The good character backstop: directions, defeasibility and frameworks of fairness

The good character 'backstop': directions, defeasibility and frameworks of fairness

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Abstract

This paper examines the law on good character evidence in criminal trials through a discussion of the important but under-analysed case of Hunter*, in which a five-judge Court of Appeal sought to clarify the law on good character directions to the jury. However, it is argued here that the judgment conflicts with the leading House of Lords decision in* Aziz*. The paper considers how the court misinterpreted the law and, in particular, the defeasible nature of the rule in* Aziz *and the impact of the Criminal Justice Act 2003. As a result, the circumstances in which a good character direction will be provided have diminished significantly. It is argued that this has important implications for the right to a fair trial, as good character directions act as a 'backstop' against miscarriages of justice. They also form a vital part of the 'framework of fairness' considered necessary, in lieu of reasoned jury verdicts, by the Grand Chamber of the European Court of Human Rights in* Taxquet v Belgium*. Accordingly, it is contended that* Aziz *rather than* Hunter *should be followed so that, where there is evidence of good character, a direction is normally provided as a matter of law.*

Key words: Criminal Justice, Evidence Law, Good Character, Jury Directions, Defeasible, Taxquet

Introduction

This paper is concerned with the law on good character evidence in criminal trials and, in particular, the provision of good character directions to the jury following the Court of Appeal decision in *Hunter (Nigel)* (hereafter '*Hunter*').[1] The court considered that there was uncertainty and a lack of consistency in the caselaw and, as a result, many trial judges felt they were required to provide unnecessary, over-generous directions to the jury.[2] This paper contends, with respect, that this assessment was unwarranted and that, prior to *Hunter*, the Privy Council was correct to hold that the law had been 'clearly settled'[3] by the House of Lords decision in *Aziz*.[4] Lord Steyn, who provided the lead judgment, created a 'simple and moderate

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[1] [2015] EWCA Crim 631.

[2] Ibid, at [66].

[3] *Teeluck v Trinidad & Tobago* [2005] UKPC 14, at [33].

[4] [1996] AC 41.

rule'[5] that where there is evidence of good character, prima facie, a direction to the jury 'must be given', as a matter of law.[6] It is argued that the judgment in *Hunter* undermines this, as the Court of Appeal appears to have misunderstood the defeasible nature of the rule set out in *Aziz*.

Hunter was a conjoined appeal by five defendants, who had been convicted of a variety of serious sexual offences and appealed on the basis of their entitlement to good character directions. In a five-judge court, Hallett LJ giving the lead judgment, reviewed the law on good character directions and sought to remedy what was described as a 'wrong turn in the law'.[7] There have been relatively few further appellate decisions, as it appears that good character directions are now regarded, contrary to *Aziz*, as largely a matter of judicial discretion rather than law. Therefore, the absence of a direction is more difficult to challenge and the Court of Appeal has indicated that it will be 'very slow' to interfere with a trial judge's decision.[8]

The paper begins by setting out the good character rule and when directions should be provided to the jury. It then analyses how the Court of Appeal suggested that changes to the law on bad character introduced by the Criminal Justice Act 2003 had, by default, also altered the law on good character. However, it is argued, that the law was not changed, as it is clear Parliament deliberately left undisturbed the common law rules on good character and the obligatory requirement to direct the jury. Importantly, it accepted the Law Commission's finding that a good character direction was justified on the ground:

> …that it is likely to prevent the conviction of the innocent… If it is of little relevance, it can at least do no harm to the accused, and if it is of great relevance then the defendant should have the benefit of it.[9]

[5] *Tang Siu Man v HKSAR* [1998] 1 HKC 371, at 403 (Bokhary PJ).
[6] *Aziz*, above n 4, at 51A and 53E; *Teeluck*, above n 3.
[7] Above n 1, at [20].
[8] Ibid, at [89]-[98]. Eg *Nankani* [2016] EWCA Crim 888.
[9] Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (Law Com CP No 141, 1996) 8.13.

That is, Parliament recognised the historically 'exceptional' nature of good character evidence[10] and that, although the scientific value of it may not be 'clear cut',[11] a direction may be viewed pragmatically as a plea for recognition, clemency or deliverance,[12] or a 'special dispensation' to the accused.[13] The direction acts as a counter-weight to the defendant's serious credibility problem,[14] which is caused by the jury's tendency to assume that the defendant in the dock has a bad character if they do not hear to the contrary.[15] As Redmayne observes, the provision of good character directions 'helps to put jurors straight'[16] and it 'bears directly' on whether there has been a fair trial.[17] Thus, a direction may be regarded as a 'backstop' or, as Lord Hutton contended in *Sealey v R*, a final 'important safeguard'[18] against miscarriages of justice.

The Court of Appeal in *Hunter* recognised that it was bound by the judgment in *Aziz*[19] but, drawing on the decision in *Doncaster*,[20] considered that the impact of the Criminal Justice Act 2003 on the common law on good character had been significant. However, this paper argues that the obligation to provide a good character direction was unaffected by the 2003 Act. It is further contended that good character directions are an aspect of the right to a fair trial under art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the 'European Convention on Human Rights'). That is, as well as acting

[10] C Kenny *Outlines of Criminal Law* (Cambridge: Cambridge University Press, 15th edn, 1947) p 464.
[11] See nn 159-168 and accompanying text.
[12] Roberts & Zuckerman *Criminal Evidence* (Oxford: Oxford University Press, 2nd edn, 2010) p 638.
[13] Law Commission CP No 141 above n 9, 8.20.
[14] M Redmayne *Character in the Criminal Trial* (Oxford: Oxford University Press, 2015) p 202; D Dripps 'The constitutional status of the reasonable doubt rule' [1987] 75 Cal L Rev 1665, 1695; L Laudan 'The presumption of innocence: material or probatory?' (2005) 11 Legal Theory 333, 348.
[15] Law Commission *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001) 6.18-19; S Lloyd-Bostock 'The effects on juries of hearing about the defendant's previous criminal record: a simulation study' [2000] Crim LR 734. In relation to use of the dock, see L Mulcahy 'Putting the defendant in their place' (2013) 53 Br J Criminol 1139.
[16] Redmayne, above n 14, p 219.
[17] *Sealey v R* [2002] UKPC 52, at [41].
[18] Ibid, at [34]; see also Standing Committee B, *Criminal Justice Bill*, 23 January 2003, cols 532 and 545-548.
[19] Above n 4; *Hunter*, above n 1, at [68].
[20] [2008] EWCA Crim 5.

as a safeguard or 'backstop' against injustice, good character directions should also be regarded as forming an important part of the 'framework of fairness' for a trial. As the Grand Chamber of the European Court of Human Rights stated in *Taxquet v Belgium*,[21] in the absence of a reasoned verdict, such a framework is valuable because it 'serves to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society'.[22]

The Court of Appeal's errors in *Hunter* appear to have been prompted, in part, by scepticism towards good character evidence, but also the influence of New Zealand jurisprudence. This was drawn upon in Munday's article 'What constitutes a good character?'[23] to which the court referred and relied upon in particular, as is evident from it echoing precisely Munday's contention that the law had taken a 'wrong turning'.[24] However, before considering these issues it is, first, necessary to address the meaning of the good character rule and how the law on good character directions to the jury has developed.

What is the good character rule?

Somewhat surprisingly, the Court of Appeal in *Hunter* did not consider the meaning in law of 'good character'. At common law, a rule emerged that the accused was entitled to prove his general good character, as an exception to the rule that character evidence was generally inadmissible. Sir James Stephen described the rule as 'a sort of indulgence' to the accused and traced its origins to before the Norman Conquest.[25] However, the earliest cited case to which he referred was *Turner*[26] and this appears to be generally accepted as the earliest known reference to the rule.[27]

[21] (2012) 54 EHRR 24.
[22] Ibid, at [90].
[23] R Munday 'What constitutes good character?' [1997] Crim LR 247.
[24] *Hunter*, above n 1, at [17], [20] and [70].
[25] J Stephen *A History of the Criminal Law of England*, vol. I (London: Macmillan & Co, 1883) p 449.
[26] (1664) 6 State Tr 926, at 929.
[27] C Tapper *Cross & Tapper on Evidence* (Oxford: Oxford University Press, 12th edn, 2010) p 339.

