

4-1-2007

Tending the Bar: The "Good Character" Requirement for Law Society Admission

Alice Woolley
University of Calgary

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Legal Profession Commons](#)

Recommended Citation

Alice Woolley, "Tending the Bar: The "Good Character" Requirement for Law Society Admission" (2007) 30:1 Dal LJ 27.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Every Canadian law society requires that applicants for bar admission be of "good character." The author assesses the administration of this requirement and its stated purposes of ensuring ethical conduct by lawyers, protecting the public and maintaining the profession's reputation. In particular, the premise underlying the use of the good character requirement to fulfill those purposes – that character is the "well-spring of professional conduct in lawyers" – is subjected to critical examination through the theoretical principles of Aristotelian virtue ethics and the empirical evidence of social psychology. The primary thesis of this paper is that as currently justified, administered and applied the good character requirement cannot be defended and must not be maintained. The secondary thesis of the paper, however, is that given the relationship – albeit a qualified one – between character and ethical conduct, a reformed version of the good character requirement can, and arguably should, be maintained by the provincial law societies.

Tous les barreaux canadiens exigent que les candidats à l'admission soient de « bonne moeurs ». L'auteur se penche sur la façon dont cette exigence est administrée et sur ses objectifs officiels qui sont de s'assurer du comportement éthique des avocats, de protéger le public et de préserver la réputation de la profession. En particulier, la prémisse qui sous-tend l'utilisation de l'exigence relative à la bonne moralité afin d'atteindre ces objectifs – que le caractère est garant de la conduite professionnelle des avocats – fait l'objet d'un examen critique à la lumière des principes d'éthique avancés par Aristote et des preuves empiriques de la psychologie sociale. La thèse primaire de cet article est que, telle que l'exigence relative à la bonne moralité est actuellement justifiée, administrée et appliquée, est indéfendable et ne doit pas être maintenue. La thèse secondaire, cependant, est qu'étant donné la relation – même caractérisée – entre le caractère et le comportement éthique, une version révisée de l'exigence relative à la bonne moralité peut être maintenue par les barreaux provinciaux et peut-être même devrait-elle être conservée.

* LL.B. (Toronto); LL.M. (Yale); Faculty of Law, University of Calgary.

1. I would like to extend particular thanks to Dalhousie Law School for inviting me to present this paper as the Wickwire Lecture in legal ethics, to Mike Bolitho for his research support, and to Sara Bagg for her long conversations about virtue ethics and the character requirement. In addition, I would like to acknowledge the last four years of legal ethics classes at the University of Calgary whose lively engagement with the question of whether character is the source of ethical behaviour significantly expanded my own thinking on this question. Any errors are, of course, my own.

Introduction

- I. *The good character requirement in Canada*
 1. *Legislative authority and process for enforcement of the good character requirement*
 2. *What are the purposes of the good character requirement?*
 3. *What is "good character" and what standards are used to measure it?*
 4. *How is the good character requirement applied in specific cases?*
 - a. *A brief history of the application of the good character requirement*
 - b. *Varying consequences of past misconduct*
 - c. *Positive character references*
 - d. *Psychological evidence*
 - e. *Assessment of the applicant as a witness*
 - f. *Inconsistencies on the totality of the evidence*
 5. *Summary of the good character requirement in Canada*
 - II. *The good character requirement in the United States*
 - III. *Analyzing the good character requirement*
 1. *Administration of the good character requirement*
 2. *Purposes of the good character requirement*
 - a. *Introduction*
 - b. *Are the purposes of the good character requirement legitimate?*
 - c. *Can a good character requirement achieve its stated purposes?*
 - Virtue ethics – the relevance of character*
 - Social psychology – the relevance of circumstances*
 - Re-asserting character*
 3. *The definition of good character, the standards used to assess character, and the application of those standards in particular cases*
 4. *Conclusion*
 - IV. *Fixing the good character requirement*
- Conclusion*

Introduction

To be admitted as a member of a provincial law society an individual must demonstrate that she is of "good character." Or, to be more accurate, she must demonstrate an absence of behaviour indicating bad character; such behaviour includes, *inter alia*, criminal convictions, academic dishonesty

and dishonesty towards the law society, as well as a failure to rehabilitate or repent with respect to same.²

That this requirement exists in the abstract is clear. What it means in practice for prospective Canadian lawyers is, however, much less clear. While the American equivalent to this requirement has been subjected to much scrutiny and academic commentary,³ relatively little has been said about it in Canada.⁴ Further, and much more significantly, provincial law societies—with the notable and laudable exception of the Law Society of Upper Canada—maintain almost total secrecy with respect to the administration and enforcement of the good character requirement.⁵ Decisions about admission are not made public unless they are subject to judicial review. In addition, only the Law Society of Manitoba⁶ has published standards indicating which factors are relevant for a good character review.

The purpose of this paper is to shed some light on the good character requirement for law society admission. Part I considers enforcement. It reviews legislative authority for the requirement and the process used by law societies to administer it. General information is provided about the frequency with which “character” issues arise and consideration is given to the limited jurisprudence and commentary. In this way Part I also identifies the purposes the requirement is meant to fulfil, how good character has been defined, the standards used for assessing character, and how those standards have been applied in particular cases.

In order to put this discussion in a broader context, Part II then briefly discusses the American experience with the “good character” requirement. It notes commentators’ discomfort with the good character requirement in

2. Some variant of the “good character” requirement exists in every Canadian jurisdiction. See *infra* notes 9-12 and accompanying text.

3. See Part II, below.

4. In their books on legal ethics Gavin MacKenzie, Allan Hutchinson and Beverley Smith all provide some commentary on the good character requirement. MacKenzie in particular provides some detailed analysis, drawing extensively from the American materials and the very limited law society jurisprudence. In addition, in the 1970s Mary Southin (then a practising lawyer and Law Society of British Columbia benchler) provided some important information about how the requirement was enforced by the Law Society at that time. See: Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin Law, 2006) at 61-66; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (Toronto: Thomson Carswell, 2007) at 23-2-23-17; Beverley G. Smith, *Professional Conduct for Lawyers and Judges*, 2d ed., looseleaf (Fredericton: Maritime Law Book, 2002) chapter 12 at paras. 10-16; Mary F. Southin, “What is Good Character” (1977) 35 Advocate 129-136.

5. The Nova Scotia Barristers’ Society has also now adopted a policy of public hearings on character. At this time, however, there are no reported decisions on character from the NSBS, although one case is currently working its way through the system.

6. See *infra* note 23.

the United States and, as well, the different circumstances which (to some extent, but not entirely) qualify our ability to rely on those commentators' analyses in the Canadian context.⁷

Part III incorporates some of the important American literature to analyze and critique the good character requirement as currently applied in Canada. It assesses the administration of the requirement and its purposes of ensuring ethical conduct by lawyers, protecting the public and maintaining the legal profession's reputation. In particular, it subjects the premise underlying the good character requirement—that character is the “well-spring of professional conduct in lawyers”⁸—to critical examination drawing on the theoretical principles of Aristotelian virtue ethics and the empirical evidence of social psychology. It also considers whether, given social psychology's claim that circumstances are at least as relevant in predicting conduct as character, the good character requirement in its current form is achieving its stated purposes.

Part III concludes that the good character requirement in its current form is unjustifiable because it provides no meaningful review of the “character” of most applicants and results in what is, arguably, excessive scrutiny of others. The secrecy of the process raises serious concerns both for the rights of potential applicants and for the public whom the requirement purports to protect. The premise that character predicts conduct is only partially correct: circumstances are as important as character in predicting future conduct. As a consequence, the standards currently used for assessing good character, and the application of those standards in particular cases, provide little comfort that the purposes of the good character requirement are being fulfilled. As currently administered and applied, the good character requirement does not reliably identify applicants with character issues indicative of future unethical conduct, and does not protect the public. The primary thesis of this paper is, therefore, that the good character requirement in its current form should not be maintained.

On the other hand, there are reasons for maintaining some version of it. Since “character” plays a role (albeit a qualified one) in determining the ethics of lawyers, law societies are justified in their concern for the character of those upon whom they are placing the imprimatur of law society admission. Thus, as a secondary thesis, this paper argues that a

7. The most important American article on the good character requirement is the seminal piece by Deborah L. Rhode, “Moral Character as a Professional Credential” (1985) 94 Yale L.J. 491. The debt which I owe Professor Rhode's work is enormous, despite the difference in the conclusion which I reach with respect to the good character requirement.

8. MacKenzie, *supra* note 4 at 23-3.

reformed version of the good character requirement can, and should, be maintained by the provincial law societies. To this end Part IV suggests reforms which would render the requirement more accountable, more principled and therefore more fair. These include identifying precisely what behaviour is necessary for ethical conduct in legal practice, focusing on this behaviour rather than immoral behaviour in general, and opening the good character requirement to public scrutiny.

I. *The good character requirement in Canada*

1. *Legislative authority and process for enforcement of the good character requirement*

All Canadian law societies have, through authorizing legislation or their own rules and regulations, some version of the good character requirement. Some require that each applicant be of "good character" or have "moral character,"⁹ others require that the applicant be of "good character and reputation"¹⁰ while still others require that the applicant be of "good moral character and a fit and proper person to be admitted."¹¹ But in all cases the general point remains the same: the character of an applicant is of central significance in deciding whether that applicant is entitled to law society admission.¹²

9. *Law Society Act*, R.S.O. 1990, c. L-8, s. 27(2): "It is a requirement for the issuance of every licence under this Act that the applicant be of good character" and *An Act respecting the Barreau du Québec*, R.S.Q. c. B-1 s. 45(2) requiring that the committee shall inquire into an applicant's "moral character." The "good character" standard is also applied in Saskatchewan, Yukon, Northwest Territories and Nunavut: *Legal Profession Act*, 1990, S.S. 1990-91, c. L-10.1, s. 24(1)(b); Rules of the Law Society of Yukon s. 81(1)(d) requiring "two letters of reference and good character satisfactory to the executive" and *Legal Profession Act*, R.S.Y. 2002, c. 134, s. 20(1)(a)(iii) requiring that a person seeking admission meet all the requirements prescribed by the rules; *Legal Profession Act (Nunavut)*, R.S.N.W.T. 1988, c. L-2, s. 18(1); *Legal Profession Act*, R.S.N.W.T. 1988, c. L-2, s. 18(1).

10. Rules of the Law Society of Newfoundland and Labrador s. 6.03(1)(a) (enacted pursuant to the *Law Society Act*, 1999, S.N.L. 1999 c. L-9.1); *Law Society Act*, S.N.B. 1996, c.89, s. 28(1)(a); *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 40(1)(a) and (2)(b).

11. Rules of the Law Society of Manitoba 5-4(c) (enacted pursuant to the *Legal Profession Act*, C.C.S.M. c. L107, s. 17(5)(b)); *Legal Profession Act*, S.B.C. 1998, c.9, s. 19(1); Nova Scotia Barristers Society Regulations (made pursuant to the *Legal Profession Act*, S.N.S. 2006, c.28) s. 3.9.2 (c) and (d).

12. It should be noted that in Prince Edward Island it appears that the requirement only applies to lawyers from other jurisdictions seeking admission in Prince Edward Island, and not necessarily to applicants for admission as a student-at-law or as a newly called lawyer (although proof of character may be required as part of the "further information and evidence" which the Law Society can require of those applicants). See *Legal Profession Act*, R.S.P.E.I. 1988, c. L-6.1, ss. 15, 19 (governing eligibility for membership as a lawyer and as an articulated clerk respectively); and *The Regulations of the Law Society of Prince Edward Island* (enacted pursuant to the *Legal Profession Act*) s. 11 (which governs admission of articulated clerks and provides for the Council's ability to require "further information and evidence") and s. 16 (which governs admission of applicants who are members of other provincial law societies and which requires the filing of "two certificates of good character").

Each of the law societies also appears to follow a similar process with respect to the consideration of applicants' characters. An applicant is required to submit an application form providing information about matters of apparent relevance to character. A fairly typical form, like that of the Nova Scotia Barristers' Society, asks the applicant whether he has a criminal record; whether disciplinary actions have been taken or sanctions imposed against him as "a member of any profession or organization"; whether he has been denied any licence or permit which requires proof of character; whether he has filed for bankruptcy or a proposal to creditors; whether there are any civil actions or judgments outstanding against him; whether he has ever disobeyed a court order; and whether there are any other matters going to the applicant's character:

Is there, to your knowledge or belief, any event, circumstance, condition or matter not disclosed in your replies to the preceding questions that touches or may concern your conduct, character and reputation, and that you know is or believe might be thought to be an impediment to your admission or warrant full inquiry by the Nova Scotia Barristers' Society?¹³

Other law societies ask similar questions. Some additionally inquire into: whether the applicant has ever been accused of, or sanctioned for, academic misconduct; whether she has been convicted of a regulatory offence; whether she has been "discharged, suspended or asked to resign from any employment"; whether charges have been instituted against her as a member of the armed forces or police force; and about the applicant's mental wellness and the existence of any present or past alcohol and drug dependencies.¹⁴

In all cases the questions are meant to discover information related to past acts or circumstances which could indicate an absence of good character. There is no attempt to discover information which points to the affirmative existence of good character. There are no questions,

13. Nova Scotia Barristers' Society, "Application for Enrolment in Bar Admission Course & as an Articled Clerk, Applicant's Questionnaire."

14. All of the above questions are asked by the Law Society of British Columbia in its Application for Law Society Admission Program Enrolment. The legitimacy of questions about the applicant's mental wellness and issues with drug and alcohol dependency go to "fitness" rather than character. As such, while these questions raise significant issues, they are not discussed in this paper. Those interested in the "fitness" aspect should see Jocelyn Downie, "Law Societies As Arbiters of Mental Fitness" (2001) 24 *Advocates' Q.* 467. When in the recommendations section, Part IV, this paper suggests that fitness for practice is a more coherent basis for consideration of character than the current approach, it is referring to fitness in an ethical sense, not fitness as investigated through questions of this nature.

for example, about whether an applicant has donated time or money to charitable organizations.

