two cases to demonstrate how, even though psychological evidence was introduced, the panels were fundamentally uncertain about how to use it. In neither of the decisions did the panel direct its consideration of that evidence to the question of whether, if the applicant became a lawyer, he posed a particular threat to the protection of the public, or to the maintenance of ethical standards.

The first case, *Re P(DM)* considered the application for admission of DMP, who had been convicted of offences related to pedophilic sexual assault.<sup>47</sup> One of the children was a profoundly deaf girl whom DMP met while working as a school bus driver. He had a sexual relationship with the girl from the time she was nine years old until she was sixteen. The second child was his biological daughter, with whom he had sexual relations from the time she was four until she was seven. DMP pled guilty to sexual assault and having sexual relations with a minor, and was sentenced to eight months in jail and three years of probation. The justification for this relatively light sentence was, in the judge’s view, to give DMP an opportunity to turn his life around and to succeed in law school.<sup>48</sup> DMP did attend law school, obtained and completed articles and applied for admission to the Law Society of Upper Canada.

His application was rejected on the basis that he was not of good character. A central issue for the panel was whether DMP was rehabilitated. The panel found that when he committed the crimes DMP was clearly not of good character; the question was whether, in the intervening five years, his character has “so changed that he can now be said to be of good character”.<sup>49</sup> To answer this question the panel considered a variety of psychological evidence. They received reports from his treating psychologist, and from five other psychologists, most of whom had not met DMP, but had read the prepared reports and records. The conclusion of DMP’s treating psychologist was that DMP was a “functional” pedophile not a “core” pedophile, he was someone who had sex with children because he had an inability to form relationships with adult women. In the first instance the treating psychologist was of the view that DMP would require significant therapy to develop his ability to form better relationships with adult women. However, less than a year later the treating psychologist was of the view that DMP was cured. He did not provide an explanation for this change in his opinion. The other psychologists who provided evidence to the panel

<sup>47</sup> For a more fulsome discussion of this decision see Woolley note 17, *supra* at 40-41 and 72.

<sup>48</sup> *Re P(DM)* note 21, *supra* at 11.

<sup>49</sup> *Re P(DM)* note 21, *supra* at 24.

disagreed with the treating psychologist on his prognosis, noting that the absence of evidence that DMP could form relations with adult women suggested that he was still at risk to re-offend. In addition, at least one report suggested that treating psychologists tend to lose the ability to judge their own patients with accuracy. The panel accepted the evidence of these other psychologists, and rejected that of the treating psychologist. They concluded that there “is no objective basis for the conclusion that Mr. P has been cured of his pedophilia.”

While the panel appears to have been careful and thoughtful in its consideration of how to balance this evidence, the use which it makes of the evidence is somewhat puzzling. Should the question not be whether, given the psychological evidence, DMP posed a risk to the public if he was admitted to the bar? The general question of whether he was likely to be a recidivist is dealt with elsewhere in the legal system, in the original criminal sanction and in the opportunity for offenders to be labeled as “dangerous” and subject to an indefinite term of incarceration. The judge in the criminal case did not appear especially concerned with the recidivism problem, stating that “I think there is a good prospect for you”.<sup>50</sup> Further, it is not clear that being a lawyer would have heightened DMP’s likelihood of re-offending; lawyers are probably less likely than many people to encounter children in their daily work lives. The most plausible explanation is that while this decision uses psychological evidence, it does not do so because of a psychological explanation of the importance of character – as a predictor of behaviour as a lawyer. It uses psychological evidence to bolster what is essentially an ethical view of character: since DMP did these horrific acts, and the possibility of him doing them again cannot be ruled out, he is, in general, a man of bad character who ought not to be admitted to the profession.

The other matter to include extensive psychological evidence was *Re Preyra*, in which the Law Society of Upper Canada twice heard the application for admission of Preyra, who falsified his resume and transcripts in applying for articles. Preyra was denied admission after the first hearing in 2000, and admitted after the second hearing in 2003. In both hearings extensive psychological evidence was presented. In the first hearing there were five medical reports prepared by three doctors (two psychologists and one psychiatrist). Preyra completed psychological testing, although the testing was not done under appropriate conditions, and one of the doctors reported that Preyra had “tried to best the test in an unsophisticated way”.<sup>51</sup> Although Preyra’s treating psychologist was of the view that Preyra had been successfully treated through a course of “brief dynamic psychotherapy,” that doctor also testified that in his view many people padded their resumes. One of the other doctors (Dr. Klassen, quoted at the outset of this paper) reported that while Preyra was not mentally ill, he was “very angry” and suffered from “grandiosity, a sense of being special or unique, with a need for admiration and, perhaps most significantly, a

---

<sup>50</sup> *Ibid.* at 11.

<sup>51</sup> *Preyra #1* at para. 36.

sense of entitlement".<sup>52</sup> Dr. Klassen expressed doubt as to whether Preyra had in fact been treated successfully.

In deciding not to admit Preyra after that hearing, the panel did not expressly refer to the psychological evidence. The only comment it made on the evidence was to disagree with the treating psychologists' assessment that padding a resume was not a significant matter.

In the second hearing more psychological evidence was introduced. A new psychiatrist, who had treated Preyra for the prior three years, testified, and Dr. Klassen was also asked by the Law Society to re-assess Preyra. Preyra again underwent psychological testing. The treating psychiatrist's evidence was positive, and Dr. Klassen's assessment was also more positive. Preyra showed improved functioning on the psychological testing. In reaching the decision to admit Preyra, the panel noted the favourable psychological evidence and appeared to rely on it, although the panel was obviously uncertain as to how to incorporate the evidence given the stated irrelevance of predictions of future conduct:

Good character is determined at the date of the hearing. Both section 27 and the case law under this section are clear that no speculation as to Mr. Preyra's future behaviour is permitted. It is presumably for this reason that restrictions or conditions cannot be placed on the admission of a member. Despite that, Dr. Klassen testified that he could not predict Mr. Preyra's future behaviour, Mr. Preyra is not required to demonstrate that the risk of future dishonesty is unlikely or non-existent. It is necessary, however, to ensure that, on a balance of probabilities, Mr. Preyra's change from bad character to good character is *bona fide*.<sup>53</sup>

I would seem, then, that even in the cases where psychological evidence is used, decision-makers have not been able to incorporate that evidence into an empirical fact-based consideration of the likelihood that a particular applicant poses an increased risk to the public. The emphasis, even here, is on the ethical aspect of character.

