
NATURAL RESOURCES JOURNAL

Volume 5
Issue 2 *Summer 1965*

Summer 1965

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"TO PURIFY THE BAR": A CONSTITUTIONAL APPROACH TO NON-PROFESSIONAL MISCONDUCT*

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A court called upon to discipline an attorney for non-professional misconduct faces a troublesome and distasteful task. Nevertheless, it has been generally assumed that "if the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."[1] Whether or not the task of discipline is to be entrusted exclusively to the legal profession, one would hope that cumulative experience might by now have established guidelines for reaching intelligent decisions in this area. Unfortunately, this hope has not been realized. In 1883, Mr. Justice Field commented on the "vagueness of thought on this subject in discussions of counsel and in opinions of courts."[2] More recent critical comment has at best only touched upon the fundamental problems.[3]

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* The quoted phrase in the title is taken from the court's statement in *Ex parte* Burr, 4 Fed. Cas. 791, 796 (No. 2186) (C.C.D.C. 1823):

> The object of an attachment of contempt is to punish the offender by fine and imprisonment. The object of the present proceeding is to purify the bar; and the utmost power which the court can exercise against the party, upon this proceeding, is to strike his name from the roll.

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1. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487, 493 (1928) (Cardozo, J.).

A few states try disciplinary cases before an ordinary civil jury. See Note, *Due Process of Law in State Disbarment Proceedings*, 37 Notre Dame Law. 346, 351 (1962). Although the fact-finding abilities of jurors are entitled to respect in disciplinary proceedings, see text p. 364 *infra*, there is no reason to suppose that jurors are equally well qualified to judge professional fitness. Even if the jury is strictly limited to fact issues, there is the danger that the publicity of a trial may both inhibit the filing of just complaints and encourage spiteful charges. One commentator has advocated the inclusion of lay members on bar disciplinary committees as a means to assuage popular suspicions. Bradway, *Moral Turpitude as the Criterion of Offenses That Justify Disbarment*, 24 Calif. L. Rev. 9, 25-26 (1935). This suggestion merits serious consideration, but like many other procedural questions connected with disciplinary proceedings, it lies beyond the scope of the present article, which deals with substantive standards for discipline. For an integrated discussion of disciplinary procedures, see generally 37 Notre Dame Law., *supra*, at 346. See also Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963).

2. *Ex parte* Wall, 107 U.S. 265, 302 (1883) (dissenting opinion).

3. Some illumination is given by the following comments: Dreyfus & Walker, *Grounds and Procedure for Discipline of Attorneys*, 18 Law. Guild Rev. 67 (1958); Note, *The Imposition of Disciplinary Measure for Misconduct of Attorneys*, 52 Colum.

The difficulties involved in imposing discipline for non-professional misconduct have been brought to the attention of the New Mexico bar by the decision of the New Mexico Supreme Court in *In re Morris*,[4] in which the court's new rules for disciplinary proceedings, adopting in substance the American Bar Association Model Rules,[5] were applied to an attorney convicted of involuntary

L. Rev. 1039 (1952); Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 Cornell L.Q. 489 (1958). Other comments have, however, merely added to the confusion: Bradway, *supra* note 1; Note, *Disciplining the Attorney for Extra-Professional Misconduct*, 12 Syracuse L. Rev. 487 (1961).

4. 74 N.M. 679, 397 P.2d 475 (1964).

5. 81 A.B.A. Rep. 482-90 (1956). The New Mexico Supreme Court appears to be one of the few state high courts that have adopted the ABA Model Rules. See also Okla. Stat. Ann. tit. 5, ch. 1, app. 1, art. VII (Supp. 1964).

The New Mexico rules were adopted by the supreme court on August 22, 1960, and became effective on November 1, 1960. The rules are codified at N.M. Stat. Ann. § 21-2-1(3) (Supp. 1965). Promulgation of the 1960 rules for discipline represents the first effort by the supreme court to provide a comprehensive guide to members of the bar since a 1941 act by the legislature authorized the court to make rules "to define and regulate the practice of law" within the state. N.M. Stat. Ann. § 18-1-1 (1953).