The law societies also require an applicant to provide information from another source about her character. In Alberta an applicant is required to provide two "Certificates of Character and Reputation" which must be filled out by non-family members who have known the applicant for more than two years. The knowledge need not be extensive; a law school professor who has taught the student is deemed to have sufficient "knowledge" to serve as a reference. In Manitoba more comprehensive knowledge is required: the applicant must provide a character reference from a non-family member who has known the applicant for more than five years.

The law societies use this information to consider whether applicants have the requisite character for admission. While law societies will consider information brought to their attention in addition to that provided by applicants,¹⁵ they do not carry out any independent investigation of candidates. The system instead relies largely on self-reporting.¹⁶ For those applicants who do present an issue of character in their applications, the law societies will investigate further. If the issue appears to be minor the applicant is permitted to enrol. If, however, the issue is more significant the application will proceed to a hearing, generally by a committee of the law society in question. The hearings are held *in camera* and, with

15. It was, for example, a letter filed by two members of the Law Society of Upper Canada which led to the recent investigation and hearing into the character of Sharon Shore (discussed below: see *infra* note 64 and accompanying text).

16. This statement and the remaining information on the process for enforcing the good character requirement are based on information provided in various phone calls with staff members at the different law societies. Specific details about those phone conversations are available on request from the author. In addition, several phone calls are referenced *infra* notes 19-21. There is no written information which clearly indicates the process used with respect to the good character applications. It appears from informal information obtained from colleagues that the Law Society of British Columbia used to briefly interview applicants prior to admission. It does not appear, however, that these interviews were investigative in nature.

the exceptions of the Law Society of Upper Canada¹⁷ and matters which proceed to judicial review, committee decisions are not published.¹⁸

It is impossible to determine definitively the number of applicants who have issues of "character." Informal conversations with law society staff members indicate, however, that the number is small. The Membership Secretary of the Law Society of Saskatchewan advised, for example, that they have never had an issue with an applicant's character.¹⁹ Manitoba's Director of Professional Education and Competence indicated that of the 60-65 applications the Law Society of Manitoba receives per year, 20 disclose something in response to a good character question and are referred to the Admission and Education Committee for additional consideration. However, of those applicants, only one every two years proceeds to a full hearing, and no applicant has been rejected on the basis of character by the Law Society of Manitoba for at least five years.²⁰ The Office of the Registrar for the Law Society of Upper Canada advised that of the 1400 applications received each year, 60-70 indicate the existence of a character issue.²¹ Again, however, actual denial of admission by the Law Society of Upper Canada is relatively rare.²²

On what basis are character determinations made by the law societies once the information has been gathered? Unfortunately this question is very difficult to answer. With the exception of the Law Society of Manitoba, which has guidelines for character review,²³ the law societies

17. And now the Nova Scotia Barristers' Society.

18. In Nova Scotia, for example, if someone answers "Yes" to any of the questions on the Articling Application they appear before a credentials committee (which will ask for more information or approve the application) or a full credentials inquiry. In Alberta all applications are vetted by a Membership Services Representative. All serious issues are referred to a staff member who is also a Member of the Credentials and Education Committee who reviews matters further. That staff member then writes a memorandum of the facts and the applicable rules of law which is given to the Credentials and Education Committee for consideration. The Committee then decides if it should approve the application or if further inquiry is needed. If further inquiry is needed the matter proceeds to a three person Panel of Inquiry. The Panel of Inquiry issues a decision. The decision is then sent back to the Credentials and Education Committee which determines the result of the application.

19. Conversation with Cheryl Eberle, Membership Secretary for the Law Society of Saskatchewan, on July 18, 2006.

20. Conversation with Sheila Redel, Director of Professional Education and Competence, Law Society of Manitoba, on July 20, 2006.

21. Conversation with Debbie Bryan, Office of the Registrar, Law Society of Upper Canada.

22. Of the fifteen post-1989 LSUC decisions reviewed for this paper, five applicants were excluded, three applicants were excluded but ultimately admitted, and six applicants were admitted. In her 1977 paper on the British Columbia Law Society Mary Southin discusses nineteen good character cases from the 1970s of which two resulted in delayed admission and two resulted in outright exclusion. See Southin, *supra* note 4.

23. "Guidelines for Good Character Applications Under Rules 5-3, 5-14(2) and 5-24" [LSM Guidelines]. These are attached to the "Application for Admission to the Manitoba CPLED Program and as an Articling Student."

do not publish standards which indicate what good character means, or the type of issues which are relevant to a good character determination.²⁴ In addition, as already noted, most law societies do not publish their decisions on matters of character. As a consequence, it is difficult to draw broadly supported conclusions about what the standards for character are, or how they are applied in particular cases.

With that caveat, however, the remainder of this section will turn to a review of the information which does exist on the application of the good character requirement. In particular, it will analyze the case law and other materials to identify: 1) the stated purposes of the good character requirement; 2) the definition of "good character" and the standards used to measure it; and 3) how the good character definition and standards have been applied in specific cases.

2. *What are the purposes of the good character requirement?*

The stated purposes of the good character requirement include "the protection of the public, the maintenance of high ethical standards, and the maintenance of public confidence in the legal profession."²⁵ The first two of these purposes appear to be largely the same: by ensuring that lawyers are ethical the public will be protected. The good character requirement rests on the assumption that character determines behaviour: a person lacking good character is less likely to maintain high ethical standards and is more likely to place an unsuspecting public at risk. As stated by Gavin MacKenzie,

The requirement that applicants be of good character is preventative, not punitive. *It recognizes that character is the well-spring of professional conduct in lawyers.* By requiring lawyers to be of good character, law societies protect the public and the reputation of the profession from potential lawyers who lack the fundamental quality of any person who seeks to practise as a member of the legal profession, namely, integrity.²⁶

24. Although the application forms of course provide some indication of areas of concern, there is no way of determining the type of responses which lead to further investigation by the law societies, those which do not, and those which, even if inquired into, lead to an actual hearing. The numbers provided by the Law Society of Upper Canada and the Law Society of Manitoba suggest significant deviation between initial investigations and final hearings, and there is no way of accounting substantively for that deviation based on the publicly available information.

25. *Re Rajnauth and Law Society of Upper Canada* (1993), 13 O.R. (3d) 381 at 384 [*Rajnauth*].

26. MacKenzie, *supra* note 4 at 23-3 [emphasis added]. As discussed below, however, while this is the stated objective of the good character requirement, in setting the standards for character review the Law Society of Upper Canada has simultaneously eschewed any attempt to measure the likelihood of future ethical conduct by applicants whose character is at issue.

The third purpose—maintenance of public confidence in the legal profession—may also relate to a concern that persons of bad character will not make ethical lawyers. A perception that (some) lawyers are of bad character may, in and of itself, be bad for the profession's already troubled reputation. However, the concern of the law societies appears to arise more specifically from a concern that the profession's reputation will suffer if people are admitted whose characters raise concerns about their prospective conduct as lawyers. That is, it is the perception that persons of bad character will make unethical lawyers, rather than a general perception that some lawyers have bad characters, which could damage the profession's reputation, and it is against this danger that the good character requirement is directed. It is noted in this respect that in its *Guidelines for Good Character Applications* the Law Society of Manitoba links the good character requirement not with the profession's reputation *per se*, but with the profession's reputation as a profession constituted of ethical practitioners. The LSM *Guidelines* direct decision-makers on character to consider whether

admission of the applicant would adversely affect the confidence of the public in the legal profession in Manitoba as an *honourable, ethical and competent profession*.²⁷

In sum, then, the good character requirement attempts to promote ethical conduct, protect the public and maintain the profession's reputation by ensuring that applicants with bad character, who are more likely to act badly, are not admitted.

3. *What is "good character" and what standards are used to measure it?*

How do law societies define the character necessary to meet these purposes? And what standards do they use to determine whether an applicant has that character?

At its most basic level, the definition of character used by law societies rests on a notion of personality, or individuality: character is what makes us, as individuals, who we are. The Law Society of Upper Canada's oft-cited definition of character uses this as its starting point: "Character is that combination of qualities or features distinguishing one person from another."²⁸

27. LSM *Guidelines*, *supra* note 23 [emphasis added].

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

In addition, and more importantly, the definition of good character is linked to morality and ethics. It is one's ability to do the right thing—to act in the right way—which constitutes one's good character.²⁹ This is also expressed in the idea that good character requires the possession of virtues. As the Law Society of Upper Canada goes on to say: "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."³⁰ Good character is thus defined not simply as a matter of moral behaviour, but also as a matter of having the virtues which will result in moral behaviour.

Character is not fixed, however. The Law Society of Upper Canada has consistently emphasized that character can change with time, and that the relevant question is the character of the applicant at the time of application, not some prior moment; the relevant test is the applicant's "good character at the time of the hearing."³¹ The Law Society notes that the "transition from being a person not of good character to one of good character is a process, not an event. It may or may not happen to someone who was not of good character."³²

All of these aspects of character are reflected in the definitions given in the various Law Society of Upper Canada decisions and, as well, by the frequently cited definition offered by then benchers (and now retired Justice) Mary Southin in her 1977 article addressing how the good character requirement is administered in British Columbia:³³

29. In a rather perplexing quotation the Law Society of Upper Canada stated the relationship between character and behaviour in this way: "Dr. Klassen described the relationship between character and behaviour, stating that 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 for Dr. Klassen was whether this was the result of a conscious decision on the part of the applicant to change his behaviour without an underlying change of 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." *Preyra v. Law Society of Upper Canada*, [2000] L.S.D.D. No. 60 at para. 33 (QL) [*Preyra #1*]. The relationship between behaviour and character is discussed more below with respect to the principles applied to determine who has, and who does not have, good character.

30. *P (DM)*, *supra* note 28 at 22. The Law Society has also described good character as "inevitably judged or perceived as a bundle of virtues": *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 at para. 23 [*Spicer*].

31. *Preyra #1*, *supra* note 29 at para. 8.

32. *Ibid.* at para. 42.

33. With the significant exception of the LSUC's emphasis on mutability of character, which Southin expressly rejects: "I have never seen any evidence that the character of grown men and women improved with age." Southin, *supra* note 4 at 135.

Character within the Act comprises in my opinion at least these qualities:

1. An appreciation of the difference between right and wrong;
2. The moral fibre to do that which is right, no matter how uncomfortable the doing may be and not to do that which is wrong no matter what the consequences may be to oneself;
3. A belief that the law at least so far as it forbids things which are *malum in se* must be upheld and the courage to see that it is upheld.³⁴

An applicant of good character should, then, be someone who, in his or her individual personality, has demonstrated behaviour consistent with the possession of moral virtues, and the courage to act in furtherance of them and the law's morality.

Given this definition, how do the law societies determine whether an applicant has this character? The approach used in the various published decisions, and in the LSM *Guidelines*, is to focus on the applicant's current character as evidenced by past misconduct but also, and more importantly, as demonstrated by information about the applicant's current conduct, reformation and rehabilitation. The applicant has an obligation to demonstrate, on a balance of probabilities and through "clear and convincing proof based on cogent evidence,"³⁵ 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

34. Southin, *ibid.* at 129.

35. *Law Society of Upper Canada v. Birman*, 2005 ONLHP 6, [2005] L.S.D.D. No. 13 at para. 6 [Birman #1].

efforts; d. the applicant's conduct since the proven misconduct."³⁶ Also of apparent relevance are circumstances which mitigate the otherwise morally doubtful prior conduct, including, for example, strains experienced by the applicant at the time, and alcohol addiction or use.³⁷

The most significant uncertainty about the standards against which an applicant's character will be judged is the specific relevance of the likelihood of future misconduct. On the one hand it appears, as discussed in the previous section, that the prevention of future misconduct by admitted lawyers is central to the entire existence of the good character requirement. In at least one case a person was denied admission in part because the Law Society was not satisfied that he would not re-offend.³⁸ On the other hand, there exists a strong reluctance to base character determinations on this consideration. Indeed, the Law Society of Upper Canada has stated on numerous occasions that an applicant is *not* required to demonstrate that he is at low risk of acting badly in the future:

Convocation respectfully believes that the relevant and applicable test is not whether the risk of further or future abuse by an applicant upon the public trust is too high, but simply whether the applicant has established his or her good character on the balance of probabilities. Mr. Rizzotto did not need to demonstrate good character beyond a reasonable doubt, *nor was he obligated to provide a warranty or assurance that in the future he would not breach the public trust.* The Act does not permit a Committee to apply any other test than that relating to the question of an applicant's

36. *Ibid.* at para. 15. The LSM *Guidelines*, *supra* note 23, list fifteen considerations to be taken into account: 1. the applicant's candour, sincerity and full disclosure in the filings and proceedings as to character and fitness; 2. the materiality of any omissions or misrepresentations; 3. the nature and extent of the applicant's voluntary treatment or rehabilitation; 4. the applicant's current attitude about the subject of their disclosure (e.g. acceptance of responsibility for the renunciation of past wrongdoing, and remorse); 5. the applicant's subsequent constructive activities and accomplishments; 6. evidence of character and moral fitness including the reasonably informed opinion of others regarding the applicant's present moral character; and [sic] 7. in light of the entire record of the applicant, whether admission of the applicant would adversely affect the confidence of the public in the legal profession in Manitoba as an honourable, ethical and competent profession; 8. the nature and character of any offences committed; 9. the number and duration of offences; 10. the age and maturity of the applicant when any offences were committed; 11. the social and historical context in which any offences were committed; 12. the sufficiency of the punishment given for any offences; 13. the grant or denial of a pardon or discharge for any offences committed; 14. the number of years that have elapsed since the last offence was committed, and the presence or absence of misconduct during that period; 15. the extent to which the applicant has made restitution and to which, if known, the restitution was made voluntarily at the initiative of the applicant, or as a consequence of the order of the Court.