In approaching the question this way, the decisions contrast strongly to other legal areas where courts are required to make psychological type determinations, and in which extensive use is made of psychological evidence to allow the court to do so.

#### *B. The Use of Psychological Evidence*

The use of psychological evidence in Canadian courts is prolific. One author estimates that such evidence is introduced in over 100,000 cases a year.<sup>54</sup> This

---

<sup>52</sup> *Preyra #1* at para. 29.

<sup>53</sup> *Preyra #2* at para. 99.

<sup>54</sup> Ron Nichwolodoff, "Expert Psychological Opinion Evidence in the Courts" (1998) 6 Health L.J. 279 at para. 2.

section focuses on two contexts where psychological evidence is used to support judges in making decisions regarding future behaviour: child custody hearings – i.e., the application of the “best-interests of the child” test – and in dangerous offender proceedings. The legal tests to be applied by judges in these areas are general and only vaguely defined: “what is in the best interests of the child?” “Is this individual dangerous?” As a consequence, courts seek to rely upon psychological evidence to make decisions about what constitutes the best decision going forward, to resolve the uncertainty of applying such a broad test to uncertain facts. This section briefly overviews the nature of the court’s reliance upon psychological evidence in these contexts.

### 1. Child Custody

The legal test for custody in Canada is the “best interests of the child.”<sup>55</sup> Custody disputes arise between parents, and between parents and the state (where a child has been apprehended). In determining custody in either case the court has to answer questions – “Who is a better parent?” and “What situation is in the best interests of the child?” – the answers to which are psychological, not legal. In addition, the answers are prospective and predictive; they turn on what will be, not on what was. The best interests test has been subject to ruthless criticism on the grounds of indeterminacy, and in particular the absence of legal guidance and the potential for infusion of a judge’s personal biases.<sup>56</sup> To address these concerns legislation gives judges a laundry list of factors to consider in awarding custody.<sup>57</sup> Yet these factors are still undefined, and the different factors are not placed in priority, leaving them substantially subjective such that the problem of indeterminacy persists.<sup>58</sup>

It is the legal void created by the psychological nature of the questions, the problem of prediction, and of general indeterminacy, that forces judges to rely on psychological evidence.<sup>59</sup> Some form of psychological evidence is presented in virtually every child custody hearing, and is relied upon by the court in some manner.

The evidence is used in a variety of ways. These include assisting the court in understanding, for example, the significance of psychological issues faced by a parent, the likely impact of a custody decision on a child, and the appropriate balance of factors relevant to the court’s determination. For our purposes, however, the key observation is that courts rely on a psychologist to independently assess a parent to determine whether being with that parent is in

<sup>55</sup> See, for example, *Family Law Act*, S.A. 2003, c. F-4.5 at s. 18(1).

<sup>56</sup> Bernd Walter, Janine Alison Isenegger and Nicholas Bala, “Best Interests’ in Child Protection Proceedings: Implications and Alternatives” (1995) 12 Can. J. Fam. Law at para. 17; T.J. Hester, “The Role of Mental Health Professionals in Child Custody Determinations Incident to Divorce” (1992) 14 Women’s Rts. L. Rep. 109 at 109; Daniel W. Shuman, “What Should We Permit Mental Health Professionals to Say About ‘The Best Interests of the Child?’ An Essay on Common Sense, Daubert, and the Rules of Evidence” (1997-1998) 31 Fam. L.Q. 551 at 567.

<sup>57</sup> *Supra*, note 55 at s. 18(2)(b). The list includes factors such as: the child’s physical, psychological and emotional needs, the child’s cultural, linguistic, religious and spiritual upbringing and heritage, and any plans proposed for the child’s care and upbringing.

<sup>58</sup> *Best Interests supra*, note 56 at para. 18.

<sup>59</sup> Thomas R. Litwack, Gwendolyn L. Gerber and C. Abraham Fenster, “The Proper Role of Psychology in Child Custody Disputes” (1979-1980) 18 J. Fam. L. 269 at 271.

the best interests of the child going forward – to gather facts about the parent and child as they are today, and to make predictions about what will happen in the future. The psychologist helps the court to filter out the dysfunctional background noise of a broken-down family and hone in on the true qualities of a parent that will affect his or her parenting going forward.<sup>60</sup> Psychological evidence allows the court to bridge the gap between the ascertainable facts that can be established in a court (for example, that a parent behaved in a particular way), and the proper outcome given those facts and the ephemeral target of the “best interests” of the child.

For example, in *C(G) v. T.V-F*<sup>61</sup> the Supreme Court of Canada considered a custody dispute between the sister of the deceased mother of the children, and the children’s father. The children had been in the sole custody of the mother; when she became terminally ill they went to live with their aunt. Upon the mother’s death the father sought and was awarded sole custody in a habeas corpus proceeding. However, the children repeatedly ran away to their aunt, and the aunt again sought custody. A psychologist took these facts and from them drew a variety of conclusions about the best interests of the child, in particular related to the effect of the positive relationship between the aunt and the children’s deceased mother, and the dysfunctional relationship between the father and the deceased mother. In her view the effect of these relationships was to fundamentally disrupt the ability of the children to thrive were they to be required to live with their father. The Supreme Court of Canada upheld the trial judge’s award of custody to the aunt, and did so substantially on the basis of this evidence which they reproduced in significant part in the judgment.<sup>62</sup>

Psychological evidence is a cornerstone of custody decision-making and is essential to the “best interests” test. The use of psychological evidence is not just prolific in custody cases, but also fundamental to the structure and reasoning of the ultimate decision. Even in decisions where the outcome seems to have largely flowed from other facts – where, for example, the parents had a three day armed stand-off police with their infant present<sup>63</sup> – judges will use psychological evidence to legitimate their decision.