The supreme court, in the preamble to the 1960 rules, declared that it had the "inherent power . . . to determine what constitutes grounds for the discipline of lawyers . . . and to revoke the license of every lawyer whose unfitness to practice has been duly established. [The] court may not properly delegate such power or duty, or recognize the existence of either elsewhere than in itself." Although the supreme court has thus asserted its power and duty in the area of attorney discipline, it is not clear that the legislature by the 1941 act recognized such power to rest exclusively with the supreme court. Prior to 1941, the legislature had provided that the supreme court *might* disbar or suspend an attorney for his conviction "of felony or misdemeanor involving moral turpitude." N.M. Stat. Ann. § 18-1-17(1) (1953). In section 18-1-17, the legislature also enumerated other forms of misconduct—of a professional nature—for which the supreme court might suspend or disbar. Apparently the legislature was not satisfied that the discretionary language of section 18-1-17(1) could be trusted to effect the legislative policy, for additional statutes were enacted providing that the supreme court was compelled to disbar an attorney upon its receipt of a copy of the attorney's conviction of a felony or of a misdemeanor involving moral turpitude. N.M. Stat. Ann. §§ 18-1-18, -20 (1953). Section 18-1-20, which removes the discretionary effect of section 18-1-17(1), specifically requires disbarment if in accordance with section 18-1-17(1), *supra*, the attorney is convicted "of felony or misdemeanor involving moral turpitude." The choice of language in section 18-1-17(1) seems to emphasize the element of moral turpitude, whether or not the crime is a felony or a misdemeanor. The language in the other mandatory disbarment section, 18-1-18, stresses conviction of "a felony or of a misdemeanor involving moral turpitude," apparently requiring disbarment for conviction of any felony regardless of the element of moral turpitude. However, in view of the court's statement in the preamble to its 1960 rules, such nuances of language as do exist in the statutes are notable only as curiosities.

A review of New Mexico discipline cases reveals that the supreme court has on occasion relied on sections 18-1-17(1) and 18-1-20, in combination, to impose discipline. See, *e.g.*, *In re* McGarry, 68 N.M. 308, 316 P.2d 718 (1961). In *McGarry*, the misconduct was non-professional—conviction of giving fraudulent and worthless checks—and the conviction and bar commissioner's hearing occurred prior to adoption of the

manslaughter. Because the court's opinion in *Morris*, like those from other jurisdictions, overlooks the constitutional dimensions of the disciplinary problem, it provides a suitable base for an extended exploration. After considering the peculiar constitutional issue inherent in the *Morris* decision, this article will analyze the constitutional framework within which a scheme of discipline for non-professional misconduct must operate. Finally, in the context of disciplinary problems that have confronted the profession, the article will offer a new approach to the "noisome work."

1960 rules, though the case was decided after the new rules had gone into effect. No case seems ever to have mentioned section 18-1-18.

The court's concept of its inherent and exclusive power to discipline attorneys does not date merely from the 1941 legislation or the 1960 rules. In a decision involving professional misconduct, State *ex rel.* Wood v. Raynolds, 22 N.M. 1, 158 Pac. 413 (1916), the court asserted its inherent power to discipline in the absence of legislative action, and added that the legislature could not abridge that power, 22 N.M. at 5, 158 Pac. at 414. It was not until the legislature created the integrated bar in 1925 (Laws 1925, ch. 100), and sought by statute to invest the commissioners of the state bar with power to discipline attorneys (Laws 1925, ch. 100, § 6), that the supreme court was required to assert its exclusive power to disbar. In *In re* Royall, 33 N.M. 386, 268 Pac. 570 (1928), the court, in a one-page opinion citing *Raynolds*, *supra*, said that disbarment of an attorney is a strictly judicial function, 33 N.M. at 387, 268 Pac. at 570. The court in a later opinion, *In re* Gibson, 35 N.M. 550, 4 P.2d 643 (1931), amplified the *Royall* opinion and said that legislative acts conferring power to disbar on the bar commissioners violated the state constitution (N.M. Const. art. III, § 1) and were repugnant to the doctrine of separation of powers, 35 N.M. at 565, 4 P.2d at 651; the legislature could not usurp a judicial power. Considering this constitutional bar to legislative action, perhaps the 1941 act was merely a belated legislative surrender to the supreme court. In any event, the court's position is made clear by the preamble to the 1960 rules.