37. *Birman #1*, *supra* note 35. See also: *Law Society of Upper Canada v. Levesque*, [2005] L.S.D.D. No. 38 (QL) [Levesque] and *Law Society of Upper Canada v. Schuchert*, [2001] L.S.D.D. No. 63 (QL) [Schuchert]. For a contrary view of the relevance of stressful circumstances, where the Committee emphasized the need for a lawyer to be ethical even when under stress, see *Law Society of Upper Canada v. D'Souza*, [2002] L.S.D.D. No. 62 (QL) [D'Souza].

38. *P(DM)*, *supra* note 28.

good character.³⁹

With this uncertainty noted, however, it appears that the general matters of relevance to the determination of good character are straightforward. They relate to the nature of past misconduct, the circumstances which may mitigate it, what the applicant has done to address past conduct by way of reform or rehabilitation, and other information about the applicant's current moral character.

4. *How is the good character requirement applied in specific cases?*

From the limited materials available there thus appears to be a relative degree of consensus with respect to the purposes of the good character requirement, the definition of good character, and the standards for assessing character. When, however, one reviews the reported decisions this clarity quickly evaporates. In this section I will, after providing a summary of the notable decisions, indicate the wide variation in the treatment of applicants whose past raises issues of character.

a. *A brief history of the application of the good character requirement*

The very first reported decision on the good character requirement is a 1950 decision of the British Columbia Court of Appeal, *Martin v. Law Society of British Columbia*.⁴⁰ In *Martin* the Court held that the Law Society of British Columbia was entitled to refuse admission on the basis of character because the applicant was an admitted communist. The Court held that adherence to the socially destructive goals of communism was inconsistent with admission to the bar.

Martin is, however, something of a stand-alone decision. There are no other reported Canadian good character decisions from any time prior to 1989, and no other reported Canadian decisions either prior to 1989 or thereafter in which the political beliefs of an applicant have resulted in her exclusion. Further, *Martin* has played no precedential role—it has never been cited—in subsequent good character decisions.

In the modern era, the first decision of note is the 1989 decision of the Law Society of Upper Canada in *P(DM)*.⁴¹ The applicant, DMP, had been convicted of offences related to sexual acts with two children. One of the children was a profoundly deaf eight-year-old girl whom he had met while working as a school bus driver, and with whom he engaged in sexual acts

39. *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 [Rizzotto] [emphasis added]. See also *Preyra #1*, *supra* note 29 at para. 8.

40. [1950] 3 D.L.R. 173 [*Martin*].

41. *Supra* note 28.

until she was sixteen. The second child was his seven-year-old biological daughter, with whom he engaged in sexual activities from the time that she was four years old. In assessing DMP's character the Law Society heard evidence about the offences and also about his troubled life. It also received a variety of highly favourable character references, including several from lawyers in the law firm for which DPM articulated. Additionally, the Law Society heard expert evidence. Some was supportive and to the effect that DMP was "not at risk for future sexual misconduct, is truly remorseful, and is indeed cured,"⁴² while other expert evidence strongly challenged this conclusion. Finally, the Committee heard disconcerting evidence from DMP himself. In particular, the Committee was troubled by DMP's testimony that he had reached a reasoned conclusion that his sexual acts were not wrongful, despite his knowledge that society would condemn them:

Mr. P pointed out that as a university student majoring in philosophy he had taken an ethics course which had helped him to rationalize that the only reason for prohibiting adult sexual activities with children was to protect infants from potential harm. So long as he acted lovingly towards children, causing them no palpable physical or emotional harm, it was quite permissible for him, he thought to demonstrate his "love" by engaging with them in sexual conduct. Thus, if he were guilty of a crime, it was nonetheless a victimless crime. Having persuaded himself that because of his love for them D and X had suffered no injury or pain Mr. P believed he was free to act as he pleased irrespective of society's strictures.⁴³

Based on this evidence, and after setting out the principles discussed in earlier sections with respect to the definition, purposes and standards of the good character requirement, the Committee refused to admit DMP. They concluded that they were "not satisfied" that he had changed the "moral code and structure of beliefs" which allowed him to engage in this wrongdoing.⁴⁴

Three years after its decision in *P(DM)* the Law Society of Upper Canada considered the application of Joseph Rizzotto.⁴⁵ Mr. Rizzotto was employed by the municipality of Frobisher Bay and while there he committed election fraud—he forged ballots—in an attempt to keep the incumbent mayor in office. Mr. Rizzotto's forged ballots were identified. He was charged and convicted after a guilty plea, briefly imprisoned and

42. *Ibid.* at 14.

43. *Ibid.* at 6.

44. *Ibid.* at 24.

45. *Rizzotto*, *supra* note 39.

released. Upon his release he attended law school at Windsor. He was not asked about any criminal convictions by Windsor and did not disclose any. In addition to information about his conviction, evidence was received by the Law Society concerning the community's continued outrage over the offence, from professors at Windsor who attested to Rizzotto's good character, and from Rizzotto himself. The original Committee rejected Mr. Rizzotto's application for admission, relying on his non-disclosure of the offence to Windsor, the continued community outrage, a lack of confidence that he would not again breach the public trust, and a general lack of faith in his credibility. The Committee's decision was overturned by Convocation who admitted Rizzotto. Convocation viewed the Committee's lack of confidence in a future breach of the public trust as irrelevant (for the reasons cited earlier on the applicable standards). It held that there had been too much emphasis on the severity of the original crimes and the non-disclosure to Windsor, and insufficient emphasis on the references from his professors at Windsor.

Louis Rajnauth was another applicant whose character was viewed variably.⁴⁶ Prior to and during law school Mr. Rajnauth committed insurance fraud against two insurance companies. In addition, he attempted to affect the criminal proceedings against him by discouraging potential witnesses from testifying. The Committee was presented with evidence about the crimes and also about Mr. Rajnauth's rehabilitation. Two of the Committee members viewed Mr. Rajnauth as rehabilitated, but one did not. The minority opinion was accepted by Convocation who declined to admit Mr. Rajnauth. This decision was upheld on judicial review.

At around the same time the Law Society of Upper Canada also declined to admit Michael Spicer.⁴⁷ Mr. Spicer was a graduate of the University of Saskatchewan law school who was admitted by the Law Society of Upper Canada as a student-at-law. He was, however, denied admission as a member as a result of an allegation that he had sexual intercourse with a twelve-year-old student during his previous career as a teacher. Mr. Spicer had been acquitted of this offence; however, the student gave testimony before the Law Society Committee which was supported by corroborative evidence. The Committee concluded "that Mr. Spicer breached his fiduciary duty by engaging in sexual intercourse with his 12-year-old pupil...[and] that Mr. Spicer was neither honest nor

46. *Rajnauth*, *supra* note 25.

47. *Spicer*, *supra* note 30.

candid when testifying under oath".⁴⁸ These findings of fact were held to be "dispositive" on the issue of Mr. Spicer's character.⁴⁹

Another important decision comes from Quebec. On November 16, 1990, after an altercation in which his mother swung at him with a baseball bat, Sébastien Brousseau stabbed her forty times and slit her throat. On the advice of psychological experts the Crown charged Mr. Brousseau with manslaughter. He was convicted and briefly imprisoned. Upon his release in 1992 he attended law school but had difficulty obtaining admission to the bar examination school. The Barreau du Québec consistently (on five occasions) refused to enrol Mr. Brousseau because of the severity of his past misconduct. It did this despite receiving considerable evidence supportive of his rehabilitation and character.⁵⁰ On May 31, 2006, after a number of judicial review proceedings with respect to its decisions, the Barreau agreed to enrol Mr. Brousseau.⁵¹

In his application for admission to the Law Society of Upper Canada Joseph Schuchert presented a criminal history more extensive but less serious than Mr. Brousseau's. Mr. Schuchert had been convicted of four counts of mischief, one count of break and enter with intent to commit theft, and two counts of theft under \$1000. He was also convicted of welfare fraud in the United States, was discharged from employment and was "evicted from numerous premises, both private and public, due to disruptive behaviour."⁵² Mr. Schuchert had been pardoned for his convictions in Canada. The Committee additionally heard evidence about his troubled childhood, the substance abuse which coincided with his criminal convictions, his significant period of sobriety and freedom from criminal convictions prior to his application, and the treatment which he had received. Finally, the Committee received a number of very supportive character references. This history, when combined with the panel's assessment of Mr. Schuchert as a witness, led the Committee to conclude that he was presently of good character and should be admitted.

The next case addressed issues of dishonesty outside the criminal context. Alan Preyra had falsified his academic record in applying for articling positions with prospective employers. He was also not completely

48. *Ibid.* at para. 48.

49. *Ibid.* at para. 52.

50. This evidence is mentioned in the 2001 decision of the Quebec Court of Appeal which overturned the then Professions Tribunal decision permitting Mr. Brousseau to enrol and restored the negative decision of the Barreau: *Brousseau v. Barreau du Québec* (2001) 200 D.L.R. (4th) 470 at 487 (Qc. C.A.) [*Brousseau*].

51. Tu Thanh Ha, "Quebec killer wins right to become lawyer" *The Globe and Mail* (7 July 2006), online: <<http://www.theglobeandmail.com>>.

52. *Schuchert*, *supra* note 37 at para. 6.

open with various people in his life, including his employers, until just before the Law Society of Upper Canada's hearing into his application. In the first hearing into his application⁵³ Mr. Preyra gave information about his stable home life and supportive information from his articling principals. However, there was extensive expert evidence presented which, while mixed, was in general not supportive. In particular, a psychologist testified that Mr. Preyra had, in his view, attempted to manipulate the psychological testing and "was still overly vulnerable to engaging in duplicitous impression management to a dangerous degree". After this hearing the Committee declined to admit Mr. Preyra:

The applicant engaged in duplicitous behavior over a long period. He failed to be entirely honest about it for four years. This was not a single lapse of judgment resulting from a stressful situation. Even after being caught, the applicant had several opportunities to admit his misrepresentations to all that he should have. He did not do so. As recently as one year before the hearing, the applicant was still misrepresenting the truth to people close to him, and was still failing to be honest with his articling principal, and even with his own lawyer.

Mr. Preyra's application came before the Law Society again in 2003.⁵⁴ On this occasion Mr. Preyra was able to provide more supportive evidence than previously. He had continued to work at the same law firm, members of whom testified as to his honesty and competence, had had a stable and successful family life and had received ongoing psychological counselling. He completed further psychological testing without trying to manipulate the results and obtained an outcome consistent with improvement in his psychological functioning. On this basis the Committee concluded that it was "satisfied, on the balance of probabilities, that Mr. Preyra is now of good character."⁵⁵

Falsification of academic records was also viewed negatively by the Law Society of Upper Canada in considering the application of Cheryl D'Souza.⁵⁶ Ms. D'Souza provided an altered transcript to a law firm with whom she was seeking employment. She provided an accurate transcript to the law firm after the alteration was noticed. She maintained to the firm, and to the Law Society to whom the firm reported the incident, that the provision of the altered transcript was negligent but inadvertent—she had changed the grade in anger when she received it and in anticipation of an

53. *Preyra #1*, *supra* note 29.

54. *Preyra v. Law Society of Upper Canada*, [2003] L.S.D.D. no. 25 (QL) [*Preyra* #2].

55. *Ibid.* at para. 103.

56. *D'Souza*, *supra* note 37.

appeal, but had not intended to provide it to a third party. This evidence was not believed by the panel who also noted that she was not prepared to admit her error. Based primarily on this assessment of her credibility, and her failure to take responsibility for her actions, Ms. D'Souza was not admitted.

The remaining cases of relevance to this analysis of the good character requirement were issued by the Law Society of Upper Canada in the last few years. In the first, the Law Society considered the application for admission of Barry Miller who, when he was a physician in Manitoba, had a sexual relationship with a patient and was consequently erased from the Manitoba register of physicians.⁵⁷ He moved back to Ontario and attended law school. He was not entirely forthright about what had occurred on his initial application to the Law Society of Upper Canada for admission as a student-at-law. After completing his articles in 1999, Dr. Miller did not immediately apply to the Law Society for admission as a member. He instead went through a period of therapy which resulted in favourable expert testimony being entered on his behalf, in addition to other positive character testimony which was provided. The totality of this evidence led the Law Society Committee to conclude that "Dr. Miller was a man of honesty, integrity and empathy".⁵⁸

In *Law Society of Upper Canada v. Stevens*,⁵⁹ the Law Society considered the application for membership of Stacey Stevens who was facing six criminal charges arising from her actions as a commissioner of oaths while a student at law. The charges had not yet proceeded to trial, and portions of the decision dealing with the circumstances of the charges are excised from the Law Society's decision. Counsel for the Law Society conceded, however, that the Law Society was unable to prove the criminal allegations on clear and convincing evidence. On the basis of the presumption of innocence and the twenty-two favourable character letters she provided, Ms. Stevens was admitted.

The Law Society of Upper Canada also admitted Alden Birman. Mr. Birman was accused of sexually harassing an assistant at his law firm. Mr. Birman never admitted that the harassment took place. Although the Law Society rejected his account and found that there was clear and convincing evidence of the harassment, they ultimately admitted Mr. Birman after he took sensitivity training which satisfied the Law Society

57. *Miller v. Law Society of Upper Canada*, 2004 ONLSP 4, [2004] L.S.D.D. No. 8 (QL) [Miller].

58. *Ibid.* at para. 23.