## 2. Dangerous Offender Proceedings<sup>64</sup>

Psychological evidence is even more entrenched in dangerous offender proceedings, so much so that this evidence is required by the Criminal Code.<sup>65</sup> The necessity of psychological evidence in this context is great. The rationale for

<sup>60</sup> For example, in *Fraser v. Moreland* [2006] NSJ No. 433 (NSCA), the father accused the mother of illegal drug use and the mother accused the father of sexually assaulting her and of physically abusing the children. The father had two prior convictions for driving while impaired. A psychologist report concluded that the mother was intelligent and that the children responded better to her, and that there was no evidence either of the mother’s drug use or of the father abusing the children. The psychologist recommended that the mother be awarded custody. Both the trial court and the appellate court followed this recommendation.

<sup>61</sup> [1987] 2 S.C.R. 244.

<sup>62</sup> *Ibid.* at para. 6.

<sup>63</sup> *Children’s Aid of Halifax v. C.V.*, [2005] N.S.J. No. 217 (NSCA).

<sup>64</sup> Canadian appellate dangerous offender cases from January 2006 to June 2008 were examined for this section of the paper.

<sup>65</sup> *Criminal Code*, R.S.C. 1985, c. C-46 at ss. 752.1(1) and 753(1).



a dangerous offender designation is to prevent the reoccurrence of further criminal acts in the future and, thus, requires some type of forecasting that such criminal acts are or are not likely to occur. Specifically, the Crown must prove two factors in a dangerous offender proceeding.<sup>66</sup> The first is that the accused committed a serious personal injury offence, which does not require psychological evidence. The second is that the accused has engaged in repetitive criminal behaviour due to an inability to restrain him or herself and this failure is likely to cause a future violent offence. It is this second step that requires psychological evidence to establish this future likelihood. To compound this prediction further, if these two criteria are met then the Court must exercise its discretion in assigning either a dangerous offender or long-term offender designation. The difference between the two is the imposition of an indeterminate sentence, which is the result of a dangerous offender designation. Thus, to find that one is a dangerous offender, the Court must be satisfied that there is no reasonable possibility that the offender's risk can be controlled by imposing a determinate long-term offender sentence. Not only is psychological evidence tendered to predict whether *generally* there is a risk of re-offending, but also to *specifically* predict whether this risk will dissipate after the accused has been imprisoned. Between these two requirements, the Court is quite demanding on its psychological experts.

The way in which the court relies on psychological evidence in this context is uniform: they accept it. The Court is reluctant to even critique psychological evidence offered unless there is a glaring error with an expert's conclusions, for example the expert opines that the accused may be manageable under intense supervision, supervision which does not accord with the practical standards in reality.<sup>67</sup> Predictions about the risk of future violence go essentially unchallenged by the Court. There is so much reliance on expert evidence in this arena that there is some indication that the lines between the expert and the decision-maker have become blurred. Experts in a few cases have felt comfortable crossing the evidentiary-legal line, giving not just behavioural predictions but also legal designation recommendations.<sup>68</sup>

The Court's dependence on psychological evidence in dangerous offender cases cannot be overstated. A designation cannot be made without it; the Court is simply not in the position to make prediction of future violent behaviour on its own. Psychological prediction evidence is foundational to dangerous offender proceedings.

### *C. The Validity of Psychological Predictions*

To this point it is arguable that the reliance on psychological evidence in custody and dangerousness proceedings supports the use of psychological evidence in good character decisions. As noted, good character decisions, like custody and

---

<sup>66</sup> *Ibid.* at s. 753(1).

<sup>67</sup> *R. v. Otto*, [2006] S.J. No. 303 (CA) at para. 19 and *R. v. Berikoff*, [2007] B.C.J. No. 218 (CA) at para 16.

<sup>68</sup> *R. v. F.E.D.*, [2007] O.J. No. 1278 at para. 25; *R. v. Allen*, [2007] O.J. No. 2226 at para. 30; *R. v. Haug*, [2008] S.J. No. 100 at para. 118.

dangerousness, involve an existing set of facts and the need to make predictions about the future, in this case about greater likelihood of risks to the public should the person be admitted. They also involve a standard – the nature of an applicant’s character and its relationship to public protection – that is essentially psychological in nature.<sup>69</sup> The universal and significant reliance on psychological evidence in custody and dangerousness proceedings shows judicial acceptance of its validity and, given the similarity of the circumstances, provides *prima facie* support for its use here.

The problem, however, is that there seems to be significant academic consensus that judicial confidence in the use of psychological evidence in these other contexts is not especially justified. Indeed, the empirical data and its academic analysis suggests that the psychological evidence relied upon by the courts is deeply suspect. Despite its obvious relevance and apparent helpfulness to courts’ application of what are essentially psychological legal standards, psychological evidence doesn’t do what it is supposed to do: it does not reliably measure future dangerousness or future parenting. This section reviews that academic literature.

In determining whether psychological predictions are valid, it is necessary to understand how they are made. In simple terms, future behaviour is a function of personality in situation.<sup>70</sup> Obviously, however, even with only these two relevant variables making a prediction as to future conduct is difficult – there are interactions not only between personality and situation but also within personality traits and within situation traits.<sup>71</sup> For example, one who possesses the personality traits of aggression and suggestibility may have a greater propensity for violence than would be expected from the presence of either trait separately. Likewise the presence of a threatening individual and a weapon may produce a greater likelihood of a violent response than if only a single variable is present. As people generally possess greater than two personality traits and can find themselves in a myriad of situations, the simple equation “personality x situation” grows exponentially more complicated. Reaching a specific prediction of specific behaviour, i.e. violence, is extremely difficult.

In the criminal context there are two approaches used by psychologists to predict behaviour: clinical and actuarial. Clinical prediction is simply a subjective decision made by a psychology professional after examining the subject and combining his or her characteristics in an intuitive way.<sup>72</sup> There are no set factors that the professional must consider in every case, and in fact, the professional may not even be aware of factors he or she is relying on in reaching

---

<sup>69</sup> Or, at least, can only claim justification if it is.