At one point it may have been limited to capital cases, where evidence of good character was admissible *in favorem vitae* and to 'doubtful cases', where the jury was not sure of guilt and character tipped the balance one way or another.[28] However, it came to be applied more widely when it was recognised there was no distinction between evidence of facts and evidence of character,[29] reflecting Russell's contention that good character: '…is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case'.[30] It is a statement of the special status of good character evidence[31] that still resonates today.

The meaning of 'good character' was not finally settled until the judgment in *Rowton*,[32] where there was a vigorous attempt to dislodge its definition in terms of the accused's good 'general reputation' in the community.[33] In this important decision, a thirteen-strong Court of Crown Cases Reserved held that evidence was admissible as to the accused's 'general reputation' in order to show 'the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged'.[34] However, evidence adduced solely for the purpose of proving the accused's actual disposition, such as evidence of specific good acts and individuals' personal opinions of the accused's character, was inadmissible. The proof of such 'isolated facts' was regarded as insufficient to amount to evidence that the accused had a good general reputation and was, therefore, of good character.[35] Notwithstanding that, an absence of previous convictions or other indications of

[28] W Russell *A Treatise on Crimes and Indictable Misdemeanours* Vol II (London: Joseph Butterworth & Son, 2nd edn, 1828) pp 703-704.
[29] The change was located to the turn of the nineteenth century by Lord Steyn in *Handbridge* [1993] Crim LR 287.
[30] Russell, above n 28, p 704.
[31] Roberts & Zuckerman, above n 12, p 636.
[32] (1865) Le & Ca 520.
[33] *Jones v DPP* [1962] AC 635, at 698-699.
[34] *Rowton*, above n 32, at 529-530.
[35] R Croom-Johnson & G Bridgman *Taylor on Evidence* Vol 1 (London: Sweet & Maxwell, 12th edn, 1931) [351] p 243.

bad character was admissible evidence of the accused's general reputation because the strongest evidence of a person's good character and best of all tributes[36] may be that 'he is not talked about at all'.[37]

The ruling in *Rowton* continues to be criticised, despite its high authority, and is commonly stated in practice to be 'more honoured in the breach than in the observance'.[38] However, it is also evident that the definition has not been overruled and remains good law.[39] It follows that a question also arises as to whether the judge should direct the jury on good character.

The provision of good character directions to the jury

Prior to *Hunter*, juries were routinely directed on good character as a matter of law and failures to do so were taken very seriously by appellate courts.[40] However, that has not always been the position. At one time, directions on good character appear to have been at the complete discretion of the trial judge. In *Aberg*[41] the appellant relied on *Bliss Hill*[42] to argue that the omission of a good character direction was a misdirection and good grounds for appeal. However, Lord Goddard CJ held that so long as the summing-up was otherwise fair, an omission to direct on good character was no reason to quash a conviction.[43] His Lordship distinguished *Bliss Hill* on the basis that it was concerned with a faulty direction rather than no directions and, importantly, held that defendants had no prima facie entitlement to a good character direction at common law, although one could be provided at the judge's discretion.

[36] Kenny, above n 10, p 465.
[37] *Rowton*, above n 32, at 536. Although that is not necessarily also evidence of the accused's motivation for an alleged crime. While they share some similarities, the argument that character and motive evidence are the same in nature is controversial and beyond the scope of this paper, see Redmayne, above n 14, pp 70-71 and A Duff et al *The Trial on Trial (3)* (Oxford, Hart, 2007) pp 254-6.
[38] D Ormerod & D Perry (eds) *Blackstone's Criminal Practice 2020* (Oxford: Oxford University Press, 2019) F14.30.
[39] *Butterwasser* [1948] 1 KB 4; *Gunewardene* [1951] 2 KB 600; *Redgrave* (1982) 74 Cr App R 10. See, more recently, *Grimes* [2018] Crim LR 68 and *Layne v Attorney General of Grenada* [2019] UKPC 11 (hereafter '*Layne*').
[40] Redmayne, above n 14, p 217.
[41] [1948] 2 KB 173.
[42] (1918) 13 Cr App R 125.
[43] See also *Smith* [1971] Crim LR 531.

Lord Goddard CJ appears, in general, to have taken a laissez-faire approach to the provision of directions to the jury. For example, he omitted to direct the jury on the standard of proof when presiding over the notorious Derek Bentley trial and his summing-up was later described by Lord Bingham as clearly contrary to the right to a fair trial.[44] However, it is also important to bear in mind that Lord Goddard's summing-up was endorsed by the Court of Criminal Appeal[45] and that his Lordship was sitting at a time when questions about an accused's rights to a particular direction were regarded as not even arguable because the issue was purely a question of the trial judge's discretion.[46]

It is contended here that it was this old, discretionary approach to judicial directions that the liberal-minded Waterhouse LJ[47] repudiated in his pivotal judgment in *Berrada*.[48] His Lordship was an early advocate of reasoned verdicts[49] and asserted unequivocally in *Berrada* that good character directions should be provided as part of the right to a fair trial and as a matter of law:

> … if good character is raised by the defendant, it should be dealt with in the summing-up. Moreover, when it is dealt with, the direction should be fair and balanced…[50]

This nascent *Taxquet* analysis[51] was regarded by the Court of Appeal in *Vye* and, in turn, by the House of Lords in *Aziz*,[52] as a watershed in the law on good character directions, as it

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[44] *Derek Bentley (Deceased)* [2001] 1 Cr App R 21, at [68].
[45] *Bentley The Times*, January 14 1953.
[46] *Vye* [1993] 1 WLR 471, at 474.
[47] Waterhouse LJ was from a Liberal Party family and also fought two general elections as a Labour Party candidate, R Waterhouse *Child of Another Century* (London: Radcliffe Press, 2013) pp 11, 89 and 104.
[48] *Berrada* (1990) 91 Cr App R 131, disapproving *Smith*, above n 43 and by implication *Aberg*, above n 41 (at the time he was Waterhouse J).
[49] Waterhouse LJ submitted a memorandum on behalf of Family Division judges to Lord Roskill's *Fraud Trials Committee Report* (London: HMSO, 1986), which recommended reasoned verdicts and the removal of juries from complex fraud trials (recommendations 92 and 94). Waterhouse LJ indicated the judges' approval for reasoned verdicts and later reiterated his strong support for this recommendation, above n 47, p 231.
[50] *Berrada*, above n 48, at 134; *X v United Kingdom* (1973) 45 CD 1; 3 DR 10.
[51] Above nn 21 and 205 and accompanying text.
[52] *Vye*, above n 46, at 475; *Aziz*, above n 4, at 51.

marked a distinct change from the 'unacceptable methods of Lord Goddard' and other judges.[53] In *Vye*, the Court of Appeal clarified the law, which had become overly technical, uncertain and inconsistent[54] and, as Griew observed, lacking in a rational basis.[55] The court confirmed the fundamental principle in *Berrada* that, where relevant, a good character direction was a mandatory requirement in relation to a defendant's credibility.[56] It also extended the rule by requiring a mandatory 'second limb' direction on the defendant's propensity to commit the offence,[57] further entrenching the direction's status as a 'backstop' or 'important safeguard'[58] against miscarriages of justice. Notwithstanding this, the Court of Appeal in *Hunter* repeated Munday's contention that the law took a 'wrong turning' in *Berrada* because good character directions were required as a matter of law.[59]

The Court of Appeal in *Hunter* also asserted that the circumstances in which good character directions were given had 'extended too far' to include what it considered to be unmeritorious defendants. [60] However, following *Aziz*, it is apparent that evidence of relevant bad character continued to render accused ineligible for a direction. For example, the defendant in *Martin*,[61] who had been charged with two robberies committed with the aid of a hammer, was held not to qualify for a direction on his lack of propensity to offend because he had two previous cautions for possession of an offensive weapon. Likewise, in *Shaw v R*,[62] Lord Bingham held that a good character direction was unnecessary for a defendant charged with murder, who admitted being a drug dealer and member of an 'armed posse' that set out to punish the deceased for tricking him in connection with a cocaine deal. More recently, the

[53] Lord Justice Robin Dunn *Sword and Wig* (London: Quiller Press, 1993) p 237.
[54] I Dennis *The Law of Evidence* (London: Sweet & Maxwell, 2017) 18-019.
[55] E Griew 'Good character is getting a bad name' (1991) 6 Arch News 5.
[56] *Berrada*, above n 48, at 134.
[57] *Vye*, above n 46, at 477.
[58] *Sealey v R*, above n 17, at [34].
[59] *Berrada*, above n 48; Munday, above n 23, 258; *Hunter*, above n 1, at [20].
[60] Above n 1, at [66] and [70].
[61] [2000] 2 Cr App R 42.
[62] [2001] UKPC 26, at [31].