59. 2005 ONLSP 15, [2005] L.S.D.D. No. 37 (QL) [Stevens].

that he “understood the need for sensitivity in the workplace and that sexual misconduct was wholly inappropriate.”⁶⁰

Lynda Levesque had been convicted of perjury and sentenced to six months in prison in Alberta.⁶¹ Ms. Levesque had claimed she was assaulted by the father of her daughter. She testified to the assault at a preliminary inquiry but then resiled from that testimony and, upon being compelled to testify at trial by the Crown, testified falsely that she had not been assaulted. She was convicted of perjury as a result of that testimony. At the character hearing the Committee heard evidence about the perjury, positive letters from numerous “professional and important people,” and medical evidence supportive of her application. On the basis of this evidence, and on her testimony, which the Committee found to be “straightforward,”⁶² the Committee held that Ms. Levesque was of good character, describing her as a “strong, independent and a responsible person, responsible to her law school, responsible to her daughter, a responsible employee and articling student. She is healthy and balanced.”⁶³

A similarly positive determination of character was reached in the case of *Law Society of Upper Canada v. Shore*.⁶⁴ Ms. Shore’s daughter died as a result of the negligence, and arguably criminal conduct,⁶⁵ of nurses at the Toronto Hospital for Sick Children who improperly administered morphine. The Crown laid criminal charges against the nurses and obtained authorizations from Ms. Shore to disclose various hospital records to the defence. Ms. Shore gave such authorizations; however, she destroyed one document rather than passing it on to the Crown. She did this because the document alleged that her daughter’s pain symptoms were psychological rather than physical, and Ms. Shore found this upsetting, particularly given the doctor’s conduct when they had met with him. During the trial of the nurses, and prior to her own testimony, Ms. Shore voluntarily disclosed the destruction of the document to the Crown and the charges against the nurses were dropped.

Ms. Shore’s actions were brought to the attention of the Law Society by the lawyers who had represented the nurses. The lawyers also made several other allegations against Ms. Shore. After an investigation and a hearing into Ms. Shore’s application, the Law Society considered only the allegations related to the destruction of the document. Further, at the end

60. *Law Society of Upper Canada v. Birman*, 2006 ONLSHP 32 at para. 23 [*Birman* #2].

61. *Levesque*, *supra* note 37.

62. *Ibid.* at para. 23.

63. *Ibid.* at para. 22.

64. 2006 ONLSHP 55 [*Shore*].

65. This was the conclusion of the coroner’s inquest into Ms. Shore’s daughter’s death.

of the hearing, the panel found that Ms. Shore was in fact of “exemplary” character, and that her conduct was the unsurprising result of the extraordinary stress and tension arising from the fact and circumstances of her daughter’s death:

We accept the evidence of the applicant herself and of the character witnesses that her wrongdoing in 2002 was an aberration in what has been, and continues to be, an exemplary life.... We conclude that the applicant was in the most unenviable situation of conflict between her integrity as a mother and her integrity as a member of civil society. The evidence is clear that it was difficult, if not impossible, for her, in the throes of extreme grief, to perceive the situation of conflict she found herself facing.⁶⁶

A very different assessment of character was made in the final case on good character, *Law Society of Upper Canada v. Burgess*.⁶⁷ Ms. Burgess committed plagiarism when she was an undergraduate at the University of Toronto and was accused of academic misconduct while a law student at Queen’s. When she was investigated by the Law Society Ms. Burgess gave a detailed account of the University of Toronto incident in a two-and-a-half page letter to the Law Society. The letter claimed that the plagiarism accusation arose because she used portions of a paper written in one course for another—essentially “submitting similar academic work for two courses.” She claimed that she decided for prudential reasons not to contest the accusations even though she did not think she had “violated the University’s policy” or done “anything wrong.” The general tenor of Ms. Burgess’s letter was that she had been wronged and had suffered unwarranted negative consequences. After further investigation, however, the Law Society discovered from the University of Toronto’s Discipline Case Report that Ms. Burgess’s account of the plagiarism accusation was wholly fabricated. In fact, the academic misconduct arose from her submission of a paper obtained from the internet as her own work. Ms. Burgess later admitted her fabrication and testified that in constructing her story she had reviewed the rules on academic misconduct at the University of Toronto and chose the least morally culpable form of sanctionable academic misconduct. Ms. Burgess offered various reasons for her dishonesty with the Law Society including her inability to forgive herself for the University of Toronto incident and fear of the impact it would have when combined with the Queen’s allegation. No psychiatric or psychological evidence was presented to the Committee.

66. *Supra* note 64 at paras. 52-55.

67. 2006 ONLSP 66 [*Burgess*].

Given the severity and recent date of her duplicity, and the absence of psychological evidence, the Committee found that Ms. Burgess was not of good character.

Having briefly summarized the decisions on good character, I will sketch out in the following sections the trends which are evident in them as a whole. In particular, I will note the significant variability in how the good character requirement has been applied. This variability is evident in several respects. First, there is little consistency with respect to how past misconduct will be treated. Second, there is little consistency with respect to the significance which will be accorded to positive third party references about the applicant. Third, there is significant variation in how psychological evidence is used. Fourth, decisions often turn less on the evidence received about the applicant than on the panel's impression of the applicant as a witness during the proceeding. Finally, and perhaps most significantly, even when two cases present similarly on several evidentiary levels, inconsistent outcomes may be reached.

b. *Varying consequences of past misconduct*

The first, and perhaps most notable point, is that the nature of the past misconduct has little predictive force in determining whether an applicant will be found to have good character or not. It is clearly a relevant factor in every decision, but it does not itself appear to play a determinative role in the outcome of the case. Applicants whose past misconduct ranges from belief in the merits of communism⁶⁸ to pedophilic sexual assault,⁶⁹ sexual harassment,⁷⁰ manslaughter,⁷¹ insurance fraud,⁷² plagiarism, dishonesty towards the law society⁷³ and falsification of academic records⁷⁴ have all been rejected, at least for some time. On the other hand, applicants who have committed election fraud,⁷⁵ sexual abuse of a patient,⁷⁶ perjury,⁷⁷ alleged falsification of affidavits as a commissioner of oaths,⁷⁸ suppression of evidence in a criminal proceeding⁷⁹ and various property and violent

68. *Martin*, *supra* note 40.

69. *P(DM)*, *supra* note 28 and *Spicer*, *supra* note 30.

70. *Birman #1*, *supra* note 35 and *Birman #2*, *supra* note 60.

71. *Brousseau*, *supra* note 50.

72. *Rajnauth*, *supra* note 25.

73. *Burgess*, *supra* note 67.

74. *Preyra #1*, *supra* note 29 and *D'Souza*, *supra* note 37.

75. *Rizzotto*, *supra* note 39.

76. *Miller*, *supra* note 57.

77. *Levesque*, *supra* note 37.

78. *Stevens*, *supra* note 59.

79. *Shore*, *supra* note 64.

offences⁸⁰ have all been accepted. In addition, some applicants—such as Brousseau and Preyra—have been denied admission initially but later admitted, even though the nature of their past misconduct remains the same.

This lack of predictive force can, at least in part, be explained by the fact that the focus of the assessment of good character is on an applicant's current character, not on past misconduct or the "risk of future abuse by the applicant of the public trust."⁸¹ However, since the question of character only arises because of the existence of the past misconduct, it is still notable that there is so little predictive relationship between the nature of the misconduct and the decision on admission. This is particularly so given that one of the few clearly ascertainable—"objective"—facts about an applicant which can be considered is the previous misconduct. Other evidence, such as supportive letters of reference, is always presented in support of an application, and often rests on impressionistic senses about the applicant rather than on specific facts about his behaviour. Nonetheless, it is clear that the objective facts of past misconduct have had little predictive value in determining the outcomes of the reported cases.

c. *Positive character references*

Every applicant presents positive references to support his application. For example, DMP provided highly favourable references, with one going so far as to say that it would be "a tragedy for him and the legal profession if such a talented person were to be shut out."⁸² Similarly, Aidan Burgess received support from her articling principal, an associate at her law firm, and two of her professors from law school. Although the referees were not fully apprised of the nature of Ms. Burgess's plagiarism at the time they provided their letters, none of them withdrew their support upon being informed of the true facts. In particular, Ms. Burgess' articling principal testified that even after her disclosure he continued "to regard her as a person of good character."⁸³ For neither DMP nor Ms. Burgess, however, was this evidence sufficient to constitute good character.⁸⁴

80. *Schuchert*, *supra* note 37.

81. *Preyra #1*, *supra* note 29 at para. 8.

82. *P(DM)*, *supra* note 28 at 12.

83. *Burgess*, *supra* note 67 at para. 42.

84. This is also the case for other applicants denied admission. Ms. D'Souza presented evidence from her articling principal that she was of "[e]xcellent character" and from another lawyer to the effect that she was "a very fine person whom she [the witness] would be happy to have in her own office." *D'Souza*, *supra* note 37 at paras. 35, 39.

By contrast, for some of the applicants admitted to the bar, the character evidence from third parties has been viewed as highly significant in establishing good character. Convocation overturned the Committee decision denying admission to Joseph Rizzotto in large part because the Committee gave insufficient weight to the character references from Mr. Rizzotto's law school professors:

Both Dean Gold and Professor Whiteside are respected members of the legal profession who worked closely with Mr. Rizzotto for three years at the University of Windsor Law School. Each has vouched for Mr. Rizzotto's good character. Convocation believes that the evidence of Dean Gold and Professor Whiteside is sufficient to permit it to substitute its opinion for that of the Committee in this case given the [other] errors in principle...⁸⁵

Similarly, in deciding to admit Lynda Levesque despite her conviction for perjury, the Law Society relied extensively on the letters from "Many professional and important people" which indicated the writers were "proud of Ms. Levesque and proud to support her application."⁸⁶ And finally, in *Stevens*, the Committee appears to have relied heavily on character evidence filed on her behalf which spoke "of her moral and ethical trustworthiness and suitability as a candidate for admission to the Society."⁸⁷

In general there is little consistency in how third party character information is viewed by decision-makers. It appears to be used largely to bolster the decision-maker's own impression of the applicant's character, gained from his or her "sense" of the evidence and of the applicant's testimony.

d. *Psychological evidence*

There is also considerable variation in the decisions' treatment of psychological evidence. In some cases the evidence is viewed as highly significant. Thus in *P(DM)*, while some of the expert evidence suggested that DMP had been cured, other evidence contradicted this result and weighed heavily in the Committee's decision to deny admission. Likewise, in both *Preyra* judgments the decision-makers relied heavily on expert psychological evidence in deciding not to admit Mr. Preyra in the first instance, and then to admit him in the second instance. Evidence of psychological counselling and treatment was also viewed as probative

85. *Rizzotto*, *supra* note 39 at para. 35.

86. *Levesque*, *supra* note 37 at para. 10.

87. *Stevens*, *supra* note 59 at para. 31.

in allowing the admission of Mr. Miller and Mr. Birman.⁸⁸ Finally, in *Burgess*, the panel was troubled by the absence of psychological evidence with respect to Ms. Burgess, noting that they "would have found it helpful if we had had some psychiatric and/or psychological evidence presented to us concerning Ms. Burgess and concerning the behaviour that she engaged in."⁸⁹

In other cases, however, no psychological evidence was presented to, or relied upon, by the panel in making its decision. No psychological evidence was presented with respect to Mr. Rizzotto, Ms. Stevens or Mr. Schuchert, all of whom were admitted. Nor was it presented with respect to Ms. D'Souza or Mr. Spicer, both of whom were denied admission.

As is the case with supportive character evidence, psychological evidence can be a factor in the determination of character, but its relevance varies. In some cases it seems to operate more to bolster an existing impression of an applicant than to carry independent significance.

e. Assessment of the applicant as a witness

Part of the reason for the sense of unpredictability and variability which arises from reading the decisions stems from the fact that in a number of cases an important factor appears to be the panel's impression of the applicant as a witness. For example, in *P(DM)* the panel noted DMP's "lack of candour in giving his evidence."⁹⁰ In *Spicer* the panel determined that Mr. Spicer did not testify truthfully about his sexual relationship with his student and concluded that this fact "[led] inexorably to the conclusion that Mr. Spicer was not of good character at the time he testified before the Committee."⁹¹ In *D'Souza* the panel was strongly influenced by the "unsatisfactory evidence of the applicant herself."⁹² In *Rizzotto* the initial Committee relied on the fact that Mr. Rizzotto's "demeanor on the stand displayed a certain caginess bordering on arrogance ... he was, at times, evasive, argumentative and combative" (note though that Convocation later rejected this finding as too generalized).

By contrast, in *Levesque* the panel was struck by the fact that in giving testimony Ms. Levesque "was straightforward. There was nothing wishy-washy about her."⁹³ And in *Schuchert* the panel noted that the applicant's "self-reporting was full and frank, and consistent with his presentation

88. Although in Mr. Birman's case the counselling was given by a law professor with a specialty in harassment issues and not by a psychologist.

89. *Burgess*, *supra* note 67 at para. 58.

90. *P(DM)*, *supra* note 28 at 5.

91. *Spicer*, *supra* note 30 at para. 51.

92. *D'Souza*, *supra* 37 at para. 42.