<sup>70</sup> John Monahan, *The Clinical Prediction of Violent Behavior* (Rockville MD: US Department of Health and Human Services, 1981) at 27.

<sup>71</sup> *Ibid.* at 28.

<sup>72</sup> John Monahan, “A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators and Patients” (2006) 92 Virginia L. R. 391 at 405; William M. Grove and Paul E. Meehl, “Comparative Efficiency of Informal (Subjective, Impressionist) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy” (1996) 2 Psych. Pub. Pol’y & L. 293 at 293.

a conclusion.<sup>73</sup> More recently, actuarial prediction has gained much attention in the psychology community. Actuarial prediction is a statistical method in which the psychology professional will record the subject's characteristics and combine them in accordance with a set mathematical model.<sup>74</sup> One author organizes the most commonly measured factors into four categories: what the person "is" (age, gender, race and personality), what the person "has" (mental disorder, substance abuse), what the person "has done" (prior crime and violence) and what has "been done" to the person (family environment and victimization).<sup>75</sup>

There is significant empirical data with respect to the predictive accuracy of both clinical and actuarial approaches. With respect to clinical predictions, two famous American studies provide a natural starting point for analysis. In the 1960s American dangerous offender laws changed as a result of court challenges. The Baxstrom study arose from the transfer of almost 1,000 dangerous offenders from hospitals for the criminally insane to civil mental hospitals in New York State after judicial invalidation of the prior approach.<sup>76</sup> Because these dangerous offenders had been designated as such based on a positive prediction of future violence, the transfer provided the opportunity to test these predictions in the context of a civil facility.<sup>77</sup> The results were remarkable. Despite the prediction of dangerousness for all Baxstrom patients, only 20% committed an assault<sup>78</sup> during the four years subsequent to the transfer.<sup>79</sup> Further, in that four-year period only 3% of these "dangerous offenders" were dangerous enough to be sent back to the hospital for the criminally insane.<sup>80</sup> The Baxstrom study expanded in scope when 121 Baxstrom patients were additionally released from the civil hospital, allowing observation of these once labeled dangerous offenders in the community.<sup>81</sup> In the two and a half years subsequent to their release only 9 of the 121 were convicted of a crime, and only one of those convictions was for a violent offence.<sup>82</sup> This suggests that 120 of the 121 released offenders (99.2%) were labeled erroneously.

Following the Baxstrom study, there was a second successful case in Pennsylvania, *Dixon v. Attorney General of the Commonwealth of Pennsylvania*,<sup>83</sup> which spurred a replicate study.<sup>84</sup> The results of this study were

---

<sup>73</sup> Joseph J. Cocozza and Henry J. Steadman, "Prediction in Psychiatry: An Example of Misplaced Confidence in Experts" (1977-1978) 25 Soc. Probs. 265 at 274.

<sup>74</sup> Monahan, *supra* note 72 at 405-406.

<sup>75</sup> Monahan, *supra* note 72 at 414 to 426.

<sup>76</sup> *Baxstrom v. Herold*, 383 U.S. 107, 1966. *Supra* note 70 at 45-46.

<sup>77</sup> *Ibid.* at 46.

<sup>78</sup> Assault is not defined, but it appears from the context to refer to being charged (not actually being charged but the act would warrant a charge) with a criminal offence involving personal injury to another.

<sup>79</sup> *Supra* note 70 at 46.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> 325 F. Supp. 966, 1971.

<sup>84</sup> *Supra* note 70 at 47

notably similar; only 14% of the patients initially thought to be dangerous engaged in “assaultive behaviour” in the four years subsequent to their release.<sup>85</sup>

One further study followed 257 male felony defendants, 60% of whom were predicted to be dangerous.<sup>86</sup> Both groups were hospitalized, the dangerous at a correctional hospital and the non-dangerous at a high-security civil facility.<sup>87</sup> The authors note the conditions and treatment at the facilities were essentially identical, thus controlling for many variables that were not controlled in the earlier studies.<sup>88</sup> The results of the study were surprising – there was no significant difference between the assaults committed by the dangerous and non-dangerous patients – dangerous offenders had only a marginally greater frequency of assaults, the difference being small enough to be explained as simply random variation.<sup>89</sup> Further, the study considered the occurrence of subsequent arrests upon release. Fourteen percent of dangerous offenders and 16% of non-dangerous offenders were rearrested for a violent offence.<sup>90</sup>

Since these initial large and relatively dramatic studies, psychologists have only infrequently reconsidered the validity of clinical predictions, although a handful of studies have been conducted.<sup>91</sup> One study assessed predictions of violence in emergency patients in a civil hospital.<sup>92</sup> Subsequent violence was comprehensively evaluated; researchers incorporated novel data: self-reporting and community informants.<sup>93</sup> This study concluded that 53% of those predicted to be “of concern” for future violence were violent subsequently; 36% of those patients not of concern were violent subsequently.<sup>94</sup> A second study focused on inpatient violence. Nurses made an initial prediction as to whether they viewed a patient as of low, moderate or high risk for violence. Ten percent of the low group, 24% of the moderate group and 40% of the high risk group committed violence.

While these results clearly suggest greater predictive accuracy, they are far from reassuring. In the first study the predictive accuracy is relatively close to random, to flipping a coin.<sup>95</sup> In the second study the accuracy was fairly high for patients viewed as of low risk of violence, but was wildly inaccurate – wrong 60% of the time – for patients predicted to be violent.

---

<sup>85</sup> *Ibid.* Note that assaultive behaviour is not defined. It appears, given the context, to, like assault, refer to conduct leading to a charge (see above) for a criminal offence involving personal injury to another.

<sup>86</sup> *Supra* note 73 at 267.

<sup>87</sup> *Ibid.* at 272.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.* at 272-273. Note that this is a relatively small absolute difference, the results were not significantly different.