Court of Appeal in *Doncaster* also indicated that, in accordance with *Aziz*, a defendant with relevant bad character would not be eligible for a direction.[63]

Nevertheless, the court in *Hunter* regretted that unnecessary good character directions were being provided and, like Dennis, was critical of 'distinctly generous' decisions to defendants that were described as 'dubious' and even 'downright disreputable'.[64] Some of the cases that were criticised, such as *PD*,[65] were post-*Aziz*, but it is a puzzling feature of *Hunter* that much of the judgment concerns criticism of cases such as *Durbin*[66] and *Teasdale*,[67] all of which preceded *Aziz*. It is submitted that Lord Mance was clearly correct when he observed more than a decade before *Hunter* that such cases must be of 'only historical interest' and the subject should:

> …now be approached in the first instance by reference to Lord Steyn's speech in [*Aziz*] …. It is not to be qualified or applied by making exhaustive attempts to fit in all previous authority into a coherent mould.[68]

The court was particularly critical of the judgment in *PD*, which concerned a defendant accused of rape who admitted potentially fraudulent behaviour and that he had sometimes acted violently towards his wife. In view of these admissions and Moses LJ's cognisance of the rule in *Aziz*, it seems surprising that both the court and the prosecution at trial accepted the defendant's lack of previous convictions for sexual offences warranted a good character direction.[69] This may have been because the court drew a dubious distinction between sexual offences and those of violence which, as Redmayne contends, may be regarded as pushing the

[63] *Doncaster*, above nn 20 and 86 and accompanying text.
[64] Above n 54, 18-019 and 18-020.
[65] [2012] EWCA Crim 19.
[66] [1995] 2 Cr App R 84.
[67] (1994) 90 Cr App R 80.
[68] *Howell* [2001] EWCA Crim 2862, at [17].
[69] Above n 65, at [13]; Redmayne, above n 14, p 219.

law into absurdity.[70] However, the judgment may also be explained on an alternative basis. PD was not actually convicted of offences relating to violence and the report does not reveal the level of violence to which PD made admissions. It may have been very minor and consented to by his wife, if she shared his highly orthodox reading of Christian scripture regarding the subservience of women.[71] Therefore, as it was uncertain to what he was admitting and the case turned on whether the defendant or the complainant was to be believed, the court allowed his appeal. Moreover, Moses LJ recognised that the strict rule in *Aziz* meant the discretion not to direct on good character was only to be exercised exceptionally and that normally it was for the jury to decide what weight to give evidence of good character having had the benefit of a direction. Presumably, it was for these reasons that his Lordship held the circumstances in *PD* did not fall into the narrow category of 'rare cases' referred to by Lord Steyn.[72]

It is, of course, trite law that the doctrine of stare decisis required the court to follow the House of Lords judgment in *Aziz* [73] and the Court of Appeal in *Hunter* set out how it interpreted this in light of changes to the law that it contended had been caused by the Criminal Justice Act 2003. Accordingly, its guidance on good character directions purported to reflect the mandatory *Vye* directions on credibility and propensity that were endorsed and clarified by the House of Lords in *Aziz*:

> 77 We use the term "absolute good character" to mean a defendant who has no previous convictions or cautions recorded against them and no other reprehensible conduct alleged, admitted or proven…. This category of

[70] Redmayne, above n 14, p 219.
[71] As reported in the local newspaper 'Wembley preacher jailed for week of rape' *Harrow Times* 15 February 2010 *https://www.harrowtimes.co.uk/news/5009131.wembley-preacher-jailed-for-week-of-rape/* (last accessed 30 January 2020).
[72] Above n 65, at [12]-[15]. See also *GAI* [2012] EWCA Crim 2033, at [28]-[29].
[73] *Aziz*, above n 4.

defendant is entitled to both limbs of the good character direction. The law is settled.

78 The first credibility limb of good character is a positive feature which should be taken into account. The second propensity limb means that good character may make it less likely that the defendant acted as alleged and so particular attention should be paid to the fact...

79 Where a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character. It does not follow from the fact that a defendant has previous convictions which are old or irrelevant to the offence charged that a judge is obliged to treat him as a person of good character. In fairness to all, the trial judge should be vigilant to ensure that only those defendants who merit an "effective good character" are afforded one. It is for the judge to make a judgment, by assessing all the circumstances of the offence(s) and the offender, to the extent known, and then deciding what fairness to all dictates. The judge should not leave it to the jury to decide whether or not the defendant is to be treated as of good character.

In addition, the court held that the judge has a discretion to provide a direction in a range of other circumstances where the accused has previous convictions or cautions, or other bad character. For example, where the accused has no previous convictions but admits other 'reprehensible behaviour' under s.101(1)(b) of the Criminal Justice Act 2003. However, it is contended that, with respect, the Court of Appeal misunderstood the effect of the enactment of the 2003 Act on the law on good character directions.

Good character evidence and the Criminal Justice Act 2003

The Court of Appeal in *Hunter* observed that 'bad character' was defined by ss.98 and 112 of the Criminal Justice Act 2003 as 'evidence of or a disposition towards misconduct' and consisted of a criminal offence or 'other reprehensible behaviour', except where that was concerned with the alleged facts of the offence or misconduct in 'connection with the investigation or prosecution of that offence'.[74] The court seems to have extrapolated from this an intention on the part of Parliament to define 'good character' as simply meaning the opposite. Accordingly, the court asserted that the 2003 Act's codification of the law on bad character[75] had, by default, also changed the law on good character.[76] However, it is contended that the law remains unchanged and it is plain that Parliament did not intend to abolish or affect the common law rules on 'good character', but only those on 'bad character'.

First, the Law Commission Consultation Paper, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*[77] that preceded the Criminal Justice Act 2003 and guided parliamentary debates did not recommend changing the law on good character. The final report focused expressly on bad character,[78] as neither the consultation paper nor its consultees suggested broadening the scope of the enquiry. Indeed, the Law Commission was unequivocal that the law on good character should be left unaltered: 'The vulnerable position of the defendant justifies… the special dispensation afforded to the defendant to call evidence of his or her good character'.[79]

Second, Parliament reflected this opinion in the contents of the Criminal Justice Act 2003. In s.118 it preserved specifically the common law rule that, in proving a person's good

[74] *Hunter*, above n 1, at [29].
[75] *Platt* [2016] 4 WLR 51, at [23]-[29].
[76] *Hunter*, above n 1, at [85]-[86].
[77] Law Commission CP No 141, above n 9, Pt VIII.
[78] Law Commission Report No 273, above n 15.
[79] Law Commission CP No 141, above n 9, 8.20.

character according to the rule in *Rowton*, evidence of reputation is admissible despite it being hearsay. In addition, s.99(1) states expressly that 'the common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished', but makes no mention of the rules on good character.

In view of the vigorous debates in Parliament during the passage of the 2003 Act[80] and, in particular, MPs' strong criticism of the admission of previous acquittals to undermine an accused's good character,[81] it is highly likely that any changes to the law on good character would have met with determined opposition. Moreover, it was part of the very purpose of the Act's new 'inclusionary' approach to bad character[82] to resolve the much-criticised imbalance that resulted from admission of good character 'as of right', while bad character remained prima facie inadmissible.[83] Therefore, there can have been little or no expectation in Parliament or the courts that good character would become less admissible and juries directed less often.

Notwithstanding this, the Court of Appeal in *Hunter* asserted that the 'whole landscape' of the law on good and bad character had been changed by the 2003 Act and, in that regard, relied on the judgment in *Doncaster*.[84] However, although Rix LJ postulated that the 2003 Act had some impact on the common law, it is important to note, as Jackson LJ observed in *Hoyte*,[85] that the Court of Appeal in *Doncaster* actually drew back from reaching a decision on that basis. Instead, the court held that the trial judge's refusal to direct on good character was justified because the situation was 'analogous' to the narrow and 'exceptional' situation referred to in *Aziz* where a good character direction was not required[86] The Court of Appeal in

[80] Standing Committee B, above n 18, cols 532 and 545-548.
[81] As in *Z* [2000] 2 AC 483.
[82] *Hansard* HC Deb, vol 413, cols 704-705, 18 November 2003; *Chopra* [2007] 1 Cr App R 16, at [12].
[83] Eg D Birch *Anderson* [1990] Crim LR 862, at 863.
[84] Above n 20; *Hunter*, above n 1, at [32], [74] and [86].
[85] [2013] EWCA Crim 1002, at [38].
[86] Notwithstanding that, it was held a modified bad character direction should have been provided, above n 20, at [42]-[43]. Redmayne notes (above n 14, p 220) that the court also suggested a modified direction could be a method of reconciling the 2003 Act bad character provisions with the common law on good character. However, he refers to this as a modified good character direction.