93. *Levesque*, *supra* note 37 at para. 23.

to the admissions panel as a man who was, with candour, fully revealing his past conduct."⁹⁴ In *Preyra #2*, when deciding to admit Mr. Preyra to the bar, the panel concluded that while Mr. Preyra was "clearly anxious and sporadically defensive" he also "acknowledged his past errors and appeared to genuinely accept responsibility for them."⁹⁵ In *Shore*, the panel was impressed by the applicant's testimony and, in particular, the fact that she "clearly, eloquently, and without qualification stated that her actions were wrong".⁹⁶

In all of these cases, therefore, in addition to (or in substitution for) evidence of past behaviour, psychological evidence and observations from those who had known the applicant for some time, a central and almost determinative factor was the panel's impressionistic sense of the applicant as a witness. Since such impressions are necessarily highly subjective and variable, this may account for the extent to which the decisions, when read together, do not appear to present a consistent and coherent whole.

f. *Inconsistencies on the totality of the evidence*

Finally, there are some decisions which are difficult to reconcile even when looking at the totality of the evidence. The most obvious example of this comes from a comparison of the two leading decisions of the Law Society of Upper Canada, *P(DM)* and *Rizzotto*. In both cases the conduct engaged in was of a serious criminal nature, potentially or actually resulting in harm to others. Further, while DMP's crime of pedophilic sexual assault was more violent and corrosive than Mr. Rizzotto's election fraud, Mr. Rizzotto's crime was arguably more closely related to the type of opportunity for wrongdoing which is wont to arise in legal practice: Mr. Rizzotto occupied a position of trust and authority which he breached by engaging in fraud. Mr. Rizzotto and DMP were also both able to produce supportive character references with respect to their moral character. As noted earlier, the panel found the evidence filed with respect to Mr. Rizzotto to be particularly persuasive, but it is worth noting that it was DMP who produced evidence with respect to his work as a lawyer. Mr. Rizzotto's evidence arose rather from his law school professors and Dean. It is, I would suggest, doubtful whether such referees could have as extensive a knowledge of the ethical character of an applicant as persons who have worked in legal practice with him. In addition, as noted earlier, the panels who heard evidence from DMP and Mr. Rizzotto were unimpressed with both of them. Finally, while some of the psychological evidence filed on DMP's behalf was unhelpful,

94. *Schuchert*, *supra* note 37 at para. 21.

95. *Preyra #2*, *supra* note 54 at para. 23.

96. *Shore*, *supra* note 64 at para. 50.

other evidence suggested that he had been cured and was unlikely to re-offend. And Mr. Rizzotto appears to have provided no psychological evidence with respect to his personal development. Certainly none was relied upon or noted in the decision by Convocation to admit him.

Yet, at the end of the day, Mr. Rizzotto was admitted and DMP was not. As Gavin MacKenzie rather caustically remarks following his detailed discussion of these two cases, in which he similarly notes the above incongruities, "One of them may have been correctly decided; it is difficult to accept that both were."⁹⁷

5. *Summary of the good character requirement in Canada*

The good character requirement is thus universally applicable, but only superficially enforced both in terms of investigative efforts and numbers of applicants excluded, and is oriented less towards the demonstration of good character than towards the demonstration of rehabilitation from past misconduct. The good character requirement is also shrouded in secrecy, with extraordinarily limited public information available about what it means, why it exists, how it is to be judged and who can be said to have, or not have, the requisite good character.

The information which is available suggests that there is some clarity amongst those applying the standard as to what good character means, what the requirement's purposes are, and what factors are relevant in determining whether an applicant possesses good character. There is equally, however, considerable variability, uncertainty and incoherence in how the good character requirement is applied to particular individuals.

Part III turns to a critique of the good character requirement. But first, to place this discussion in some context, Part II briefly considers the American good character requirement.

II. *The good character requirement in the United States*

The good character requirement has a long and storied history in the American legal profession. In her seminal article Deborah Rhode describes it as a "fixed star in an otherwise unsettled regulatory universe."⁹⁸

Despite, or perhaps because of, this long history, American commentators have not been enamoured with the good character requirement. They have criticized its dubious premises and purposes, its

97. MacKenzie, *supra* note 4 at 23-12.

98. Rhode, *supra* note 7 at 496.

inconsistent and unfair application, and its doubtful constitutionality.⁹⁹ I will rely on these commentators, and in particular Professor Rhode, both in critiquing the Canadian good character requirement and in suggesting how it should be reformed. This reliance must be cautious, however. The “fixed star” of the good character requirement in the United States only loosely parallels the Canadian experience. The remainder of the section will note key similarities and differences between the approach to reviewing character in the two jurisdictions and indicate the extent to which American commentators can safely be relied upon in assessing the Canadian good character requirement.

A number of the features of the good character requirement as set out in the previous sections are also present in its American counterpart. As in Canada, the good character requirement is universally applicable to those seeking bar admission.¹⁰⁰ It is a significant consumer of regulatory resources.¹⁰¹ It has been relatively inconsistently applied state-to-state and individual-to-individual.¹⁰² Further, the emphasis of the inquiry in the United States has similarly been on bad conduct in the past rather than on a positive demonstration of present good character.¹⁰³ Finally, and most importantly, its conceptual justification has also been found in the dual need to protect both the public and the reputation of the profession.¹⁰⁴

There are, however, some significant differences between the Canadian and American approaches to good character review. First, while there are

99. See, e.g.: Charles W. Wolfram, *Modern Legal Ethics* (St. Paul, MN.: West, 1986); Mark H. Aultman, “Moral Character and Professional Regulation” (1994) 8 Geo. J. Legal Ethics 103; Michael D. White, “Good Moral Character and Admission to the Bar: A Constitutionally Invalid Standard?” (1979) 48 U. Cin. L. Rev. 876; M.A. Cunningham, “The Professional Image Standard: An Untold Standard of Admission to the Bar” (1992) 66 Tul. L. Rev. 1015; Marshall Scott May, “*Partin v. Bar of Arkansas*: The Good Moral Character Requirement for Arkansas Bar Applicants” (1997) 49 Ark. L. Rev. 829; Marcus Ratcliff, “The Good Character Requirement: A Proposal for a Uniform National Standard” (2000) 36 Tulsa L.J. 487; Arpa B. Stepanian, “Law Student Clerkships; Walking a Thin Line Requirement of ‘Good Moral Character’ for Admission to the Bar” (2001) 3 J. Legal Advoc. & Prac. 67.

100. Rhode, *supra* note 7 at 493.

101. *Ibid.* at 563.

102. *Ibid.* at 532-546. See also Richard R. Arnold, “Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Standards for Bar Applicants” (1997) Utah L. Rev. 63 at 64: “the shift toward a more flexible character standard poses particular problems of vagueness and unpredictability” and Mark R. Privratsky, “A Critical Review Culminating in Practical Bar Examination Application Techniques in Regards to the ‘Good Moral Character Requirement’ – *In re Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993) (1995) 74 Neb. L. Rev. 324. There is some indication, though, that Rhode’s criticisms have influenced how the good character requirement is administered. See Patrick L. Baude, “An Essay on the Regulation of the Legal Profession and the Future of Lawyers’ Characters” (1993) 68 Ind. L.J. 647 at 654. Further, as noted below, there are now published standards relating to the good character requirement. See Arnold and, as well, Diane Van Aken, “Unraveling the Mystery of the Character & Fitness Process” (2004) 83:10 Michigan Bar Journal 25.

103. Matthew A. Ritter, “The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection Upon Bar Admissions” (2002) 39 Cal. W.L. Rev. 1 at 47-51.

104. Rhode, *supra* note 7 at 507-512.

inconsistencies in the application of the good character standard, there have been numerous attempts in the United States, including by the American Bar Association, to indicate how the requirement is to be applied. These standards indicate the type of conduct which should give rise to character review, and the factors which should qualify the significance of that past conduct.¹⁰⁵ Second, there is in general greater transparency with respect to the administration of the good character requirement in the United States. This transparency is evident in the publication of standards and information about the process of review, and in the publication of character determinations by state decision-makers. Third, the good character requirement has, in general, been more rigorously enforced in the United States. As noted, it appears that no Canadian jurisdiction undertakes independent investigations of applicants who do not report character issues. Such investigations do take place in the United States.¹⁰⁶

Fourth, there is a continuing history in the United States of excluding applicants on the basis of their political beliefs. The numerous United States Supreme Court decisions on the good character requirement all arose from the exclusion of an applicant with alleged ties to the Communist party or other suspect beliefs.¹⁰⁷ A recent case of notoriety arose from the exclusion of a white supremacist who advocated violence.¹⁰⁸ With the

105. Arnold, *supra* note 102 at 67-68. The type of conduct identified by the ABA includes, *inter alia*, unlawful conduct, misconduct in employment, acts involving dishonesty, fraud, deceit or misrepresentation, and evidence of mental or emotional instability. Arnold notes that every state has "character standards that govern the admissibility of bar applicants."

106. Van Aken describes the Michigan investigative procedure as follows: "Once the application is accepted, State Bar staff undertakes an investigation of each applicant. Various methods are used to follow up on applicant responses; letters are sent, phone calls are made, and when needed, field investigation is also done to collect information and interview witnesses. As information is received, it is compared with the applicant's disclosures. The applicant may be asked to explain a discrepancy between the applicant's disclosure and official records, or to explain a non-disclosure when information is discovered during the course of the investigation. Once all information is collected for each file, the file is viewed as a whole." Van Aken, *supra* note 102 at 26.

107. *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) [*Schwartz*] (communism); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (communism); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961) (communism); *Re Anastaplo*, 366 U.S. 82 (1961) (communism—Anastaplo refused to answer questions with respect to communist party associations); *Re Summers*, 325 U.S. 561 (1945) (conscientious objection to military service); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (refusal to answer questions about Communist party membership); *Re Stolar*, 401 U.S. 23 (1971) (refusal to answer question about all organizational affiliations); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (general challenge to questions asked by New York State of bar applicants). A comprehensive discussion of these cases can be found in Theresa Keeley, "Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-9/11 World on an Elevated Threat Level" (2004) 6 U. Pa. J. Const. L. 844.

108. Richard L. Sloane, "Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law" (2002) 15 Geo. J. Legal Ethics 397.

exception of *Martin*, the good character requirement in Canada does not have a similar history (past or recent) of excluding applicants on the basis of their political beliefs.

Fifth, analysis of the good character requirement in the United States takes place against a constitutional backdrop. In American jurisprudence the ability to obtain a licence to practise law enjoys status as a right which cannot be denied without the demonstration of some rational connection between the denial and the applicant's "fitness or capacity to practice law."¹⁰⁹ While discriminatory denial of bar admission has attracted constitutional scrutiny in Canada,¹¹⁰ to date this scrutiny has arisen from the fact of discriminatory state action *per se*, not because the subject matter of the discrimination was admission to the bar.¹¹¹

As a consequence, therefore, when analyzing and critiquing the Canadian requirement I will draw on American commentators only with respect to the administrative problems which arise in both jurisdictions, and to the general justifications for the requirement.

III. *Analyzing the good character requirement*

This section assesses the good character requirement as applied in Canada, following the organization of Part I. It will first consider problems arising from the administration of the requirement. It will then consider issues arising with respect to the requirement's stated purposes. In particular, it will assess the problems arising from the evidence of social psychology that the premise underlying the idea that the good character requirement can achieve its purposes—the idea that "character is the wellspring of professional conduct"—is at best only partially true. Finally, in light of this analysis, it will indicate the extent to which the current definition of

109. *Schware*, *supra* note 107, cited in Michael K. McChrystal, "A Structural Analysis of the Good Moral Character Requirement for Bar Admission" (1984) 60 *Notre Dame L. Rev.* 67 at 74.

110. *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

111. It has been suggested that the good character requirement may suffer from unconstitutional vagueness (see MacKenzie, *supra* note 4). There are, however, difficulties with applying the doctrine of vagueness here. First, the case law on 'void for vagueness' arises from *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] and it would therefore be necessary to demonstrate that a refusal of admission to the bar engages the life, liberty and security of the person interest protected by s. 7 of the *Charter*. While there is some Canadian case law affording s. 7 protection to economic rights like a medical billing number (see *Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171, [1989] 2 W.W.R. 1 (B.C.C.A.)), this will still be a difficult argument to sustain. Second, much of the vagueness case law arises from the criminal and regulatory context, in which there is an attempt by the state to sanction particular conduct, and there is uncertainty as to what that conduct is. Given that even in its current problematic form the good character requirement is viewed as preventative, not punitive, and is oriented towards current character, not past bad behaviour, it is unclear that that case law would support a s. 7 vagueness challenge. Having said that, this argument certainly warrants further consideration, but it is beyond the scope of this paper.

good character, the standards used for assessing it, and the application of these standards in particular cases prevent the good character requirement from achieving its purposes.

1. *Administration of the good character requirement*

There are several evident problems with the administration of the good character requirement. The first, while not of enormous practical significance, is nonetheless notable: at the point of administration the good character requirement is no such thing. Rather it is a requirement that an applicant not have committed acts indicative of bad character. While the focus of character hearings is said to be on an applicant's current good character, such hearings only take place for applicants whose past bad behaviour raises concerns about their character. At the administrative stage the requirement focuses on badness, not goodness, and on conduct, not character.¹¹² While such an emphasis may be necessary in practice and in principle,¹¹³ it does raise doubts about the extent to which the good character requirement meaningfully ensures high ethical standards. The best claim law societies can make is that the good character requirement may occasionally exclude someone who poses a risk to the public; they cannot make any broader claim that the requirement ensures high ethical standards flowing from lawyers' demonstrably good characters. The good character requirement is one in name only.

Further, and more significantly, because law societies do not undertake independent investigation of applicants, there is no assurance that all applicants with issues arising from prior misconduct have been identified. Even a basic requirement that applicants provide a criminal record check, or a social services check,¹¹⁴ would significantly widen the scope of the law societies' inquiries. As noted, in the United States such independent investigation is a regular feature of the application of the good character requirement.