<sup>91</sup> John Monahan, *Clinical and Actuarial Predictions of Violence: The Scientific Status of Research on Clinical and Actuarial Predictions of Violence*, §7-2.1.1, in *Modern Scientific Evidence: The Law and Science of Expert Testimony* (David L. Faigman, David H. Kaye, Michael J. Saks and Joseph Sanders eds, 1997) at 308.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Assuming that the groups “of concern” and those not “of concern” had equal numbers, across the sample group as a whole the predictive accuracy was 44.5%.

The conclusion drawn from these studies – that clinical prediction is essentially impossible – has been subject to criticism. It is argued, for example, that the problem is not clinical prediction *per se*; it is rather the institutional pressures created by dangerousness proceedings. Because of those pressures the accuracy of prediction is being influenced by a bias on the part of the professional making the prediction.<sup>96</sup> Those professionals either intentionally over-predict to keep career criminals and chronic offenders institutionalized,<sup>97</sup> or are reacting unconsciously to an incentive to over-predict.<sup>98</sup> Intentional over-prediction seems unlikely and difficult to prove; it is clear, however, that there is an incentive for over-prediction. The repercussions of a false negative are severe. If an individual predicted not to be dangerous commits a subsequent egregious violent crime, the result is a public outcry and questioning of the process by which this decision was made.<sup>99</sup> On the other hand, if there is a trend toward over-prediction, there is no consequence for the predictor or for the judicial system, only for the person mis-identified and incarcerated.<sup>100</sup> The substance of this critique, therefore, is that predictions of violence are not inaccurate, they are rather coloured by either a bias or an agenda on the part of the prediction-maker.

The significance of this critique should not be overstated, however. In almost every area of human endeavor these kinds of biases can arise – the possibility of true disinterest is unlikely. In addition, and more importantly, the existence of assessor bias is unlikely to account for the sheer magnitude of the statistical unreliability of these assessments. It may account for a certain amount of it, but it does not explain why the accuracy of predictions in some studies was shown to be little better than flipping a coin. Finally, it certainly does not explain why in some studies the predictions of non-violent future behaviour were also incorrect – inaccurate by as much as 36%.<sup>101</sup>

Others have suggested that the predictions at issue, particularly in the Baxstrom and Dixon studies, were out of date. That is, the predictions were made at the time of incarceration and at that time the offenders were in fact dangerous. But, over the time spent institutionalized they have been treated and are now less dangerous such that the initial prediction is no longer accurate.<sup>102</sup> In addition, by the time the studies were completed the offenders were older, and age notoriously decreases dangerous behaviour.<sup>103</sup> The problem with these critiques, however, is that they essentially amount to an argument that as circumstances change predictions may become inaccurate. But if the court is going to rely on predictions to keep a person indefinitely incarcerated the predictions have to be able to account for changing circumstances – the changing circumstances (such

---

<sup>96</sup> *Supra* note 70 at 51.

<sup>97</sup> *Ibid.*

<sup>98</sup> Bernard L. Diamond, "The Psychiatric Prediction of Dangerousness" (1974) 123 U. Penn. L. R. 439 at 447.

<sup>99</sup> *Ibid.* at 439.

<sup>100</sup> *Ibid.* at 447.

<sup>101</sup> See footnote 94 and accompanying text.

<sup>102</sup> *Supra* note 70 at 51.

<sup>103</sup> Joseph J. Cocozza and Henry J. Steadman, "The failure of psychiatric predictions of dangerousness: Clear and convincing evidence" (1976) 29 Rutgers Law Review 1084 at 1093.

as aging) explain why the prediction was inaccurate, they do not make it possible to predict accurately. Also, the empirical claim of the first of these arguments is suspect, as the studies were not examining the initial prediction; the studies were examining the accuracy of the decision to *keep* the offender in the hospital.<sup>104</sup>

Finally, it has been suggested that these prediction studies have underestimated the actual violence committed by those predicted to be dangerous offenders. Therefore, the apparent over-prediction of dangerousness is a function of later under-recording of violence not of prior over-estimation.<sup>105</sup> It is uncontroversial that there is some underestimation of violence, but the question is whether it is enough to invalidate or at least call into question the results of the above studies.<sup>106</sup> This seems unlikely. As noted earlier, in at least one of the more recent studies the researchers relied upon additional reporting measures, and the predictions were still inaccurate.<sup>107</sup> In addition, there have been studies that have examined the extent of unreported violence. One study examined a group of repeat offenders and found that for every arrest, the offender had committed seven unreported offences, a second study found a rate of ten felonies per arrest.<sup>108</sup> Thus, the studies concluded that unreported violence is generally being committed by the same people – the ones eventually getting caught. It follows then, that these studies do not refute the inaccuracy of prediction; rather they support the proposition that of the true dangerous offenders, some are more dangerous than others. While it is true that studies will underestimate the actual amount of violence, it is unlikely that the underestimation is significant enough to correct for the inaccuracy of prediction.

In sum, then, even with these critiques, the validity of clinical assessment of future behaviour is doubtful. This is the case even where the behaviour in question is relatively extreme and also frequent, as it is for individuals designated as dangerous or likely to be violent.

With respect to actuarial predictions, the general consensus appears to be far more positive. One author summarizes three of the most notable actuarial models used for predicting violence, and reviews literature assessing the accuracy of each model. Each model categorizes subjects into several risk categories ranging from low to high. The literature review indicated that for each model there was a considerable degree of accuracy. Overall, where application of a model generated the lowest predicted likelihood of future violence, 1-11% of subjects were actually violent; where the application of a model generated the highest predicted likelihood of future violence 75-100% of the subjects were actually violent.<sup>109</sup>

---

<sup>104</sup> *Supra* note 70 at 51-52.

<sup>105</sup> *Ibid.* at 52.

<sup>106</sup> *Ibid.*

<sup>107</sup> See note 93 and accompanying text.

<sup>108</sup> *Ibid.* at 53-54.

<sup>109</sup> In these studies the occurrence of violence was measured in a number of ways: whether the individual was returned to the max-security hospital for committing the act, from official police reports, self-reports and reports from 'collaterals' - people in the community who know the offender well.