In some other states, where similar exclusive and inherent powers have been asserted by supreme courts, the courts have reached a degree of cooperation with the legislative policy without undue conflict. For an account of judicial and legislative interplay in other states, see Bradway, *supra* note 1, at 12-13.

In New Mexico, the legislature has created a statutory muddle through its act in 1909 (Laws 1909, ch. 53) creating a board of bar examiners and providing for the disbarment of attorneys; by its act in 1925 (Laws 1925, ch. 100) integrating the state bar, and by the 1941 act (Laws 1941, ch. 96) authorizing the supreme court to regulate the practice of law. Little care has been exercised by the legislature in specific repeal of conflicting statutes, and the compiler has been understandably reluctant to delete statutes that may conflict when the legislature has merely indicated that "all statutes in conflict are repealed." For example, the provisions of the 1925 act, permitting the commissioners of the state bar to disbar or suspend an attorney, declared void in the *Royall* opinion in 1928, were not repealed until 1963 (Laws 1963, ch. 81, omitting the disciplinary powers of the board of bar commissioners contained in former section 18-1-6). The legislature should repeal sections 18-1-17, 18-1-18, and 18-1-20, discussed *supra*, for those statutes are not compatible with the 1960 rules or with the 1941 act authorizing the supreme court to regulate the practice of law.

I

THE MORRIS CASE

A. A Decision for Ambiguity

Morris, an attorney, pleaded guilty and was convicted by a district court on a charge of involuntary manslaughter. The charge resulted from the killing of five members of a family which occurred during the commission by Morris of an unlawful act not amounting to a felony—driving a motor vehicle while under the influence of intoxicating liquor.[6] Morris' car had collided with the rear of the moving automobile in which the decedents were riding.[7] Morris was fined $500 and required to pay costs, but the district court, relying on the testimony of witnesses to Morris' good character, placed him on probation, suspended the fine, and deferred sentencing for twelve months.[8] The court's disposition of the case did not pass unnoticed. A popular New Mexico columnist, Will Harrison, charged the district court with displaying unusual leniency because of favoritism toward a fellow member of the bar. The district court responded to this criticism by citing Harrison for criminal contempt.[9]

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6. Brief for Relator, p. 2, *In re* Morris, 74 N.M. 679, 397 P.2d 475 (1964).

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds . . . 2nd. Involuntary: In the commission of an unlawful act not amounting to felony . . . . " N.M. Laws 1907, ch. 36, § 2. The New Mexico criminal code in effect when Morris' conduct occurred, including the foregoing section, was repealed by N.M. Laws 1963, ch. 303, § 30-1. The current involuntary manslaughter provision is codified at N.M. Stat. Ann. § 40A-2-3 (Repl. 1964). "It is unlawful and punishable . . . for any person who is under the influence of intoxicating liquor to drive . . . any vehicle within this state." N.M. Stat. Ann. § 64-22-2(a) (Repl. 1960). Because driving under the influence is punishable in the county jail rather than the penitentiary (§ 64-22-2(c)), and is not denominated a felony, it was classed as a misdemeanor under the former criminal code. N.M. Laws 1853-54, at 82. The present criminal code continues this classification for a first violation, but now because a sentence of no more than ninety days may be imposed. Sections 40A-1-6 (Repl. 1964) and 64-22-2(c) (Repl. 1960).