Hunter appears to have overlooked this endorsement of the common law and suggested that the meaning of good character had been altered by a broadening of the definition of 'bad character' by the 2003 Act.

The court stated that this now extended well beyond the absence of previous convictions, which it considered it to have been the prevailing definition before the Act.[87] Accordingly, it held that the circumstances in which good character directions were given should be restricted. However, it is not clear that the law on 'bad character' was broadened by the 2003 Act. The expression 'reprehensible behaviour' in s.98 of the 2003 Act is novel but its scope is 'not at all clear'[88] and Lord Sumption has since stated, unequivocally, that good character was never so limited.[89] Nevertheless, the Court of Appeal in *Hunter* insisted that a broader definition of 'bad character' in the 2003 Act concomitantly narrowed the meaning of 'good character' and affected eligibility for a good character direction.

The narrowing of 'protean' good character

As we have seen, the Court of Appeal in *Hunter* conceded that a defendant with 'bad character' (which may consist of previous convictions, cautions or other 'reprehensible behaviour') might qualify as being of 'effective' good character. However, even this may be doubted, in view of the court's criticism of the decision in *Payton*[90] to allow an appeal where the judge omitted to direct on the defendant's effective good character. It is apparent that the default position following *Hunter* is that such a defendant is not of good character in what Hallett LJ described as 'the proper sense'[91] of the term. Her Ladyship regarded this as 'a statement of the obvious'[92] and observed when refusing leave to appeal in *Morgans*: 'A defendant with convictions is not

[87] *Hunter*, above n 1, at [74]-[75].
[88] H Malek *Phipson on Evidence* (London: Sweet & Maxwell, 19th edn, 2017) 19-65.
[89] *Layne*, above n 39, at [56].
[90] [2006] EWCA Crim 1226. Above n 1, at [72].
[91] *Hunter*, above n 1, at [70].
[92] Ibid, at [71]-[72].

entitled as of right to any part of the good character direction, for the simple reason he does not have a good character'.[93]

It is an opinion that has been readily endorsed by the courts[94] but it is contended that it is an absolutist view that ignores the variable or 'protean' nature of good character referred to recently by Lord Sumption in *Layne*.[95] The analysis in *Hunter* also has potentially serious consequences. It means, for example, that a defendant charged with a substantial financial fraud, who has a minor motoring conviction from thirty years ago, is prima facie not considered to be deserving of a good character direction. This may be regarded as a form of what Lacey has termed 'character essentialism' or 'character determinism'.[96] That is, an approach that demonstrates a reluctance to accept the variability of a defendant's character and that bad character is not necessarily fixed. It may, in time, diminish in relevance or importance to such an extent that a good character direction becomes appropriate. It is possible, following *Hunter*, that a judge will direct the jury that the defendant can be treated as being of 'effective' good character, provided the bad character consists of previous convictions that are 'old, minor and irrelevant'. However, it is submitted that this represents a significant narrowing of what was previously regarded as 'good character' simpliciter.

This narrowing is all the more apparent because Hallett LJ insisted that the words 'old, minor and irrelevant' must be read conjunctively[97] and appears to privilege them over the usual test of relevance for determining whether past misconduct will undermine an accused's good character. Lord Sumption was clear in *Layne* that Hallett LJ had fallen into error in this regard

[93] [2015] EWCA Crim 1997, at [13]. See also Hallett LJ's 'Blackstone Lecture 2017', *Trial by jury – past and present https://www.judiciary.uk/wp-content/uploads/2017/05/hallett-lj-blackstone-lecture-20170522-1.pdf* (last accessed 30 January 2020).
[94] Eg *Pegram v DPP* [2019] EWHC 2673 (Admin); *Evans* [2017] EWCA Crim 2386 and *Martin* [2016] EWCA Crim 474.
[95] Above n 39, at [55].
[96] N Lacey 'The Resurgence of Character: Responsibility in the Context of Criminalization' in R Duff & S Green *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) p 156.
[97] *Morgans*, above n 93, at [14].

and that the true test is the broader one of relevance.[98] That is, past misconduct must be material to the defendant's character at the time that it falls for evaluation for it to undermine good character[99] and 'old and minor previous convictions' are only particular examples of what may fall to be taken into account in deciding if the accused may still be regarded as being eligible for a good character direction.

Lord Sumption's analysis in *Layne* also reflects the approach before *Hunter*. Thus, Glidewell LJ held in *Liacopoulous*,[100] at a time when he was head of the Judicial Studies Board, that a defendant with a 'very minor' irrelevant previous conviction was undoubtedly of 'positive' good character[101] and not just 'effective' good character. Moreover, this broad interpretation of good character was repeated in Glidewell LJ's Court of Appeal judgment in *Aziz*, where he stated that the appellant could be of good character because his convictions were not of 'any relevance or significance',[102] and was referred to with approval by Lord Steyn in the House of Lords.[103] Indeed, it is arguable that to suggest otherwise would be to mislead the jury about the defendant's character, which was a matter of particular concern to the Court of Appeal in *Hunter*.[104] It is also apparent from *Layne*[105] that, contrary to *Hunter*, past misconduct that does not undermine good character is not necessarily limited to minor convictions. The Privy Council in *Layne* was called upon to decide whether the appellant could be of good character despite his previous convictions for the murder of 10 people, including the Prime Minister of Grenada and his cabinet. The appeal was dismissed, but Lord Kerr dissented[106] and

[98] Above n 39, at [58].
[99] Ibid, at [66].
[100] [1994] Lexis Citation 2279.
[101] Ibid.
[102] *Aziz* (Court of Appeal) unreported 4 March 1994, at 15-16.
[103] *Aziz* (House of Lords), above n 4, at 47F; *CM* [2009] EWCA Crim 158.
[104] Above n 1, at [68].
[105] Above n 39,
[106] Ibid, at [64]-[89].

the majority did not rule out the possibility of a person being treated as being of good character in similar circumstances in the future, even where the previous convictions were for murder.[107]

As well as making errors in the law, the court in *Hunter* also appears to have made certain errors of fact, which compounded the problem. That is, it stated the appellant in *Aziz* had no previous convictions, but he had two.[108] The court also seems to have misconstrued Taylor LJ's judgment in *Vye*.[109] While it is correct that *Vye* concerned appellants with no previous convictions, a few months later in *Horrex*,[110] Taylor LJ again giving the lead judgment clarified that a defendant with a previous conviction could also be treated as being of 'good character', just like the appellant in *Vye* who had no previous convictions. Accordingly, contrary to Hallett LJ's finding, it was not an 'important distinction' from later case law that both *Aziz* and *Vye* 'were concerned with defendants with no previous convictions'.[111] However, more importantly, the Court of Appeal appears to have also misunderstood the nature and essence of the unanimous House of Lords' judgment in *Aziz*, which had been the subject of regular approval at a high level.[112] In particular, the process for the provision of good character directions was wrongly changed from being a matter of 'judgment' to a matter of 'discretion'.[113]

Directing the jury: discretion, law and defeasibility

The Court of Appeal in *Hunter* held that only defendants with 'absolute' or 'effective' good character were entitled 'as of right' to a good character direction[114] and that qualification for the latter appellation was at the judge's discretion. As a result of the narrowing of good

[107] Ibid, at [59] and [46].
[108] *Aziz*, above n 4, at 46E and *Aziz* (Court of Appeal), above n 102, at 16; E Freer [2015] Arch Rev 4.
[109] Above n 46.
[110] [1994] Crim LR 205.
[111] *Hunter*, above n 1, at [27] and [58].
[112] *Teeluck*, above n 3; *Krishna v Trinidad & Tobago* [2011] UKPC 18; *Barrow v The State* [1998] UKPC 18.
[113] The distinction between judgment and discretion is of significance: F Bennion 'Distinguishing judgment and discretion' [2000] PL 368; 'Judgment and discretion revisited: pedantry or substance?' [2005] PL 707 and *Understanding Common Law Legislation* (Oxford: Oxford University Press, 2009).
[114] Above n 1, at [77].

character discussed above, and contrary to previous authority, it is apparent that if *Hunter* is followed there will now only be a few instances when a direction will be given 'as of right' and that much will be left to the individual judge's discretion.