A 1996 meta-analysis summarized the results of 136 studies of the relative accuracy of clinical and actuarial predictions.<sup>110</sup> Of the 136 studies, 64 found actuarial methods to be significantly more accurate while only 8 preferred clinical predictions, with the remaining studies showing no significant difference between the two methods of prediction.<sup>111</sup>

Not surprisingly, there has been reluctance to adopt actuarial prediction techniques for use in the courtroom, despite their increased accuracy. Use of actuarial methods is not always a practical possibility as there may be insufficient time or a situation may arise where an actuarial model does not exist.<sup>112</sup> It is likely, for example, that no actuarial calculations could be done with respect to the relationship between past conduct by applicants for admission to the bar and future conduct as a lawyer.<sup>113</sup> Further, actuarial methods are generally, not specifically, accurate; they cannot account for the rare event, a determinative factor in an individual case that is not included in the model.<sup>114</sup> Any individual has the possibility to be the statistical outlier. There is some evidence of the use of actuarial models in recent Canadian dangerous offender appeals cases,<sup>115</sup> but the vast majority of cases still rely exclusively on clinical predictions of violence.

The results of the empirical studies testing the validity of predictions of violence are not particularly encouraging. All studies report a significant rate of false positives, that is, labeling a person as dangerous when in fact he or she is not. To the extent that actuarial predictions improve the accuracy of predictions, their use is simply not reflected in actual legal decision-making. While there are various complications in the data arising from, *inter alia*, assessor incentives and under-prediction of violence, none fundamentally undermine the conclusion that there is only modest support for the proposition that psychological experts can accurately predict future violence.

Is the story any better in the custody context?

Generally, predictions of the best interests of the child are determined in a similar fashion to predictions of violence. Clinical predictions are simply the intuitive conclusion of an experienced professional as to what custody arrangement will be in the best interest of the child. Actuarial models are also available for custody cases, but seem restricted to child protection cases where there are

---

<sup>110</sup> *Grove and Meehl supra* note 72 at 296. Note the studies were not exclusive to predictions in the context of violence but ranging from mental health to success in school/employment.

<sup>111</sup> *Ibid.* at 297.

<sup>112</sup> *Supra* note 70 at 84-85; *Grove and Meehl supra* note 72 at 301.

<sup>113</sup> The problem would be an absence of available data correlating facts about individual lawyers and, e.g., future disciplinary problems. For this reason alone it appears unlikely that actuarial methods provide any solution to the character admission problem.

<sup>114</sup> *Ibid.* at 83-84.

<sup>115</sup> See *R. v. Grayer*, [2007] O.J. No. 123 (CA) at paras. 20-23 and 32-33; *R. v. N.P.C.*, [2007] O.J. No. 2444 (CA) at para. 46.

allegations of abuse or neglect of a child.<sup>116</sup> Only one of the Canadian custody cases examined employed actuarial assessments.<sup>117</sup>

Predictions of the best interests of the child are also problematic. Empirical studies examining the validity of predictions in this context are rare. The studies that do exist validate predictions on the basis of the consensus of the professionals making a prediction.<sup>118</sup> No work has determined whether these predictions, even where a consensus exists, are correct in practice.<sup>119</sup>

There exists one formidable obstacle preventing actual validation studies. The best interest of a child is not a concrete, defined concept – there is no single variable that one can measure to determine the precision of a prediction. If a study were to assess the success rate of these psychological predictions, what indicia would it consider: the child's success in school, happiness, need for counseling? The legal test poses this operational definition problem – there is no well-defined outcome.<sup>120</sup> Thus the indeterminacy factor of the legal test is what creates the need for psychological evidence, but it is also what prevents any *ex-post* assessment of its viability.<sup>121</sup>

In the absence of these studies, most critics of psychological evidence in the custody context rely on analysis of predictions in a general sense, or rely on empirical data with respect to the accuracy of predictions of violence, to assert that predictions of behaviour relied on in custody decisions are simply not accurate.<sup>122</sup> They supplement these findings with additional factors unique to child custody cases to argue that in this context predictions are even more fallible. Psychologists often make a prediction based on limited exposure to a parent occurring at a stressful time; the behaviour that is most influential in formulating a prediction may thus be highly atypical for the parent.<sup>123</sup> Additionally, the information received directly from parents or children may be biased. All parties involved may feel compelled to tell the psychologist what they think he or she wants to hear, or what will advance each of their positions.<sup>124</sup>

---

<sup>116</sup> See Christopher Baird, Dennis Wagner, Theresa Healy, and Kristen Johnson, "Risk Assessment in Child Protective Services: Consensus and Actuarial Model Reliability" (1999) 78 *Child Welfare* 723; Donald J. Bauman, J. Randolph Law, James Sheets, Grant Reid and J. Christopher Graham, "Evaluating the Effectiveness of Actuarial Risk Assessment Models" (2005) 27 *Children & Youth Services R.* 465.

<sup>117</sup> *Fraser v. Moreland* note 60, *supra*.

<sup>118</sup> *Supra* note 116.

<sup>119</sup> Note that if one were to evaluate the reliability of predictions of violence on this consensus basis that the results may be encouraging. However, this result is not reflective of the fact that psychology experts consistently over-predict violence, so while there may be consensus, this does not ensure accuracy.

<sup>120</sup> Daniel A. Krauss and Bruce D. Sales, "Legal Standards, Expertise and Experts in the Resolution of Contested Child Custody Cases" (2000) 6 *Psych. Pub. Pol'y & L.* 843 at 851.

<sup>121</sup> Several authors indicate a need for a true experiment in order to control confounding variables. While this would be extremely useful in determining the effects of custody arrangements in general, it is not necessary to assess the validity of the predictions of best interests made in these cases. The absence of a true experiment has not limited the extensive findings on accuracy in the dangerous offender context.

<sup>122</sup> *Best Interests supra* note 56 at para. 19; *Supra* note 59 at 272.

<sup>123</sup> Alison Richey McBurney, "Bitter Battles: The Use of Psychological Evaluations in Child Custody Disputes in West Virginia" (1995) 97 *W. Va. L. R.* 773 at 776 and 778.