7. Brief for Relator, p. 2.

8. *Id.*, pp. 3-4. The trial court is given authority to suspend sentence or defer sentencing by N.M. Stat. Ann. § 40A-29-15 (Repl. 1964).

In April, 1965, the trial judge dismissed the manslaughter charges after permitting Morris to change his plea from guilty to innocent. The trial judge acted upon recommendation of the probation officer and the state's attorney who had prosecuted the manslaughter charge. Albuquerque Tribune, May 1, 1965, p. A-1, col. 2.

9. Harrison had commented on the Morris trial in at least six of his daily columns between November 12, 1963 and January 22, 1964. He had compared the sentence given Morris to the 1-to-5 year sentence for manslaughter imposed by another district judge on Elirio Trujillo, who Harrison described as a "humble Santa Fe driver."

Three prominent Santa Fe residents were killed when their car was struck by one driven by Trujillo. N.Y. Times, March 31, 1964, p. 17, cols. 1-6.

Harrison, in the November 12, 1963, column wrote:

> Naturally, the lawyers' handling of a lawyer in trouble—in this case a public prosecuting lawyer—has set off widespread comment.
>
> * * * *
>
> What the court does with the humble Santa Fe driver who killed the prominent people will go on record with what the court did with the prominent driver who killed the humble people.

In his column of January 22, 1964, Harrison said:

> There has been widespread comment about the no fine, no jail judgment of the court in handling a fellow lawyer.
>
> Among the most critical are lawyers themselves who fear that the profession is being made to appear as a favored group in court.

Albuquerque Tribune, Jan. 22, 1964, p. B-3, cols. 1-2. After publication of the January 22nd column, counsel for Morris filed affidavits with the same judge who had presided at Morris' criminal trial and requested that Harrison be cited for contempt because his comments "tended to bring the state's judicial system into contempt and disrepute." N.Y. Times, *supra*.

On March 27, 1964, Harrison was convicted of criminal contempt, the judge determining that because there had not been a final disposition of the *Morris* case (the sentence having been deferred), the court's motives were not open to journalistic speculation. Harrison was fined $250 and given a ten-day jail sentence, but the fine and sentence were suspended pending appeal to the New Mexico Supreme Court. N.Y. Times, *supra*. Relying on decisions of the United States Supreme Court, particularly Bridges v. California, 314 U.S. 252 (1941), and subsequent first amendment cases, the New Mexico Supreme Court reversed Harrison's contempt conviction on October 4, 1965. State v. Morris, 4 N.M. State Bar Bull. 151, 156 (1965). Specifically, the court concluded that the appellee had "failed to sustain its burden of proving beyond a reasonable doubt that there was a clear and present danger, or imminent peril, to the administration of justice" in Harrison's comments about Morris' manslaughter conviction. *Id.* at 155.

A short editorial in *The New York Times*, speaking of Harrison's conviction for contempt, said, "As for the case against a journalist who probed too deeply, and was rewarded for his efforts with a criminal contempt sentence, that smacks of some primitive concept of law west of the Pecos, as if the First Amendment did not exist." N.Y. Times, April 2, 1964, p. 32, cols. 1-2. The 1965 session of the New Mexico legislature enacted a bill providing for jury trial or disqualification of an interested judge in cases of "indirect" criminal contempt arising from "written publications made out of court." N.M. Stat. Ann. §§ 16-1-3.1, 21-5-8 (Supp. 1965). "The bill was introduced as a direct result of the contempt trial a year ago of Santa Fe Columnist Will Harrison." Albuquerque Tribune, March 24, 1965, p. B-3, cols. 1-2.

In fairness to Judge Paul Tackett, the district judge to whom reference has been made, it should be noted that he has subsequently deferred sentencing following the manslaughter conviction of Larry Ehlers, a plumber's apprentice, whose auto had collided with one driven by Henry Kiker, a prominent Albuquerque attorney and popular political leader. Mr. Kiker and his wife were killed in the accident. Albuquerque Journal, May 2, 1965, p. A-4, col. 1 (editorial).