The Court of Appeal stated that it was bound by *Aziz*,[115] but only in the light of the Criminal Justice Act 2003. However, it has been argued here that, contrary to *Hunter*, the 2003 Act did not change the law on good character. It follows that the Court of Appeal's focus ought to have been confined to *Aziz*. Prior to *Hunter*, a judge would come to an objective assessment of whether past misconduct or convictions were relevant to whether the defendant should be regarded as being of good character. This was a matter of judgment rather than discretion, as a question of law was involved and not the judge's individual choice.[116] *Vye* was an attempt to avoid the 'judicial idiosyncrasy and variance' as to when a direction should be provided that had prevailed under the previous discretionary regime.[117] The House of Lords in *Aziz* provided further certainty by laying down a strict, 'clear-cut' rule that a good character direction should normally be provided where there was evidence of good character.[118] That is, the House of Lords confirmed that what had once been a question of discretion[119] had crystallised into an obligation to direct the jury on good character as a matter of law.[120] Whether a direction was provided was an objective exercise,[121] but it could only not be provided in exceptional circumstances. Lord Steyn described the discretion not to direct on good character as 'residual' but, arguably, the discretion might have been more properly described as 'liminal' or 'existing at the very outer margins of the rule' to convey more accurately the intention that non-direction would be a rarity.[122] Critically, the Court of Appeal appears to have misunderstood the

[115] Ibid, at [68].
[116] F Bennion 'Distinguishing judgment and discretion' [2000] PL 368.
[117] *Melbourne* [1999] 164 ALR 465, at [115].
[118] *Aziz*, above n 4, at 52.
[119] Eg *Aberg*, above n 41.
[120] *Aziz*, above n 4, at 51A; *Teeluck*, above n 3; *Berrada*, above n 48, at 134.
[121] *Layne*, above n 39, at [71].
[122] As observed by Moses LJ in *PD*, above n 65, at [12]-[15].

narrowness of Lord Steyn's exception to good character directions being provided because it did not appreciate the defeasible nature of the rule set out by his Lordship in *Aziz*.

HLA Hart, the philosopher of legal positivism, has been credited with introducing the idea of 'defeasibility' into legal analysis.[123] 'Defeasibility' may be described as the notion that a legal concept or rule is open to implied exceptions, which cannot be known ex ante and, accordingly, only provides prima facie and not conclusive obligations.[124] That is, a rule that appears certain may, nevertheless, be contradicted or defeated by the discovery of further facts, as exceptions to rules are 'incapable of exhaustive statement'.[125] The thesis is that there is, unavoidably, an element of indeterminacy in the application of rules. This recognises that due to the 'open texture of law'[126] a general rule, such as that a good character direction should be given where a defendant is judged to be of good character, will rarely be constructed so clearly and precisely that it leaves no room for doubt and no loopholes, or no uncertainty at the borderline.[127]

Lord Steyn acknowledged his debt to legal positivism[128] and HLA Hart in particular, who he described as the 'great master of English legal philosophy'.[129] He was also a confirmed critic of what Hart described as the 'vice of formalism'[130] in statutory interpretation. So, it should come as no surprise that his Lordship would apply defeasibility in *Aziz* and, therefore, accept a degree of flexibility in the provision of a legal rule on good character directions.

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[123] In HLA Hart 'The Ascription of Responsibility and Rights' (1948-49) 49 Proceedings of the Aristotelian Society 175. He repudiated this in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), but others have further developed his ideas, eg R Tur in 'Defeasibilism' (2001) 21(2) OJLS 355.
[124] J Beltran & G Ratti 'Legal Defeasibility: An Introduction' in J Beltran & G Ratti (eds) *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford: Oxford University Press, 2012) p 1.
[125] HLA Hart *The Concept of Law* (Oxford: Clarendon Press, 1961) p 136.
[126] Ibid, ch VII 'Formalism and Rule-scepticism: 1. The open texture of the law', pp 121-132.
[127] HLA Hart, above n 125, p 125; Twining and Miers 'How to do Things with Rules' (London: Butterworths, 4th edn, 1999) p 181.
[128] J Steyn 'Does legal formalism hold sway in England?' (1996) 49(1) CLP 43, 44.
[129] J Steyn '*Pepper v Hart*; A re-examination' (2001) 21(1) OJLS 59; *R (Jackson and others) v Attorney General* [2005] UKHL 56, at [120] (Lord Steyn).
[130] Above n 125, p 126; above n 128.

What Lord Steyn outlined in *Aziz* was that, to avoid the previous uncertainty in the law, there was a mandatory rule in relation to good character directions - that prima facie the direction is obligatory where a person is of good character.[131] As we have seen, 'good character' is broadly understood in law to mean the defendant's good 'general reputation', which includes a lack of previous convictions (or ones of relevance).[132] These standard instances represented a 'core of certainty',[133] the plain cases where it was clear that a good character direction should be given. However, his Lordship also accepted that there should, nevertheless, be a very limited discretion for a direction not to be given, in exceptional circumstances, where it would be a complete absurdity to do so. This followed from Hart's contention that it is logically impossible to eliminate the need for discretion because the 'open texture' of the law means it is always possible to find a borderline case for the application of a rule.[134]

Therefore, Lord Steyn held that a direction would not be necessary where this would be an 'insult to common sense'[135] due to the peculiar facts of the case.[136] However, it should not be overlooked that these are 'very strong words',[137] as false mortgage applications and tax declarations were held insufficient for a good character direction to be lost in *Aziz*, despite it being a case concerned with defrauding the tax authorities and the Crown describing a direction in these circumstances as 'absurd'.[138] Accordingly, it is evident that Lord Steyn meant the discretion to omit a good character direction to be exercised at the very fringes or, if we utilise the terminology of positivism, 'in the penumbra' of the rule,[139] with the form of any such

[131] *Aziz*, above n 4, at 53E.
[132] *Rowton*, above n 32.
[133] HLA Hart, above n 125, p 119.
[134] Uncertainty at the borderline is a common feature of rules, ibid, pp 124-5. See further, G Baker 'Defeasibility and Meaning' in P Hacker & J Raz (eds) *Law, Morality and Society* (Oxford: Clarendon Press, 1977) pp 36-37.
[135] *Aziz*, above n 4, at 53C.
[136] As Kirby J noted of *Aziz* in *Melbourne*, above n 117 at [114].
[137] As observed by Bokhary PJ in his discussion of *Aziz* in *Tang Siu Man*, above n 5.
[138] *Aziz*, above n 4, at 44H.
[139] HLA Hart, above n 125, p 130.

direction being left to the 'good sense of trial judges'.[140] Therefore, criticism of the judgment for leaving a void because it did not adequately identify those circumstances[141] is misplaced, as it does not acknowledge the narrow scope for non-direction and its resulting rarity under the rule in *Aziz*.[142] It also follows that it is erroneous to suggest that *Aziz* actually broadened this discretion in order to discourage judges from their supposed 'indulgent' tendencies' towards defendants.[143]

In *Aziz*, his Lordship noted, clearly utilising the language of Hart and defeasibility, how discretions ranged from 'open-textured' to 'narrowly circumscribed'[144] and described the discretion not to direct on good character as the latter. It is apparent that Lord Steyn meant by this 'heavily constrained by established principles', as he drew the same distinction in *Bey*[145] when considering the discretion to direct the jury on a defendant's lies:

> Discretions vary greatly in nature. At one end of the spectrum one has a completely open-textured discretion. At the other end one has a discretion heavily constrained by established principles.[146]

It is also contended that when he referred to 'established principles', Lord Steyn had in mind the rule in *Berrada* and *Vye*[147] that fairness demanded that a good character direction would normally be provided as part of the right to a fair trial and as a matter of law rather than discretion. However, as the Court of Appeal in *Hunter* seemed to misunderstand the defeasible nature of the rule in *Aziz*, it held that there was no 'fixed rule' that failing to direct the jury would render a conviction unfair.[148]

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[140] *Aziz*, above n 4, at 53F.
[141] *Hunter*, above n 1, at [65]-[66].
[142] *PD*, above n 65, at [12]-[15] (Moses LJ).
[143] Dennis, above n 54, 18-021.
[144] *Aziz*, above n 4, at 53D**.**
[145] [1994] 1 WLR 39.
[146] Ibid, at 45.
[147] *Berrada*, above n 48; *Vye*, above n 46; *Teeluck*, above n 3.
[148] *Hunter*, above n 1, at [89].