The impact of this narrow scope of the law societies' investigations on the enforcement of the requirement is heightened by the relative rarity with which applicants who do raise good character issues are excluded. As noted, only a handful of applicants are excluded from law society admission in any given year across Canada.¹¹⁵ Several American commentators

112. This point is explored in an interesting but highly abstract way by Matthew Ritter, *supra* note 103.

113. Truly testing for *good* character would be enormously costly as well as intrusive.

114. Both of which are required, for example, before working as an aide for children with disabilities in Alberta.

115. See *supra* notes 19-22 and accompanying text.

have suggested that even where applicants present issues of character, bar admissions bodies are reluctant to exclude them because, at the point of application, the candidates have already invested considerable time and effort in obtaining their professional qualification.¹¹⁶ That reluctance may be operative in Canada as well, but ultimately, if the good character requirement is necessary for the protection of the public, an applicant's investment of three years in legal education is by itself an insufficient reason to warrant her admission.¹¹⁷

The narrow application of the good character requirement makes it doubtful that the requirement provides any meaningful protection to the public. Where there is limited screening of applicants, no independent investigation and little will to exclude applicants with character issues, in what sense has the public received any assurance about the character of lawyers?

Yet, at the same time, for the few applicants who are subject to law society scrutiny, a considerable burden is imposed. And while this burden may be justifiable for some of those applicants, for many it is not. Take, for example, the case of Sharon Shore, whose single act of unethical behaviour took place in circumstances of extreme grief and personal suffering, and whose life was otherwise judged to be "exemplary." In the context of hundreds of other applicants who have likely never faced these kinds of pressures, but may well lack Ms. Shore's virtues of "integrity, candour, empathy and honesty,"¹¹⁸ it is quite unfair for Ms. Shore to have had to face the delay, expense and publicity which the good character hearing involved. If other applicants had faced similar scrutiny, Ms. Shore's experience (especially in light of her clear wrongdoing in destroying the document, described by the panel as a "wrong of the most serious kind"¹¹⁹) would be unproblematic. But the fact that she faced such scrutiny when so few other applicants did so, even though it is statistically probable that many of them would have engaged in questionable conduct, is incoherent and unfair.

In addition, even with the narrow investigations conducted by Canadian law societies, and the limited number of hearings which are held, there is a financial cost (for the law societies) associated with administration of the good character requirement. Staff and volunteers spend significant amounts of time reviewing files and investigating applicants who do

116. See, e.g., Rhode, *supra* note 7 at 515.

117. Although logically some burden should be placed on law schools to alert applicants to the good character requirement.

118. Shore, *supra* note 64 at para. 47.

119. *Ibid.* at para. 49.

present problems. It is questionable whether, if the requirement is not going to result in meaningful scrutiny, this expenditure of time and effort is warranted.¹²⁰

The administration of the requirement is also, and most significantly, problematic because of the secrecy with which it is cloaked. The law societies claim that the good character requirement is designed to protect the public and maintain public confidence in the legal profession, yet outside of Ontario¹²¹ the public is entirely excluded from the process. No information is provided for the public to monitor the basis on which character is being assessed. There may well be numerous candidates who would be judged by a member of the public as wholly lacking in the "character" he would want his lawyer to have, but law societies do not provide enough information to enable members of the public to make those judgments for themselves.

Law societies may respond that secrecy is necessary to ensure that those applicants who are ultimately found to be of good character have their reputation and privacy protected. But surely, if the good character requirement is to be justified as existing for the public good, the cost of publicity is one which applicants for the privilege of bar admission should bear. And since the applicant will have a public declaration of good character in the end, it is arguable that any damage to reputation is inconsequential.¹²²

The administration of the good character requirement is thus at once both too narrow and too broad. It is too secretive, relies too heavily on self-reporting, focuses largely on bad conduct and not on good character, and excludes only a tiny percentage of applicants for bar admission. On the other hand, it places a considerable burden on the few applicants captured by it and upon the various law society staff and volunteers required to administer it, all for the sake of denying admission to at most one or two applicants each year.

120. This point is emphasized by Rhode, *supra* note 7 at 563-566.

121. And recently Nova Scotia.

122. It is acknowledged, though, that the posited response of the law societies may have more weight in the context of sporadic enforcement with its resulting unfairness to those applicants who do receive scrutiny (like Ms. Shore). Having said that, 'remedying' the wrongs caused by an inadequate system by ensuring that no one knows about them is not an outcome generally favoured in democratic legal systems. See *infra* note 154 and accompanying text for discussion of the argument that the effect of publicity may be entirely positive for applicants like Ms. Shore whose character is inaccurately called into question.

2. *Purposes of the good character requirement*

a. *Introduction*

What, though, of the purposes the good character requirement serves? As discussed in Part I.2, above, the purposes of the good character requirement are said to be to protect the public, promote ethical conduct by lawyers and maintain public confidence in the legal profession. This section assesses these purposes and considers first, whether they are legitimate on their own terms and, second, even if they are, whether any logical relationship exists between them and the good character requirement.

b. *Are the purposes of the good character requirement legitimate?*

The purposes which the good character requirement serve are, on the whole, *prima facie* legitimate. Indeed, protection of the public and promotion of ethical conduct by practising lawyers are precisely where the regulation of lawyers should be directed.

The only purpose which is not *prima facie* legitimate is the assertion that the good character requirement is necessary for maintenance of the legal profession's reputation. That purpose can be criticized on the basis that it is simply an attempt to ensure that lawyers "look good" to the public, and can maintain their "regulatory autonomy and economic monopoly."¹²³ Even if the good character requirement achieves this goal it is by no means clear that such a goal is worth achieving. As cogently assessed by Deborah Rhode:

Even as a theoretical matter, however, this rationale for character screening remains problematic. While these professional interests help explain, they fail adequately to justify the bar's attachment to character screening. To prevent or deter individuals from entering a profession in order to promote the reputation, autonomy, or monopoly of existing members is troubling on constitutional as well as public policy grounds. Taken to its logical extreme, this rationale would support exclusion of any applicant whose conduct the local bar deemed unbecoming or likely to taint its public image. Particularly in a profession charged with safeguarding the rights of the unpopular, the price of such unbounded licensing discretion could be substantial.¹²⁴

As noted in Part I.2, however, it appears in Canada that concern with the profession's reputation is the harm which would follow from admitting lawyers who will be unethical. The profession wants to maintain or promote its reputation as a profession constituted of ethical practitioners,

123. Rhode, *supra* note 7 at 511.

124. *Ibid.* at 512.

not simply to bolster the general public perception of lawyers. To that extent a concern with the public perception of lawyers is a legitimate area of regulatory focus.

Further, though, even if this purpose is unjustifiable—if, for example, the more credible view is that the profession’s concern here *is* with its “regulatory autonomy and economic monopoly”—the other purposes of the good character requirement remain legitimate. If, therefore, the good character requirement fulfills these purposes—if it ensures the maintenance of high ethical standards and if the public is protected from unethical behaviour—then it is normatively justifiable.

c. Can a good character requirement achieve its stated purposes?

This leads, however, to the next important question: is there any logical relationship between the good character requirement and success in ensuring that lawyers are ethical so that the public is protected? As noted earlier, the idea that the good character requirement can fulfill these goals rests on the premise that “character” is a reliable indicator of a person’s ethics, and that an absence of good character in an applicant indicates a greater likelihood that that applicant will be an unethical lawyer. Unless character determines conduct in this way, having a good character requirement is not logically related to ensuring ethical conduct among practising lawyers. And without that logical relationship the requirement cannot be normatively justified (even if its purposes can be).¹²⁵

It is impossible to prove that conduct flows from character, and some have argued that the assertion that it does is largely indefensible.¹²⁶ However, when considered in light of its philosophical history, and the evidence of social psychology, the premise that character determines conduct can make a qualified claim to correctness. To demonstrate this position, and to articulate the nature of that qualified claim, this section will first briefly consider the “virtue ethics” view of the relevance of character to conduct. Second, it will review social psychology’s contrary assertion that circumstances, not character, determine conduct. Finally, it

125. A deeper criticism of the good character requirement would acknowledge the potential truth of the premise that character determines conduct but assert that there is nonetheless no rational reason for concern with the character of bar applicants. There is no reason, for example, why we should be more concerned about the future conduct of prospective lawyers than that of grocers. This deeper criticism is rejected for this paper. If it can be demonstrated that the character of applicants to the bar is relevant to their conduct as lawyers, and that their characters can in this sense be determined, then the maintenance of a good character requirement seems eminently justifiable. The ethical conduct of lawyers matters. It may be that the good character requirement could be done away with without harm in practice—as argued for by Rhode, for example – but it is not unjustifiable.

126. Rhode, *supra* note 7 at 556-59.

will re-assert the relevance of character to conduct as properly qualified by the social psychology evidence.

Virtue ethics – the relevance of character

The notion of character as a source of conduct has ancient philosophical roots, and continues to have modern philosophical credibility. Virtue ethics posits that a person of good character will have virtues that orient him towards conduct consistent with the maintenance of those virtues. This is not the significance or purpose of the virtues (which is rather their contribution to human flourishing), but it is an observable effect which the virtues have.¹²⁷ A person with the virtue of honesty, for example, will tend to choose conduct consistent with honesty over conduct which is not.

In order to exercise the virtues a person must also have *phronesis* or “practical judgment.” It is not enough to value honesty; you must also have the judgment to understand what honesty requires in a particular situation and, more significantly, to know how to weigh honesty and pursue it consistently with other virtues such as compassion or benevolence. Virtue ethics eschews the notion of specific rules as the source of ethical guidance—the Kantian position that, for example, because honesty is required by the categorical imperative there are no circumstances in which a lie is justified—and argues instead that it is our virtues of character which, when exercised through our practical judgment, will lead us to ethical action.¹²⁸

Virtues are the excellencies that lead us toward the ultimate *telos*.
Vices impede this journey. Virtues are skills. Virtues are also traits of

127. From the perspective of virtue ethics the significance of the virtues is their relationship to the leading of a good life. In his seminal work on virtue ethics Alisdair MacIntyre describes the function of the virtues as follows: “A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.” Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, IN: University of Notre Dame Press, 1981) at 178. Having said that, however, the connection between virtue and action, as observed by virtue ethics, is the central point of relevance for our discussion here. That is, while the importance of the virtues in virtue ethics arises from their connection to the achievement of the good, virtue ethics also identifies the virtues as being, when exercised through proper judgment, the source of rightful action. And it is this premise which, I argue, underlies the good character requirement, and the critique of which is addressed here.

128. Some virtue ethicists go so far as to suggest that as a consequence the only way to judge an action as ethical, or unethical, is through knowledge of the person who did it. This is called “aretaic agent ethics.” Most virtue ethics do not, however, go this far. See Jan Steutel & David Carr, “Virtue Ethics and the Virtue Approach to Moral Education” in Jan Steutel & David Carr, eds., *Virtue Ethics and Moral Education* (London: Routledge, 1999) 3. For a critique of aretaic agent ethics see David Copp & David Sobel, “Morality and Virtue: An Assessment of Some Recent Work in Virtue Ethics” (2004) 114 *Ethics* 514. Note as well that a third important part of virtue ethics is the concept of *eudaimonia*, sometimes translated as “happiness” or “flourishing.” *Eudaimonia* is the concept which informs both what the virtues are and what a life exercised consistently with the virtues will consist of.

character. They are habits or dispositions. Virtues not only allow us to act in particular ways, "but also to feel particular ways." Virtues not only empower us to do the right thing, they are essential to the determination of what is right. Virtues and vices do not lead inexorably to rightful or wrongful action because in varying degrees, we are free to act contrary to our settled dispositions. *But virtues make rightful actions far more likely, as vices make wrongful actions more likely.*¹²⁹

For the virtue ethicist, the good character of a lawyer is what will determine her human flourishing. It is also, though, what will impel that lawyer to exercise her judgment consistently with the virtues she possesses. A lawyer who is honest, compassionate and just is more likely to make decisions about how to practise law that are consistent with these virtues than will a lawyer who is not honest, compassionate or just. She will not follow rules of "honesty in all circumstances," "compassion in all circumstances" or "justice in all circumstances." Rather she will exercise her judgment to choose the course of action most appropriate and consistent with the overall balance and pursuit of the virtues of honesty, compassion and justice.

Social psychology – the relevance of circumstances

Despite its ancient lineage and modern philosophical credibility, virtue ethics has been attacked on the basis that its premise of character as a source of ethical conduct is inconsistent with the empirical evidence. That evidence indicates that it is situations and circumstances, not "character," which dictate how people behave. John M. Doris, amongst others, has argued that virtue ethicists and people in general tend to commit fundamental attribution errors when observing the behaviour of others.¹³⁰ If, for example, we see X tell the supermarket cashier that he has been given too much change, we tend to assume that X is broadly possessed

129. James W. Perkins, "Virtues and the Lawyer" (1998) 38 *Cath. Law.* 185 at 198 [emphasis added, footnotes omitted]. For discussion of virtue ethics, including its role in understanding legal ethics, see: Rosalind Hursthouse, "Virtue Ethics" *Stanford Encyclopedia of Philosophy* (18 July 2007), online: <<http://plato.stanford.edu/entries/ethics-virtue/>> (Dr. Hursthouse is one of the leading modern virtue ethicists); Marcia Homiak, "Moral Character" *Stanford Encyclopedia & Philosophy* (13 February 2007), online: <<http://plato.stanford.edu/entries/moral-character/>>; Christine Swanton, "Virtue Ethics" in N.J. Smelser & Paul B. Bates, eds., *International Encyclopedia of the Social and Behavioral Sciences* (Oxford: Pergamon, 2001) 16218-16224; Sherman J. Clark, "Law as Communitarian Virtue Ethics" (2005) 53 *Buff. L. Rev.* 757; Robert Araújo, "The Virtuous Lawyer: Paradigm and Possibility" (1997) 50 *SMU L. Rev.* 433; Rebecca S. Henry, "The Virtue in Discretion: Ethics, Justice, and Why Judges Must be 'Students of the Soul'" (1999) 25 *N.Y.U. Rev. L. & Soc. Change* 65; Mark Neal Aaronson, "Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism" (1995) 8 *St. Thomas L. Rev.* 113; David Carr, "Character and Moral Choice in the Cultivation of Virtue" (2003) 78 *Philosophy* 219.