In his column of November 12, 1963, Will Harrison observed that a "Santa Fe authority on disbarment" thought that Morris would not lose his license to practice law because state law providing for disbarment required conviction of a crime involving moral turpitude. Albuquerque Tribune, Nov. 12, 1963, p. B-10, cols. 1-2. Later developments, of course, proved the "authority" to have been mistaken; but in view of the language of the supreme court's new rules, to be discussed *infra*, the judgment of the "authority on disbarment" could not have been faulted.

Following Morris' conviction, a disciplinary proceeding was instituted against him before the New Mexico Board of Bar Commissioners. Relying solely on the transcript of the criminal action, the board reached the following conclusions:

> * * *
>
> 2. That the conduct of Respondent in the unlawful killing of a human being as charged in the amended information to which he pled guilty constitutes conduct on the part of Respondent contrary to justice or good morals warranting the imposition of discipline on the Respondent.
>
> 3. That for the Respondent to continue without interruption the practice of law after having been convicted of a crime of the character here involved is harmful to the profession and to the administration of justice.
>
> 4. That conduct such as that of the Respondent on the part of a lawyer and an officer of the court is detrimental to the administration of justice.[10]

The board recommended to the supreme court that Morris be suspended from the practice of law for an indefinite period. In a per curiam opinion, Justice Noble dissenting, the supreme court adopted the board's recommendation and ordered indefinite suspension with leave to apply for termination of the suspension after one year.[11]

The *Morris* opinion first quoted the applicable supreme court rules:

> * * *
>
> '2.04 *The commission of any act contrary to honesty, justice or good morals,* whether the act is committed in the course of his relations as an attorney or otherwise, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to discipline.
>
> '2.06 . . . . *Conviction of a crime involving moral turpitude shall be conclusive proof of the guilt of the respondent* . . . and a plea of guilty or a plea of *nolo contendere,* where followed by a judgment of conviction, shall be deemed to be a conviction within the meaning of this rule.'[12]

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10. Brief for Relator, pp. 4-5.

11. 74 N.M. at 685, 397 P.2d at 478-79.

12. *Id.* at 682, 397 P. 2d at 476-77. (Emphasis by the court.) N.M. Sup. Ct. R. 3.3-1.01 to 3-4.02, codified as N.M. Stat. Ann. § 21-2-1(3) (Supp. 1965) [hereinafter cited as N.M. Rules].

The opinion then posed two issues for decision: (1) Was Morris' "offense" contrary to honesty, justice, or good morals? (2) Was "the offense one involving moral turpitude so that conviction thereof is conclusive proof of guilt requiring disbarring or suspending from practice?"[13] The second issue was never reached by the court[14] because the court concluded that the basis for discipline is "any act contrary to honesty, justice, or good morals" and that this standard is not synonymous with moral turpitude. Later, however, the opinion reiterated the mandatory nature of discipline for conviction of a crime involving moral turpitude.[15]

The ground for the court's finding that Morris had committed an "act contrary to honesty, justice and good morals" is unclear. Did Morris commit such an "act" simply by driving while under the influence of alcohol? Perhaps. The court concluded that "the *conduct* of respondent constituted a serious breach by him of his oath to obey the laws . . . ."[16] But in the same sentence the court stressed the "commission of the offense," evidently the offense of manslaughter.[17] Thus, the opinion can be construed to hold that the deaths which resulted from Morris' conduct were the *sine qua non* of discipline. The remainder of the court's opinion does not resolve this disturbing ambiguity. Along with moral turpitude, the court rejected as touchstones for the imposition of discipline the more or less well-established lines between crimes constituting felonies and those amounting to misdemeanors, crimes *malum in se* and *crimes malum*

13. 74 N.M. at 682, 397 P.2d at 477.

14. "[M]oral turpitude is not a consideration." *Id.* at 683, 397 P.2d at 477.