The Court of Appeal was sceptical about the importance of good character directions. This is apparent from the tone of the judgments in both *Hunter*[149] and *Morgans*,[150] as well as Hallett LJ's extra-judicial remarks[151] that, as a 'democratic branch of the judiciary', the jury has no need for good character directions.[152] The court stated:

> …many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend. [153]

It is likely that the 'many' the Court of Appeal had in mind included, in particular, the New Zealand Court of Appeal. Its sceptical judgment on good character in *Falealili*[154] was referred to with particular approval in Munday's article 'What constitutes a good character?'[155] which, as we have noted, the Court of Appeal relied upon.[156] It is, therefore, necessary to examine the state of the law on good character directions in New Zealand.

The impact of sceptical New Zealand jurisprudence on *Hunter*

The New Zealand law on good character directions was strongly influenced by a sceptical scientific position, which also shaped Munday's view and led to questioning of the value of good character evidence in cases such as *Falealili*[157] and now *Hunter.* Thus, the New Zealand

[149] Above n 1, at [20], [70] and [72]; R Munday 'Good character directions in criminal trials: an exercise in containment' (2015) CLJ 388, 391.
[150] Above n 93, at [13]
[151] 'Blackstone Lecture 2017', above n 93.
[152] However, as L Blom-Cooper observes, the jury has never been part of the judiciary nor democratic: *Unreasoned Verdict: The Jury's Out* (Oxford: Hart, 2019) pp 49-50.
[153] *Hunter*, above n 1, at [67].
[154] [1996] 3 NZLR 664.
[155] Munday, above n 23.
[156] The Court of Appeal's reference here (above n 1, at [20]) was to the section of Munday's article on *Falealili* and repeats his opinion that *Berrada* was a 'wrong turn' in the law – above n 23, 255 and 258.
[157] Above n 154; *Melbourne*, above n 117.

Court of Appeal treated a lack of previous convictions as 'generally neutral'[158] and insufficient to demonstrate good character.

Munday observed 'it is surely disturbing that the law should for so long have been totally out of step with received scientific wisdom'.[159] He cited, in particular, the work of Hartshorne and May,[160] who propounded a theory of 'situationism' to the effect that it is impossible to conclude people have certain traits that cause them to behave consistently from one situation to another. It follows that traits of good character can be of no real value in predicting behaviour and deciding a person's guilt. However, although this was the scientific orthodoxy at the time of his writing, the science has since moved on. This is not the place to examine that science in full, but it is worth noting that Redmayne, when reviewing it in *Character in the Criminal Trial*,[161] observed that there had been a significant change since Munday's article. It is evident that there is now a consensus that both personality traits and situations are relevant factors in explaining behaviour – the so-called 'interactionism' theory.[162] It is accepted that there is evidence of broad consistencies in stable individual differences over time. As a result, contrary to the theories that influenced Munday and then the Court of Appeal in *Hunter*, personality traits continue to be relevant in the current 'five-factor' and 'alternative five-factor' models of personality,[163] even if some regard character as 'fragmented'.[164]

[158] Above n 154, at 667.
[159] R Munday 'Reflections on the Criminal Evidence Act 1898' (1985) 44 CLJ 62, 67.
[160] H Hartshorne and M May *Studies in the Nature of Character Vol 1: Studies in Deceit* (New York: MacMillan, 1928).
[161] Redmayne, above n 14.
[162] Ibid, p 12.
[163] Eg P Sârbescu and A Boncu 'The resilient, the restraint and the restless: Personality types based on the Alternative Five-Factor Model' [2018] 134 Personality and Individual Differences 81; E Sawula et al 'Associations between personality and self-reported driving restriction in the Candrive II study of older drivers' [2017] 50 Transportation Research Part F: Traffic Psychology and Behaviour 89.
[164] J Maltby, L Day & A Macaskill *Personality, Individual Differences and Intelligence* (Harlow: Pearson, 4th edn, 2017) p 108 regarding George A Kelly's personal construct theory and 'fragmentation corollary'; J Doris *Lack of Character: Personality and Moral Behaviour* (Cambridge: Cambridge University Press, 2002) p 64.

It may be concluded that the science on character is not straightforward and, further, because the research is invariably situated in workplace or educational contexts, rather than the courtroom, such scientific insights as there are on character may not always be helpful in evaluating good character evidence. Psychology is evidently still finding its way in this field and, as Jill Hunter has observed 'much work lies ahead'.[165] However, it is also worth heeding the comments of the eminent Australian jurist, Kirby J, who was critical of this approach to the law because of its association with what has been described as the 'scientization of inquiry'.[166] He argued that a good character direction should be required in all cases where there is evidence of good character[167] and cautioned that even if the science were to be more compelling, we might still consider that the law should rest on legal history and policy rather than science.[168]

In *Falealili*,[169] the New Zealand Court of Appeal held that a good character direction should only be required where evidence of the defendant's 'positive' good character is provided and not where an accused simply lacks previous convictions. This confirmed Munday's opinion that compared to the courts in England and Wales, the New Zealand courts were more sceptical about good character and less inclined to 'bend over backwards' for defendants who relied on an absence of previous convictions as evidence of good character.[170] However, the Court of Appeal's reliance on *Falealili* in *Hunter*, albeit indirectly through the influence of Munday's article,[171] was misplaced. *Falealili* has not been good law since at least 2010, as it was overruled by the New Zealand Supreme Court in *Wi v R*[172] and superseded by the codification of law brought about by the Evidence Act 2006.

[165] J Hunter 'Character evidence in the Criminal Trial' [2016] E & P 162, 167.
[166] M Damaska 'Free proof and its detractors' (1995) 43 Am J Comp L 343, 352.
[167] In a powerful dissent in *Melbourne*, above n 117, at [120].
[168] Ibid, at [107]-[109].
[169] Above n 154.
[170] Munday, above n 23, 256.
[171] Ibid.
[172] [2010] 2 NZLR 11.

In what was a 'substantial departure' from the common law',[173] the admissibility of evidence of good character in New Zealand is now governed under the Evidence Act 2006, solely by a 'veracity rule' (s.37) and a 'propensity rule' (s.40). As a consequence, evidence of good character is admissible in assessing a person's veracity, which is defined as the 'disposition of a person to refrain from lying',[174] only if it is 'substantially helpful'. It is also potentially admissible under the propensity rule, but subject to a lower test of relevance, namely that it 'tends to show a person's propensity to act in a particular way or to have a state of mind'.

These provisions were closely examined in *Wi*[175] and, preferring *Aziz*, the Supreme Court overruled *Falealili*. The Justices considered the latter led to 'uncertainties' in the law and that:

> The English approach to the admissibility of lack of previous convictions has the advantage of both simplicity and consistency with long-standing criminal trial practice. For the reasons given we consider the Act can and should be construed to the same effect…The common law approach in England fortifies the appropriate construction of the Act.[176]

It is contended that if the Court of Appeal in *Hunter* had been aware of the current law in New Zealand and the Supreme Court's preference for 'long-standing criminal trial practice' and the judgment in *Aziz*, it would have been less influenced by Munday's *Falelalili*-inspired critique of the position in England and Wales. It was held in *Wi*, contrary to *Falealili*, that there is no requirement for 'positive' evidence of good character. It was further held that a lack of previous convictions is not 'neutral' but, rather, admissible evidence of good character in relation to a defendant's propensity to not act in a particular way. The Justices found that a lack

[173] Ibid, at [26]; *Alletson* [2009] NZCA 205, at [42].
[174] Evidence Act 2006, s.37(5).
[175] Above n 172.
[176] Ibid, at [29] and [32]; *Banks* [2014] 3 NZLR 256, at [18].

of previous convictions was relevant evidence of good character, as it has a tendency to show that the defendant had never committed any such offence.[177]

It follows that the New Zealand Supreme Court accepted that a defendant's good character, in the form of a lack of previous convictions, is potentially relevant evidence of the defendant's propensity and veracity. The Justices stated that its probative value can be only 'marginal' or 'slight', but this does not mean that it is necessarily unimportant to a fair trial. As Lord Steyn stated in *Aziz*,[178] echoing the European Court of Human Rights, the judge has an important obligation to put the defendant's character to the jury in a 'fair and balanced way'[179] and in sufficient detail.[180] However, as we have noted, the good character direction may also be regarded as acting as a 'backstop' against miscarriages of justice and, in lieu of reasoned judgments, as a necessary part of the 'framework of fairness' for a trial.