130. John M. Doris, "Persons, Situations, and Virtue Ethics" (1998) 32:4 *Noûs* 504.

of the virtue of honesty, and that if placed in another situation requiring honesty, he will behave honestly. Social psychology tells us, however, that this assumption is fallacious; it commits the “fundamental attribution error” of positing a person’s possession of the global virtue of honesty from the evidence of a single honest action in a particular context.

Why do we know this assumption is fallacious? Because a variety of behavioural experiments tells us that although human beings show significant “temporal stability” in their behaviours—so that if given excess change tomorrow X is likely to again tell the cashier that he was given too much change—they show very little “cross-situational consistency”—so that if X is placed in an entirely different situation he is no more statistically likely to behave honestly than is someone else. That is, we can say that X has the “local” character trait of honesty in dealing with retailers, but we cannot say that he has the global character trait of honesty which will lead him to be honest in other very different circumstances—as a lawyer filling out his time sheets, for example. It is the relevant factors about a particular situation which determine our behaviour, not global character traits which we do (or do not) possess.¹³¹

Behavioural regularity and consistency in individual conduct exist but they do so because the circumstances of our lives tend to be the same from day to day—“the preponderance of our life circumstances may involve a relatively structured range of situations”—not because we have global character traits which predict how we behave.¹³² Doris summarizes his position as follows:

[B]ehavioral variation among individuals often owes more to distinct circumstances than distinct personalities; the difference between the person who behaves honestly and the one who fails to do so, for example, may be more a function of situation than character. Moreover, behavior may vary quite radically when compared with that expected on the postulation of a given trait. We have little assurance that a person to whom we attributed a trait will consistently behave in a trait-relevant fashion across a run of trait-relevant situations with variable pressures to such behavior... Behavioral evidence suggests that personality is comprised of evaluatively fragmented trait-associations rather than

131. The most famous experiments relied upon in this critique are the Princeton theological seminary experiment, in which there appeared to be no correlation between subjects’ moral commitments and their willingness to assist others (while there was a strong correlation between certain situational variables and a willingness to help) and the Milgram experiment in which subjects were asked to administer apparent electric shocks to participants. Other experiments similarly show the strong predictive force of situational variables. These are discussed in Doris, *ibid.* as well as Gopal Sreenivasan, “Errors about Errors: Virtue Theory and Trait Attribution” (2002) 111 *Mind* 47 and Christian Miller, “Social Psychology and Virtue Ethics” (2003) 7 *Journal of Ethics* 365.

132. Doris, *supra* note 130 at 508.

evaluatively integrated ones: e.g., for a given person, a local disposition to honesty will often be found together with local dispositions to dishonesty.¹³³

To the social psychologist the overwhelming empirical evidence is that it is the circumstances of the lawyer's life—the pressures, culture and temptations of legal practice—which will dictate the ethics of his practice. The lawyer's character as "honest," "compassionate" or "just" are simply labels we apply to that lawyer based on the random observation of particular acts; those labels have no predictive force whatsoever in determining how that lawyer will act in the future should her circumstances change. Further, and more importantly, the assessment of an applicant's pre-lawyer "character"—which will almost always be in circumstances removed from legal practice—has no predictive force whatsoever about the kind of lawyer she will be.

Re-asserting character

There are two significant responses to this social psychology-based criticism which qualify (but do not wholly dispute) its rejection of the relevance of character. The first, which Doris himself acknowledges, is that the existence of "local" character traits, particularly given the general predictability and stability of human lives, does mean that human behaviour is predictable and, at least to some extent, follows from character, insofar as character is a collection of local personality traits. It is, at least in part for these reasons, a psychological truism that the "best predictor of future behaviour is past behaviour." As a consequence, therefore, and in spite of social psychology's observations about the lack of cross-situational consistency in human behaviour, where a lawyer misappropriated trust funds from a client it *would* be predictable that that lawyer is at high risk to do so again. The lawyer can be appropriately labelled as having the local character trait of dishonesty in the circumstances of managing client funds;¹³⁴ her past behaviour in those circumstances is a good predictor of her future behaviour in similar circumstances. The fact that that lawyer might be honest when dealing with her spouse does not alter the predictive force of dishonesty with respect to her management of her client's accounts. There are, as Doris notes, "temporally stable, situation-particular, 'local' traits that may reflect dispositional differences among persons"¹³⁵ which influence behaviour, and which, if known, have

133. *Ibid.* at 508-9.

134. Assuming there is no evidence which suggests it is incorrect to draw that inference.

135. *Supra* note 130 at 507.

predictive force with respect to how that person will behave in the same situation in the future.

Second, however, and with respect to the continuing relevance of broader character traits to the determination of conduct, virtue ethics gives far greater scope to situational variation in behaviour than its social psychology based critics acknowledge. Virtue ethics acknowledges that making decisions about how to act always requires judgment, and that judgment requires factoring in information about the situation one is confronting and about how a particular virtue should be measured against others in those circumstances. Thus, while one may judge the participants in Milgram's notorious experiment as having made a faulty decision when choosing (apparently) to administer electric shocks to participants, that decision may have been consistent with virtues such as "respect for authority, trust, honouring commitments (fidelity), and appreciation of (the value) of knowledge."¹³⁶ It does not demonstrate that there is no such thing as a virtue of compassion which motivates the decisions of those who possess it.¹³⁷ In other words, virtue ethics recognizes and indeed asserts, far more than its deontological counterparts, the relevance and significance of circumstances in influencing decisions about what constitutes virtuous conduct. The virtues motivate ethical decisions, but it is through judgment of what the circumstances require that ethical decisions are made. Predicting behaviour from virtue ethics requires consideration of both character *and* circumstances.

It appears, then, that when considering both virtue ethics and social psychology it is fair to say that character plays a role in predicting conduct. However, it is also the case that the circumstances and context of ethical decisions, whether because they affect the exercise of judgment about what the virtues require, or because they have an independent influence on human behaviour, are highly significant in affecting ethical decisions.

What this means, in turn, for the purposes of the good character requirement, is that, while in theory admitting only applicants of good

136. Christine Swanton, *Virtue Ethics: A Pluralistic View* (Oxford: Oxford University Press, 2003) at 31.

137. Sreenivasan argues that to truly demonstrate that an absence of cross-situational consistency also means that there are no such things as virtues you would have to have three experiment controls: "(i) each behavioural measure must specify a response that represents a central or *paradigm* case of what that trait requires; (ii) the concrete situation each specifies must *not* have any features that *defeat the reason* on account of which that trait requires the response in question; and (iii) the *subject and the observer must agree* on these characterizations of the specified responses and situations." Sreenivasan, *supra* note 131 at 61-62. Not surprisingly, Sreenivasan concludes that none of the social psychology experiments purporting to show the non-existence of virtues satisfies this criterion. For another criticism of the social psychology-based critiques of virtue ethics see Miller, *supra* note 131.

character could ensure lawyers of the highest ethical standards, protection of the public and maintenance of confidence in the legal profession, in practice identifying lawyers with the relevant character traits for ethical lawyering is a task of no small magnitude. How this task might be accomplished will be discussed in Part IV. Before turning to that analysis, however, the remainder of this Part will assess the extent to which, given the foregoing critique, the current good character requirement fulfills its purposes. That is, it will assess the extent to which the current good character requirement does identify the relevant character issues which may be predictive of future unethical conduct and, therefore, the extent to which the current good character requirement protects the public and maintains the legal profession's reputation.

3. *The definition of good character, the standards used to assess character, and the application of those standards in particular cases*

As previously set out in Part I.3, law societies rely on a general definition of character as an individual's moral character and her possession of "an amalgam of virtuous or socially acceptable attributes or traits."¹³⁸ They rely, in other words, on a traditional virtue-based understanding of character in which the focus is on global character traits which will determine conduct with cross-situational consistency. As just noted, however, it is not at all obvious that such global character traits exist, or that identification of character traits from behaviour in very different circumstances indicates much about the applicant's ethical conduct as a lawyer. It is an applicant's character as understood more specifically—as possessing the virtues relevant for legal practice, and the capacity to exercise them in the circumstances of legal practice—which is primarily relevant. As currently set out, the definition of good character is too general. It inappropriately orients the inquiry away from specific concerns with an applicant's ability to practise law ethically, towards a general impressionistic analysis of whether the applicant is, or is not, virtuous.

The standards used to measure character also appear problematic for fulfilling the good character requirement's purposes. When law societies require no consideration of the applicant's future conduct as a lawyer they automatically render the inquiry into the applicant's character inapt for what the good character requirement is supposed to accomplish. If the question of future conduct is not relevant, then in what way does the requirement even facially protect the public, ensure ethical lawyers

138. *P(DM)*, *supra* note 28 at 22.

and maintain public confidence in the ethics and competence of the profession?¹³⁹

But quite apart from the obvious problem created by the refusal to consider the issue of future misconduct, the standards used to assess good character do not focus on the relevant questions. In particular, they do not focus on whether the applicant lacks (or possesses) the virtues for ethical lawyering and has demonstrated an (in)ability to exercise those virtues in circumstances akin to legal practice. Some of the existing decisions do directly and expressly connect the applicant's behaviour with the particular virtues required in the circumstances of legal practice, and assess the significance of the applicant's prior behaviour in that light. Thus, in *Burgess*, the panel's concern with the applicant's plagiarism and dishonesty with the law society arose in large part because those actions "go to the very heart of *who lawyers are, and what lawyers do*. Integrity is fundamental to the competence of a lawyer; competence necessarily includes integrity."¹⁴⁰

Far more commonly, however, the inquiries into character are not focused carefully on the virtues required for legal practice and the extent to which the conduct of the applicant demonstrates the absence (or presence) of those virtues in circumstances akin to legal practice. In *Rizzotto*, for example, there is no discussion of the extent to which involvement in the management of an election is relatively similar to what a lawyer might do, and that engaging in electoral fraud in those circumstances might indeed be probative of the applicant's future conduct as a lawyer. Similarly, while the panel decided to deny admission to DMP, and could have explained why the abuse of trust and disrespect for the rule of law which his conduct reflected might be predictive of his future ethics as a lawyer, the connections between his misconduct and his ethics as a future lawyer are largely left implicit in the judgment. The decision seems to turn more on a finding of bad character *simpliciter* rather than of bad character as of predictive relevance for his future conduct as a lawyer. Indeed, one of the final statements in the judgment is that DMP's "intellectual capability and his academic *and job performance* have never been in dispute."¹⁴¹

139. These assertions of the non-relevance of future conduct lend credibility to assessments like Rhode's which argue that the main thrust of the requirement is aimed at protection of the profession's regulatory autonomy and economic monopoly. If this is so, then, as Rhode concludes, the requirement cannot be justified. However, this paper gives the profession the benefit of the doubt and assumes that the purposes are legitimate but that attempts to fulfil them have gone off track.

140. *Supra* note 67 at para. 9 [emphasis added].

141. *P(DM)*, *supra* note 28 at 24 [emphasis added].

Further, and significantly, the ability of the good character requirement to fulfil its purposes is undermined by the unpredictable and inconsistent nature of the decisions which apply it to individual applicants. As noted above, it is difficult to find common threads running through the judgments with respect to how past conduct, supportive character evidence, psychological evidence or even fact patterns with an overall degree of similarity will be treated. At the same time, highly subjective and impressionistic factors such as the panel's view of the applicant's credibility as a witness appear to be of considerable significance. It is difficult to conclude in the light of this inconsistency that, even if the standards articulated for assessing character are sufficient to satisfy the requirement's purposes, the application of those standards to particular individuals is actually doing so. Rather, the inconsistency and unpredictability of application lend credence to the perspective expressed by one American commentator that enforcement of the good character requirement is one of the few places in the legal system where one can argue that Oscar Wilde's quip that "Morality is simply the attitude we adopt toward people whom we personally dislike" has some force.¹⁴²

Previous Canadian commentators on the good character requirement share this view. As noted earlier, Gavin MacKenzie has suggested that some of the decisions issued are simply irreconcilable. And Allan Hutchinson is characteristically blunt in his assessment that "[t]he fact is that law societies have played fast and loose with what does and does not amount to good character."¹⁴³

A defence to this criticism may be that a lack of certainty and predictability in the application of standards to particular facts is not in itself problematic. After all, even in straightforward legal areas like whether there is an "offer" for forming a contract, the decision can be impressionistic and dependent on the totality of the "language used and the circumstances of the particular case" rather than on one particular fact about the parties' dealings with each other.¹⁴⁴ However, the variability in the application of the standards for good character is, I would suggest, far more significant than the variability within legal areas like contract offer. Although there is variation in the contract cases, there are also broad patterns of consistency, and experienced lawyers generally have no difficulty in drawing defensible conclusions about whether a set of

142. Cited by Privatsky, *supra* note 102 at 325.

143. Hutchinson, *supra* note 4 at 63.

144. See, e.g., *Canadian Dyers Association Ltd. v. Burton* (1920), 47 O.L.R. 259 at 260 (Ont. S.C.(H. C. Div.)).

facts will be viewed as creating an offer or not. Further, when combined with the issues which arise in general with the administration of the good character requirement, its purposes, its definition and its standards, the inconsistency in the application of the requirement becomes of greater concern. The variability of fact-specific assessments of contract offer takes place within a stable, predictable and largely coherent legal structure. The variability in the application of the good character standard does not.