<sup>124</sup> *Ibid.* at 777, 778.



Similarly, children are malleable and may be indirectly or directly influenced by their parents to speak or act in a certain way around the psychologist.<sup>125</sup>

Some also argue that there is no way to predict long-term parenting ability and the effect of changes in parenting ability on children.<sup>126</sup> A parent's ability to deal with a child may change throughout the course of the child's development, and the skills a parent possesses may be more useful at certain times during a child's life than others. Thus, basing a prediction on the assumption that parents will continue to act and parent in the same way as they have in the past may be erroneous.

The lack of studies assessing the accuracy of child custody predictions makes it difficult to draw any specific conclusion as to their validity. The conceptual and practical limitations are such that this type of accuracy study will be rare. Given that the predictions in this context are far more specific, in a sense, than predictions of violence (that is, the psychologist is seeking to predict one's ability to deal with his or her own children as opposed to one's functioning in the general community without resorting to violence), one might speculate that child custody predictions may be more accurate. On the other hand, specific predictions may in fact be more difficult given the broad and general nature of psychology theory.<sup>127</sup> This uncertainty has led some critics to conclude that psychological evidence in child custody cases should be limited to the more traditional role of assisting a judge in discovery, articulating, highlighting and analyzing the facts before him or her, and that any predictive function should be set aside.<sup>128</sup>

There is thus good reason to doubt the reliability of psychological predictions as to future conduct, despite the widespread reliance on these predictions in custody and dangerousness decisions. There is also reason for general concern with the incursion of expert evidence into judicial decision-making, general concern that exists whenever expert evidence is introduced, but which arguably compounds the accuracy problem. The concern arises from the fact that the judge is the competent authority in a legal sense – the person charged with deciding – but the expert's knowledge in a particular area far outweighs the judge's. In particular, there exists the concern that there will be undue deference to the expert, given that it is the expert instructing the decision-maker on how to interpret the evidence.<sup>129</sup> While this role-reversal alone is highly influential to the decision-maker, it can be especially problematic when there is much conflicting evidence and the expert evidence is given priority over the rest.

---

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.* at 777.

<sup>127</sup> *Supra* note 59 at 275.

<sup>128</sup> *Ibid.* at 283-295.

<sup>129</sup> *Supra* note 54 at para. 6; David M. Paciocco, "Coping with Expert Evidence About Human Behaviour" (1999) 25 *Queen's L. J.* 305 at para. 4.

In addition, it is often difficult for decision-makers to discern whether expert evidence is reliable.<sup>130</sup> The actual scientific problem is discussed above, but this is potentially compounded by issues with expert bias and the lack of consensus within a scientific community – a particularly common problem in psychology.<sup>131</sup> The problems with bias and consensus are exacerbated by the adversarial system – it is the parties selecting the experts. Given the flexibility of psychological theories, it is very likely that both sides will have a psychology expert that supports their claim.<sup>132</sup> This battle of the experts is troublesome when the decision-maker is unable to spot the weaknesses in the evidence, as it can lead to reliance on features such as the charisma or confidence of the expert testifying.<sup>133</sup>

These evidentiary problems exist in every courtroom that deals with expert evidence, even in the case of hard science – where there are accepted and reliable scientific theories. But in the case of predicting future behaviour, the problem becomes two-tiered: first, the scientific viability of the expert's ability to make such a prediction is questionable; and second, the questionable evidence may not be used in a consistent and justifiable fashion once in the courtroom.

The final section will consider the implications of this analysis for the good character requirement.

#### **IV. The Psychology of Good Character**

If law societies want to regulate admission on the basis of character they need to justify doing so; they need some reasoned argument as to why such regulation is legitimate.<sup>134</sup> As argued above, it is difficult to see any basis on which a law society could justifiably regulate character as an ethical concept; there is no link between character in this sense and law societies' legitimate objectives of protecting the public and maintaining ethical standards.<sup>135</sup> If understood psychologically, as a set of personal dispositions that, in certain circumstances, lead to a greater likelihood of wrongful conduct, then regulation of character may be justifiable. But then the question becomes, how is character in this sense established? How can a law society determine whether an applicant for admission has a personality trait that has manifested itself in circumstances sufficiently similar to legal practice to warrant the prediction that the individual poses a greater risk to the public should she be admitted to practice?

At first blush psychological evidence seems to provide an answer to this problem. In both the custody and dangerousness contexts psychologists provide the court with exactly this type of analysis: based on the current information about a particular individual (or individuals) – his personality and how he has acted in

<sup>130</sup> *Supra* note 54 at para. 19; *Paciocco supra* 129 note at paras. 9-10.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Paciocco supra* note 129 at para. 10; *Supra* note 54 para. 38.

<sup>133</sup> *Supra* note 54 at para. 38.

<sup>134</sup> For an analysis of the basis on which a law society can claim legitimacy for its regulatory action see Duncan Webb and Alice Woolley, "Screamin' Mo Sychuk: Nefarious Conduct and the Fit and Proper Person Test" IELC Paper 2008.

<sup>135</sup> Although it may be able to link this regulation to the objective of maintaining the profession's reputation, this objective is, if understood apart from protection of the public, invalid. See Woolley, note 17 *supra* at 60 and Rhode, note 15 at 511.

various circumstances – what is the likely outcome going forward? If this evidence was reliable, its use in these contexts – the overwhelming recognition of its legitimacy by the judiciary – would be sufficient reason for its adoption in the context of character review, and would provide a modern justification for the retention of what is essentially a historical anachronism.

The glaring problem, however, is that the usefulness of this evidence in those contexts is far from obvious. The academic consensus is that the predictions of future conduct based on clinical assessment relied on in making those decisions are largely inaccurate. Moreover, it is quite possible that clinical assessment is even more likely to be inaccurate in the context of good character proceedings. In dangerousness cases the individuals in question have committed a serious personal injury offence and repeated criminal offences. There is a pattern of behaviour that the psychologist can assess.<sup>136</sup> In addition, there are actuarial models available that could at least confirm or qualify the clinical assessment with some degree of accuracy. By contrast, in the context of good character the behaviour that gives rise to the inquiry is highly variable, there may be no repeated pattern of behaviour and, as noted, there is no actuarial model against which to judge the clinical assessment.