The 'framework of fairness' and jury directions

It has been argued that the requirement for a good character direction in *Aziz* was derived from the right to a fair trial and a desire to avoid miscarriages of justice. In that regard, it is pertinent to observe that Lord Steyn's judgment in *Aziz* came only a few years after the 'Birmingham Six' and Judith Ward appeals, which concerned gross miscarriages of justice. The importance of having a 'backstop' or 'final safeguard', in the form of a good character direction, is likely to have weighed particularly heavily on both Lord Steyn and Glidewell LJ, who sat on the appeals in *Aziz* before the House of Lords[181] and the Court of Appeal[182] respectively. Both also

[177] However, it also held such evidence would be inadmissible according to s.37, as it would not meet the higher test requiring it to be 'substantially' helpful in assessing veracity.
[178] *Aziz*, above n 4, at 53E.
[179] A judge's summing-up should be fair, balanced and accurate: *X v United Kingdom*, above n 50; *Berrada*, above n 48; *Vye*, above n 46; *Teeluck*, above n 3.
[180] *Condron v United Kingdom* (2001) 31 EHRR 1.
[181] Above n 4.
[182] Above n 102.

sat in the appeal of Judith Ward,[183] who was convicted due to what Lord Steyn described as 'lamentable failures' by the prosecution to disclose critical information and documents.[184]

Of course, good character directions will not always prevent wrongful convictions, but they may, at least, cause a jury to pause for thought before convicting a person of previous good character on what appears to be strong prosecution evidence. This may not be reliable and, moreover, critical evidence may not have been disclosed by the prosecution, as in *Ward*[185] and, more recently, in Liam Allan's case.[186] Therefore, it is submitted that good character directions remain relevant to a fair trial for the same reasons of pragmatism and 'sombre realism' that led Lord Steyn and Glidewell LJ to conclude in *Ward*:

> The law is of necessity concerned with practical affairs, and it cannot effectively guard against all the failings of those who play a part in the criminal justice system.[187]

Research suggests that juries can be largely relied upon to make appropriate use of judicial directions[188] and any potential negative consequences of requiring such a direction 'as of right' appear to be limited. As Kirby J suggested in *Melbourne*,[189] even if a good character direction is provided that appears unrealistic to a jury, it is likely to be treated with some doubt and ignored or regarded as 'at worst, a manifestation of the law's proclaimed solicitude for those accused of crime'.[190] That is, although the provision of the direction is a matter of law, the weight to be given to the evidence of good character is a matter for the jury.[191]

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[183] [1993] 1 WLR 619.
[184] J Steyn *Democracy through Law* (London: Routledge, 2004) p 190.
[185] Above n 183.
[186] Eg D Brown & A Mostrous 'Rape case scandal is just "tip of the iceberg" ' *The Times* 16 December 2017.
[187] Above n 183, at 675
[188] C Thomas *Are juries fair?* (February 2010) *https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf* (last accessed 30 January 2020).
[189] Above n 117.
[190] Ibid, at [117].
[191] *PD* above n 65, at [14] (Moses LJ) and *GAI* above n 72 (Pitchford LJ).

This contrasts sharply with the sceptical analysis of the law provided by the Court of Appeal in *Hunter*, which doubted whether, even where good character was relevant, the jury ever needed a direction to understand its significance because it was a matter of common sense.[192] However, it is contended that we should be cautious about relying on 'common sense' in a more heterogeneous society, as the extent to which individuals believe in the significance of good character may vary.[193] Moreover, Pennington and Hastie have argued that juries frequently make decisions by using stories in order to comprehend the trial and, consequently, different jurors will construct different stories based on their experience.[194] It follows that, without a judicial direction, some jurors will take account of an accused's good character as significant or even over-emphasise its importance, while others may take a much more sceptical view.

Even if a jury might understand the significance of good character, it was cogently argued in *Tang Siu Man v HKSAR*[195] that 'it is a commonplace of the criminal law that certain jury directions are standard' and unclear why, if 'good character', broadly understood, is relevant evidence, that it should be treated differently.[196] It is likely, for example, that jurors will be aware by the end of a trial about the law on the onus and standard of proof. They will have been informed of these at the commencement of the trial, reminded by advocates and the judge and may have been already aware of them from their general knowledge. Nevertheless, it

[192] *Hunter*, above n 1, at [62], [81] and [91].
[193] J Jackson 'Making juries accountable' (2002) 50 Am J Comp L 477, 525. Disagreements about common sense are not confined to jurors. Griew stated it was common sense that good character was of little or no value, although his comments should be viewed in context, as he was writing prior to both *Vye* and *Aziz*, when the law was less clear, above n 55.
[194] N Pennington & R Hastie, 'A cognitive theory of juror decision making: the story model' (1991) 13 Cardozo L Rev 519, 525.
[195] Above n 5.
[196] Ibid, at 403 (Bokhary PJ).

remains an essential requirement of a fair trial that a direction is given to the jury[197] and, following *Taxquet v Belgium*,[198] particularly in the absence of a reasoned judgment.[199]

The European Court of Human Rights held in *Taxquet* that art. 6(1) of the European Convention obliges courts, in general, to give reasons for their judgments in both civil and criminal proceedings as a safeguard against arbitrariness.[200] This is regarded as vital not only for the defendant but also for the maintenance of confidence in the administration of justice.[201] However, as juries do not provide reasons for their verdicts, and the Grand Chamber was not prepared to require it,[202] the Justices in *Taxquet* held it was important that both the defendant and the public[203] should be able to understand the reasons for a conviction. Transparency in reasoning is strongly associated with the right to a fair trial, as without it parties are unable to protect their rights, and it has emerged as a benchmark of good practice in criminal proceedings.[204] Accordingly, the Grand Chamber indicated in *Taxquet* that appropriate safeguards to prevent unfairness would be:

> …directions or guidance by the presiding judge to the jurors on the legal issues arising or the evidence adduced… forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers.[205]

The Grand Chamber's judgment might have been regarded as simply reflecting the nature of trials in England and Wales and the symbiotic relationship between the judge and the jury.[206]

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[197] *Woolmington v DPP* [1935] AC 462, at 481; *Derek Bentley (Deceased)*, above n 44, at [42].
[198] Above n 21.
[199] Ibid; *Judge v United Kingdom* (2011) 52 EHRR SE17.
[200] Above n 21, at [90]; *Ruiz Torija v Spain* [1994] 18390/91, at [29].
[201] P Craig 'The Common Law, Reasons and Administrative Justice' (1994) 53 CLJ 282, 283.
[202] See *Saric v Denmark* (31913/96) and *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, at [43].
[203] Or, at least, the 'informed observer', *CH v HM Advocate* [2016] HCJAC 4, at [13].
[204] M Coen & J Doak 'Embedding explained jury verdicts in the English criminal trial' [2017] 37(4) LS 786, 791.
[205] Above n 21, at [92]; *Legillon v France* [2013] 53406/10, at [54]. For a critical view, M Coen 'With cat-like tread: jury trial and the European Court of Human Rights' (2014) 14(1) HRLR 107.
[206] L Blom-Cooper 'Article 6 and modes of criminal trial' [2001] EHRLR 1, 11-12.

However, despite that, the decision in *Taxquet*, which was confirmed in *Lhermitte v Belgium*,[207] appears to have had limited impact on the Court of Appeal. For example, the judgment was dismissed in *Ahmad (Benjamin)*[208] as 'not remotely relevant' to jury trials in England and Wales.

The Strasbourg Court has stated on a number of occasions that, in deciding the fairness of proceedings, it will have regard to them as a whole, including that errors may be rectified on appeal.[209] However, in relation to good character in England and Wales, this is increasingly unlikely in practice. This is because the good character direction post-*Hunter* is regarded as a matter of discretion rather than law and such evidence is treated with the same scepticism that resonated throughout the judgment in *Hunter*.[210] It is also contended that an appeal on its own would not address the wider concern that neither the accused nor the public would be aware of the reasons for the verdict and that, accordingly, the accused's ability to participate in proceedings as a 'responsible agent' guided by reasons will not be respected.[211] As Tribe argues, no better way has been found of generating the sense that justice has been done than the sense of 'interchange' that comes from a hearing:

> Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision… and receiving an explanation of why the decision is being made in a certain way.[212]

[207] [2016] 34238/09 (Grand Chamber).
[208] [2011] EWCA Crim 1043, at [12]; *Ali (Chomir)* [2011] EWCA Crim 1011, at [49]-[53].
[209] Eg *Edwards v UK* (1993) 15 EHRR 417, at [39]; *De Cubber v Belgium* (1985) 7 EHRR 236, at [33].
[210] Above n 1, at [20], [70] and [72]; eg *Bates* [2017] EWCA Crim 2522, at [14].
[211] Duff et al consider this an essential element in any criminal trial, which they theorise as a 'calling to answer' a charge of criminal wrongdoing, above n 37.
[212] LH Tribe *American Constitutional Law* (Mineola: The Foundation Press, 1988) p 666.