There is, additionally, little reason to be confident in the accuracy of a process which is impressionistic rather than focused on consistent treatment of different types of evidence. As Rhode notes, subjective assessments of the character of applicants, and drawing predictive conclusions from those assessments, is of doubtful accuracy and validity even in the best of circumstances.¹⁴⁵ And while others, as discussed below,¹⁴⁶ have suggested that it is possible, if relying on focused and objective criteria, to improve the predictive accuracy of the character review process, the standards and application used here do not satisfy that requirement. The standards do not clearly delineate and focus on the virtues and character required for ethical lawyering and, when applied, they provide no predictive or rationally explicable distinction between those applicants who have, and those who do not have, the moral character of the good lawyer.

4. *Conclusion*

In sum, then, the good character requirement is incoherently administered, provides little real scrutiny of most applicants yet too much of some, and proceeds in unjustifiable secrecy. The purposes which the requirement serves are laudable, but the premise on the basis of which it is asserted that a good character requirement will fulfil those purposes, is only accurate in a highly qualified form. Further, there is little reason to believe that, as currently defined and applied, the good character requirement is fulfilling those purposes. The focus is on the applicant's character in general, rather than on her character as measured against the virtues and circumstances of lawyering, and there is often an express disavowal of the relevance of the applicant's future conduct. Further, the inquiry into character is impressionistic and personal rather than focused and objective, and there is little predictability or rationality in the decisions reached in particular cases.

145. Rhode, *supra* note 7 at 559.

146. See *infra* note 150 and accompanying text.

The next section focuses on some concrete proposals for improving the good character requirement to ensure that its purposes can be better served.

IV. *Fixing the Good Character Requirement*

In her seminal article on the good character requirement Deborah Rhode argues strongly for its abolition. She proposes that the scarce resources of state bar associations would be better directed towards disciplining unethical lawyers in practice rather than on excluding applicants. While this argument has merit, in my view, it excessively discounts the validity of the purposes underlying the requirement¹⁴⁷ and the public interest in ensuring that the public is protected from applicants who present character issues which are legitimately relevant to their future conduct as lawyers. When Aidan Burgess applied to the law society she had acted dishonestly within an institutional setting for personal gain. She had also attempted to subvert the quasi-judicial process reviewing her actions by a carefully fabricated deceit with respect to her conduct. When the Law Society of Upper Canada (or any other law society) admits someone to the bar it provides some assurance to the public that the person in question has the qualities relevant to legal practice, both intellectual and practical. It gives this assurance through its articling system and legal qualifications but also, if done properly, through its good character requirement. Aidan Burgess has, through her conduct, and in particular to the extent her conduct involved an attempt to subvert legal proceedings, demonstrated an absence of those qualities. The public, who naturally assume that a law society plays a screening role in determining who is entitled to membership, could feel legitimately resentful were the Law Society of Upper Canada to represent that Ms. Burgess has the qualities relevant to ethical legal practice. Indeed, in 1981 the Law Society of Upper Canada was sued by individuals harmed by a lawyer who, they alleged, had raised issues of character which the Law Society had failed to address at the time of the lawyer's admission.¹⁴⁸

147. Rhode's article on good character was published in 1985. The bulk of the literature relied on in this paper with respect to the role of character in predicting conduct was published subsequent to that time. See *supra* notes 127-137. Having said that, the perspective that circumstances are the central factor in determining conduct is certainly one with current subscribers (see, e.g., Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007)), and the views adopted in this paper may simply arise from a disagreement between the author and Rhode on this point.

148. *Calvert v. Law Society of Upper Canada* (1981), 32 O.R. (2d) 176 (Ont. H.Ct.J.). While the action was struck on the basis that the pleadings as written disclosed no cause of action, the Court suggested that with properly constructed pleadings such an action could be pursued.

Similarly to Ms. Burgess, although in a quite different context, DPM's past misconduct raises serious issues of character relevant to the circumstances of legal practice. He took gross advantage of his position of trust as a mentor to one young girl, and the father of another, to obtain personal gratification at great harm to them. He abused their trust to further his own advantage and, significantly, engaged in remarkable rationalization in order to ignore the moral values underlying the legal prohibitions on sexual abuse of minors. Absent overwhelmingly compelling evidence that this behaviour—both the sexual assaults and the rationalizations—were aberrational or corrected (which DPM did not provide), it is reasonable for a law society to find that he lacked qualities relevant to good legal practice. It is true that not every lawyer interacts with children or other vulnerable persons, but every lawyer has an obligation to act as a fiduciary—to not compromise his client's interests in furtherance of his own—and every lawyer has an obligation not to use his powers of reason to subvert his obligation to act within the law.

Moreover, it is possible to imagine plausible but hypothetical cases, even more obvious than these, in which maintenance of the character requirement seems essential. If, for example, a lawyer were to be disbarred by the Law Society of Alberta for misappropriation of client funds and then apply for admission to the Nova Scotia Barristers' Society, it is obvious that his admission should be denied on the basis of his character as evidenced by his disbarment.¹⁴⁹

There is also some reason to believe that focused and objective admission criteria can reduce the likelihood that later professional misconduct will occur. In a study commissioned for the Minnesota bar, which had revised its character requirements to make them more focused and objective, the files of 52 members disciplined for professional misconduct were reviewed. Of those 52 it was found that 26 raised issues which would have led to character screening under the new criteria, a number far greater than the 20% of general applicants who raise issues leading to character screening. There are several methodological issues with the Minnesota study arising from its small sample size and the combination of the subjectivity which exists even with the new Minnesota criteria and the use of retrospective review of the application files (it is easier to find issues of character *ex post facto*). Having said that, a review of the outcomes from the study suggests that "if the methodological problems can be resolved, it would be possible

149. One could argue simply for a requirement that no one who has been disbarred from one law society can be admitted to another. However, I would argue that it is the facts underlying the disbarment, as much as the disbarment itself, which should be relevant.

to predict lawyer misconduct more effectively than is often supposed by academic critics."¹⁵⁰

The point of this section of the paper, then, is not to argue for abolition of the good character requirement, but rather to suggest how the good character requirement can be reformed to ensure that it better fulfills its purposes. The necessary reforms are relatively straightforward and follow from the issues raised with the good character requirement in the previous section.

First, and most fundamentally, the good character requirement needs to shift away from a concern with "character" understood generically and impressionistically and towards a careful delineation of what constitutes ethical lawyering, focusing on both the "virtues" of the ethical lawyer and the circumstances of legal practice. It should attempt to identify the existence (or absence) of "local" character traits, of those habits and ways of acting in contexts similar to legal practice which suggest that an applicant will, or will not, be an ethical lawyer. Identification of the local virtues of the ethical lawyer is beyond the reach of this paper (and is properly the subject of debate within the practising bar and the general public), but honesty, respecting confidences, acting in the best interests of others even at the expense of one's own self-interest, and integrity appear to be central values reflected in the various codes of professional conduct applicable in the Canadian provinces.¹⁵¹ Conduct which shows an absence of those virtues should, without something which clearly and objectively explains the behaviour or suggests that the character traits which led to it have been corrected, lead to denial of admission. This is particularly so where the context is related to legal practice. If, for example, a chartered accountant who had misappropriated client funds in her accountancy practice were to apply for admission to legal practice, a law society could reasonably conclude that her prior behaviour indicates the existence of vices in a context highly similar to legal practice and should, absent an exceptional explanation or reformation, lead to a denial of bar admission.

As Michael McChrystal has argued in the American context, the focus needs to be less on an applicant's "character" writ large than on her "fitness" for the ethical rigours of legal practice. A bar applicant should only be denied admission if his "past misconduct... is rationally connected to his

150. Baude, *supra* note 102 at 655. The study and its issues are discussed at 654-656.

151. See Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9 Can. J.L. & Jur. 61 and David M. Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dal. L.J. 267.

fitness to practice law," and fitness needs to be carefully defined based on the "standards imposed upon persons who actually practice law."¹⁵²

The application of this more careful standard could easily have changed the results of some of the cases considered here, and would have changed the reasoning process in all of them. In *Rizzotto*, for example, rather than receiving a pass on the need to verify his future conduct as a lawyer, the onus would have been squarely on Mr. Rizzotto to explain why the inference of relevant bad character which arises from his dishonesty and duplicity in a position of responsibility similar to that occupied by a lawyer should be overcome and admission granted. Absent some clear and exceptional evidence, which does not appear to have been presented in that case, his application should have been denied. Similarly, while Ms. Levesque may under this standard still have been admitted because of the circumstances surrounding her perjury, she would have had to explain why the logical correlation between her deception of the court then, and the concern that she will be unable to meet the requirement for honesty to the court in all circumstances as a lawyer, should not be drawn. She would have faced, in this respect, a more onerous burden than, for example, Mr. Preyra whose deception, while significant, occurred in a context somewhat different from that of legal practice.

Second, investigation of potential applicants should reach beyond the simple self-reporting system currently used. While it may be unrealistic and an undesirable allocation of resources to engage in extensive investigation of every applicant, investigation on at least an audit basis to increase the likelihood of accurate reporting should be undertaken. Applicants should be required to provide a list of individuals with personal knowledge of them and, as well, to consent to the law society discussing their application with others. In addition, as suggested earlier, applicants should be required to submit criminal record and social services checks.

Third, the current regime of secrecy should be abandoned. The public cannot derive any comfort from the current process, and wrongful admissions will never be discovered, without the benefit of public reporting and scrutiny.¹⁵³ While decisions of the Law Society of Upper Canada may have been the target of some of the criticism in this paper, in general it deserves significant credit for allowing its decisions to be reviewed, and for being accountable for them. In the end, it is far more likely that the public will be protected, and applicants treated fairly, in the Law Society of Upper Canada's system than in the others, where no material information

152. *Supra* note 109 at 101. See also *supra* note 14.

153. Wrongful denials of admission may come to light through judicial review.

about what goes on is publicly available. For example, while this paper has suggested that it is unfair for Sharon Shore to have faced character scrutiny when so few applicants do so, it is important to note that this point was made clearly and consistently by the national media as well. The light of public scrutiny enabled public criticism and, perhaps, productively focused the Law Society's consideration of her application.¹⁵⁴

Fourth, thought should be given to the timing of character review. At the Law Society of Upper Canada most cases appear to have arisen at the time the applicant was applying for membership—that is, after his or her articles had been completed. In other cases, such as *Brousseau*, the character consideration took place at the point of application for enrolment as a student-at-law. Most law societies have the jurisdiction to consider character at either time.

Arguably, as noted by the American commentators,¹⁵⁵ both these points of time come too late—after the applicant has invested three years in her legal education when a law society will be reluctant to decline her admission. Of course, arguments can be made in favour of either of these times. After a period of articles the law society will have more information about the character of the applicant. On the other hand, an applicant with serious character issues may pose a risk to the public if acting unethically as a student-at-law, which warrants scrutinizing the applicant's character prior to that opportunity being granted. Overall, I would argue that the optimal approach to the timing of the character review would have the following elements. Prior to attending law school an applicant should be able to obtain detailed information from the law society to which she hopes to gain admittance with respect to what the law society's good character requirement consists of (the removal of secrecy would assist in this respect). At the point of admission as a student-at-law, an applicant's character should be reviewed. However, the law society should be given the power to enrol an applicant as a student-at-law with additional conditions if the applicant's character is in doubt, but is not sufficiently in doubt to deny admission outright. The inherently supervisory nature of articles makes such conditioning powers workable in the student-at-law context in a way which they are not at the point of admission to legal practice. These conditions could require, for example, that articles take place within a firm approved by the law society, that the student have

154. See articles by Christie Blatchford in *The Globe and Mail* on Ms. Shore's application: "aCALLtotheBAR" (24 June 2006), "A lawyer's 'good character' indeed" (15 August 2006), "Forever her daughter's keeper" (16 August 2006) and "A touch of kindness at end of a hard road" (18 August 2006), archived online: <<http://www.theglobeandmail.com>>.

155. See *supra* note 116 and accompanying text.

more limited powers to appear in court than are usually granted, that the student be supervised when meeting with clients, and that articles extend beyond the usual time period. This conditioning power could also be used to address the delay inherent in investigations into an applicant's character – to allow the applicant to continue working towards qualification while the investigation takes place. Finally, character should be reviewed again at the point of admission to law society membership. This subsequent review would look at issues arising or coming to light after articling has taken place, but not at character issues previously adjudicated.

Fifth, all applicants should be advised that psychological evidence may be relevant and probative to the inquiry. While such information must, as noted by Rhode, be treated with caution as a predictive tool, it would level the playing field if all applicants were advised of its relevance, and in those cases in which it was provided it would also offer some guidance to the law societies when evaluating the fitness of applicants for legal practice.

Finally, the true focus of the good character requirement should be made clear. The requirement is not an assurance that lawyers admitted to practice are of good moral character. It is an attempt to ensure that no lawyers with obvious, relevant and unremedied flaws of character, flaws which make them currently unfit for legal practice, are admitted. The rules and legislation governing the requirement should be amended to reflect this reality. Doing so would make the requirement less vague and more accurate, and would focus the inquiry, as it should be, on the ethics of lawyers and what is needed to fulfill them.

Conclusion

The good character requirement cannot, perhaps, be described as a "fixed star" of lawyer regulation in Canada. It is, though, a significant feature of our regulatory regime. While the requirement has a relatively small effect on most applicants for bar admission, and a large one on only a handful of applicants, it represents a significant exercise of regulatory power by the provincial law societies.

Given that significance, the requirement warrants more attention than has previously been given to it. In particular, if the law societies wish to continue to use the requirement as a way of ensuring ethical conduct by lawyers and protecting the public, a radical reworking of every aspect of the requirement is necessary. Its administration must be changed to ensure that it is transparent, coherent and fair. The enforcement of the requirement—both in terms of the general definition and standards articulated with respect to character, and in terms of the application of those standards in particular cases—must be entirely re-thought. Otherwise, the outcome will continue

to be wasted law society resources and unfair burdens placed on individual applicants, with little discernible impact on either the profession's ethics or the public's protection.