In the custody contexts there may also be less situational variability to complicate the validity of the assessment. In the custody context you have circumstances which may change, but which at least have some relationship to each other: this parent parenting this child now and this parent parenting this child in the future. This may provide some reason to think, at least some of the time, that the predictions have merit. In the good character context there may be little temporal or situational relationship between the pre-application conduct and the situation that the person will find herself in as a lawyer.

With respect to the argument that there is some reason to use the evidence in good character hearings because of judicial recognition of its legitimacy elsewhere, it needs to be noted that courts making determinations on dangerousness or custody have little choice about whether to rely on psychological evidence. Once an individual has been incarcerated repeatedly for violent offences society has to make some determination about the consequences for that individual, and how to manage the future risk that he potentially presents. And once parents separate, or once a parent has demonstrated an apparent incapacity to care for a child, some determination as to what should happen to that child needs to be made. In making those arguably unavoidable decisions the legislature has articulated defensible legal standards on which to make them – prevention of future violence and protecting the best interests of the child. It is the function of courts to apply those standards. Thus judicial determination of the empirical foundation to which to apply those legal principles is almost impossibly difficult but is also inescapable; the decision has

---

<sup>136</sup> This is also the case in custody hearings where the state has apprehended the child; in almost all these cases there is not a single incident motivating the state decision, there is a repeated pattern of neglect or abuse and also repeated attempts on the part of the agency to assist the parent in caring for the child.

to be made and the principles have to be applied. Whatever the flaws of psychological evidence, it is likely to assist a judge in making those determinations, and its use can be justified on that basis.

This perspective was recognized by the Supreme Court of Canada in *R. v. Lyons*,<sup>137</sup> in which the Court considered the constitutionality of the dangerousness provisions. Lyons argued that one of the problems with the provisions was the reliance on psychological evidence, given the essential invalidity of that evidence. The Supreme Court rejected this argument. It did not disagree that the evidence was problematic, but simply asserted that in a balance between a “risk of harm to innocent persons at the hands of an offender who is judged likely to inflict it,”<sup>138</sup> and the rights of that offender, the weight should be placed on the rights of the innocent. The fallibility of the evidence may warrant greater procedural protections, but did not invalidate the entire exercise.

Can a similar argument be made about the good character requirement? Perhaps. Arguably a law society faced with an applicant who has behaved badly has to make a decision about whether to admit that applicant. Doing so on the basis of whether the applicant presents a risk to the protection of the public, or to the maintenance of high ethical standards is a legitimate legal principle to apply in making that admission decision. Determining the empirical foundation against which to apply that principle involves a psychological question: given what this person has done – their personality traits, the circumstances of the prior conduct, and the circumstances of law practice – do they pose a greater risk to the public or to the profession’s ethical standards? If they do, they should not be admitted. Since a law society is almost certainly ill-suited to make this determination, and could benefit from the assistance of psychological evidence, psychological evidence should be relied upon by law societies in making this decision. Indeed, it is arguable that no law society should be making this kind of predictive psychological assessment without expert evidence. Because to do so will lead inevitably to the subjective, applicant testimony driven decision-making which currently pervades the process, and leads (consequently) to unpredictable and arguably irrational decisions.

On closer examination, however, this argument is problematic. We agree that if law societies are going to continue to scrutinize applicant “character” they need to be more cognizant of the essentially psychological nature of the standard they are imposing, and be more rigorous in considering the application on that basis, including appropriate (i.e., critical) use of psychological evidence. But this begs the question of whether the scrutiny of applicant character is warranted. As noted, if the psychological evidence was first rate and reliable not much in the way of reasons would be needed to justify using it to assess applicant character. But the evidence isn’t first rate and reliable. It is unreliable. As such, it should only be used if there is little other option, if the decision has to be made and the evidence provides some grounds to assist the competent authority making it.

---

<sup>137</sup> [1987] 2 S.C.R. 309.

<sup>138</sup> *Ibid.* at para. 100.

That is arguably the case for dangerousness and certainly the case for custody, but it is less obviously the case for character scrutiny. The good character standard in Canada is not rigorously enforced. Only a handful of applicants are denied admission in any given year, and some jurisdictions claim not to have denied admission to anyone in the past five years.<sup>139</sup> If the good character requirement were to be eliminated tomorrow it would have little practical impact on the public at large. This means that the retention of the requirement is best understood as optional, its elimination as of marginal significance. Given that, and given the impossibility of making psychological predictions with reliability, the inevitable conclusion appears to be that the requirement should not be retained.

## **V. Conclusion**

After he was denied admission to the Law Society of Upper Canada, DMP committed suicide. While few individuals are denied admission on the basis of character, and as just noted the protection of the public that results from the application of the standard is minimal, it is important to be cognizant of the potential hardship for, and impact on, the individual who is denied admission. Such a decision should not be made lightly, and it should be made legitimately.

The current approach to character screening in Canada is insufficiently rigorous. It incorporates too much of the historical concept of generic ethical character, and does not focus sufficiently on the character requirement's purpose, the protection of the public. The published decisions fundamentally duck the real issue: does this applicant present a greater risk to the public in the future, or not? In this paper we have explored whether shifting the character requirement unambiguously to the domain of psychological assessment would impose the necessary level of rigour. In the abstract it might, and certainly if law societies insist on retaining character screening there seems little justification for doing so other than on the basis of some assessment of the applicant's future conduct in law. In practice, however, it appears doubtful whether this approach would serve any useful purpose, and it has the potential to be quite unfair. Such predictions cannot be made with any accuracy on an individual basis. As a consequence, it is as likely as not that any given denial of admission will be unjust. If that is the case, then the good character requirement should be abandoned.

---

<sup>139</sup> Woolley note 17 *supra* at 34.