Although there are compelling arguments for reasoned verdicts,[213] it seems unlikely that they will become part of the law of England and Wales in the near future. Therefore, it is submitted that it is necessary in law for a standard good character direction to be provided where there is evidence of good character, as part of the overall 'framework of fairness' required by the Grand Chamber.[214] That is, following *Taxquet*, it is an important element of a fair trial, where a reasoned judgment has not been given, that clear, relatively full[215] directions are provided as part of a 'properly structured summing up'[216] in order to appropriately assist the jury in deciding guilt or innocence.[217] The right to a fair trial implies that the court has a 'duty effectively to examine the grounds, arguments and evidence adduced by the parties'.[218] Accordingly, if neither the reasons for the verdict nor full directions are provided to the jury, it is plain that the defendant and the public cannot be reassured that a defendant's good character formed a necessary link in the 'chain of reasoning'[219] of an impartial jury, as part of the accused's 'right to be heard'[220] in a fair trial. Although research indicates that juries try defendants on the evidence before them,[221] one cannot know for certain that a jury has the shared common sense that good character is relevant and taken it into account.[222] Therefore, directions provide some reassurance that, when called to answer at trial, the defendant's case has been properly heard and, in particular, where character is central to guilt.[223] Moreover, in

[213] Coen & Doak, above n 204. For critical views, see K Burd & V Hans 'Reasons verdicts: oversold?' [2018] 51 Cornell Int'l LJ 319, 320.
[214] *Taxquet*, above n 21; *Judge v United Kingdom*, above n 199; *Lawless* [2011] EWCA Crim 59, at [28].
[215] P. Duff 'The compatibility of jury verdicts with article 6: Taxquet v Belgium' [2011] 15(2) Edin LR 246, 250.
[216] Lord Judge *The Safest Shield* (Oxford: Hart, 2015) p 209.
[217] *Taxquet v Belgium* App. No. 926/05, Merits, 13 January 2009 (Second Section), at [48].
[218] *Dulaurans v France* (2001) 33 EHRR 45, at [33]; *Kraska v Switzerland* (1994) 18 EHRR 188, at [30].
[219] *Taxquet*, above n 21, at [74].
[220] S Trechsel *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) pp 104-105.
[221] Thomas *Are juries fair?* above n 188.
[222] Above nn 192-194 and accompanying text.
[223] Eg dishonesty offences: Law Commission *Fraud and Deception* (Law Com CP No 155, 1999) 3.17 and 3.20 and sexual offences, *PD*, above n 65, at [17]; *CM*, above n 103, at [12] and *Doncaster*, above n 20, at [41].

the absence of a reasoned decision, misdirections at least afford a party a ground on which to have the decision reviewed by an appellate body.[224]

Conclusion

This paper has contended that the Court of Appeal in *Hunter* misinterpreted the law on good character evidence and, in particular, the leading House of Lords authority of *Aziz* by which it was bound. The court appeared to underestimate the strictness of the rule on good character directions in *Aziz* and misunderstood its defeasible nature. Therefore, instead of Lord Steyn's 'simple and moderate rule'[225] that 'prima facie the directions must be given',[226] the law set out in *Hunter* appears 'somewhat complex'[227] and spells a return to the 'judicial lottery' and inconsistency of the pre-*Vye* days.[228]

It has been argued that this occurred, in part, because the Court of Appeal considered erroneously that good character directions were being given where the accused was of bad character and the judgment in *Aziz* required reassessment in light of changes to the law on bad character brought about by the Criminal Justice Act 2003. What Lord Sumption described as the 'protean phrase of good character'[229] was then interpreted very narrowly and the influence of a sceptical academic critique of the law on the Court of Appeal[230] has permitted judges to exercise an extensive discretion to not direct the jury on good character.[231] The relatively few further reported appeals on the provision of good character directions that have followed[232] is

[224] *Suominen v Finland* [2003] ECHR 37801/97, at [37]; *Tatishvili v Russia* (2007) 45 EHRR 52, at [58].
[225] *Tang Siu Man*, above n 5.
[226] *Aziz*, above n 4, at [53].
[227] Malek, above n 88, 18-16.
[228] *Vye*, above n 46, at 474; *Melbourne*, above n 117, at [115].
[229] *Layne*, above n 39, at [55].
[230] Specifically, Munday's influential article 'What constitutes good character?' above n 23, which drew on the New Zealand Supreme Court case of *Falelalili*, above n 154.
[231] *R (on the application of Arthur) v Blackfriars Crown Court* [2018] 2 Cr App R 4, at [14].
[232] According to the Westlaw Case Digest, *Hunter* has been applied, followed and considered twice each, respectively, and mentioned 13 times since 2015 *www.westlaw.com* (last accessed on 30 January 2020)

a good indication that the 'golden metwand of the law' in *Aziz* has been displaced by the 'crooked cord of discretion'[233] in *Hunter*, so that the possibility of appeal is more limited.

It is contended here that the House of Lords in *Aziz* regarded good character directions in the same light as directions on the burden and standard of proof and on confessions, that is, as 'protection necessary to preserve a fair trial'.[234] They act as an important counter-weight to the serious credibility problem that the defendant faces because of the jury's tendency to assume that the defendant in the dock has a bad character.[235] However, the Court of Appeal in *Hunter* did not seem to fully appreciate this aspect of the law and that, in the absence of reasoned jury verdicts, good character directions also form part of the 'framework of fairness' referred to in *Taxquet v Belgium*, reassuring the defendant and the public that good character has been taken into account by the jury.[236]

It follows that if good character directions should be regarded as an aspect of the right to a fair trial, we can also assume, as Lord Steyn argued elsewhere, that 'Parliament would not curtail such rights by a side-wind, but only by the clearest provision in the plainest English'.[237] The Criminal Justice Act 2003 Act could not have been clearer that only the law on bad character was abolished and not the law on good character. It is submitted that the judgment in *Doncaster*[238] is of no assistance in this regard and *Aziz* remains the leading common law authority that, where there is evidence of good character, a jury direction should normally be provided as a matter of law and as part of the right to a fair trial.

As, in practice, the law is unable to guard effectively against all the failings of the criminal justice system, 'sombre realism'[239] dictates that the good character direction remains an

[233] E Coke *The Fourth Part of the Institutes of the Laws of England* (1644) ch 1, p 41.
[234] *Sealey v R*, above n 17, at [35].
[235] Redmayne and others, above n 14.
[236] *Taxquet*, above n 21; *Lawless*, above n 214, at [28].
[237] *Secretary of State for the Home Department v Abdi and Gawe* [1994] Imm AR 402.
[238] Above n 20.
[239] *Ward*, above n 183.

important 'backstop' or safeguard against potential miscarriages of justice.[240] As such, it continues the historic 'exceptionalism' of good character evidence. The direction is a 'special dispensation'[241] that asks the jury to pause before they convict a fellow citizen called to answer for alleged wrongdoing, to consider whether, notwithstanding the evidence that they have heard, they are sure that this defendant is guilty. Thus, as the Law Commission has stated, the good character direction has an important role in 'preventing the conviction of the innocent'[242] and accords with common principles of justice by treating the particular defendant with respect, as an end in themselves, rather than a means to an end.[243] Accordingly, it is submitted that, contrary to Hallett LJ's contention, it is *Hunter* that was the 'wrong turn' in the law,[244] which should be remedied by the United Kingdom Supreme Court at the earliest opportunity.

[240] *Sealey v R*, above n 17, at [34].
[241] Law Commission CP No 141, above n 9, 8.20.
[242] Ibid, 8.13.
[243] In Kantian terms, see R Duff *Criminal Attempts* (Oxford, Oxford University Press, 1997) p 201.
[244] *Hunter*, above n 1, at [70].