15. 74 N.M. at 682, 397 P.2d at 477. This interpretation of New Mexico rule 3-2.06, quoted in text accompanying note 12 *supra*, does not appear justified by its language, which deals only with proof of facts. However, under prior statutes, disbarment was mandatory upon conviction of felony or misdemeanor involving moral turpitude. N.M. Stat. Ann. §§ 18-1-18, -20 (1953). The present status of these statutes is discussed in note 5 *supra*.

Absent a determination that Morris had been convicted of a crime involving moral turpitude, his conviction would not have been entitled to conclusive effect under rule 3-2.06, even with respect to facts essential to a finding of guilt. See text pp. 364-65 *infra*. However, Morris made no effort to relitigate the facts in the disciplinary proceedings.

16. *Id.* at 684, 379 P.2d at 478. (Emphasis added.)

17. *Ibid.* The court's concern with the nature of the crime committed by Morris is emphasized in a later passage:

> We must consider only the question of whether the plea of guilty of respondent to a crime of involuntary manslaughter, resulting from driving while under the influence of intoxicating liquor, a felony charge, supports the recommendation of suspension.

74 N.M. at 684, 379 P.2d at 478.

prohibitum, and conduct which is criminal and that which is not.[18] However, the rejection of the felony-misdemeanor distinction, which in the present case would tie discipline to the felonious deaths, must be taken with something more than a grain of salt. At two points in the opinion the fact that Morris was convicted of a felony is emphasized. Moreover, the argument made on Morris' behalf that because driving under the influence is a misdemeanor, "the untoward or unintended result of such an act—in this instance the death of five people—would not alter the nature of the act," was expressly rejected by the court.[19] Still, the opinion leaves unanswered the question whether the deaths—be they characterized as "act," "offense," or whatever—were crucial to the court's decision.

In his thoughtful dissenting opinion, Justice Noble probed this precise issue. In his judgment, "the result—not the cause—is the determining factor as . . . [the majority] view it" because

> the majority has not pointed out anything in the mere fact of driving while under the influence of intoxicating liquor which in and of itself evinces a depraved character or which renders a lawyer untrustworthy or a reflection upon the bar or the court, as an officer thereof, as distinguished from the violation of any other law of the road which unintentionally results in the death of another.[20]

Thus, under the majority's reasoning, "a lawyer [lacking good depth perception] who drove 65 m.p.h. in a posted 60-mile zone and who struck the rear of another car, with resulting death to an occupant thereof," would be subject to discipline, though discipline "for such an unfortunate result of a petty offense" would generally be found repugnant. Reasoning that the terms "moral turpitude" and "contrary to honesty, justice and good morals" are synonymous —a proposition amply supported by authority[21]—and that moral turpitude requires an act that "offends the generally accepted moral

18. 74 N.M. at 683, 397 P.2d at 477-78. The court attached "no significance" to the fact that Morris was serving as an assistant district attorney at the time he committed the offense. *Id.* at 684, 397 P.2d at 478. For a discussion of discipline of attorneys holding public office for which membership in the bar is a prerequisite, see note 220 *infra*.

19. 74 N.M. at 682-83, 379 P.2d at 477.

20. *Id.* at 688, 379 P.2d at 481.

21. See authorities cited by Justice Noble, 74 N.M. at 686, 379 P.2d at 479. See also Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920); *In re* Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); *In re* McNeese, 346 Mo. 425, 142 S.W.2d 33 (1940); *In re* Jacoby, 74 Ohio App. 147, 57 N.E.2d 932 (1943); State v. McCarthy, 255 Wis. 234, 38 N.W.2d 679 (1949). For the proposition that the terms are not synonymous, the majority cites no authority.

code of mankind," the dissenting justice concluded from precedent that the offense of driving under the influence "is not, in and of itself, one contrary to 'honesty, justice and good morals.' "[22]

B. *Equal Protection for Morris?*

Almost as an afterthought, the court in *Morris* dismissed as without merit the claim that discipline under the circumstances would violate the fourteenth amendment to the United States Constitution. Because that amendment guarantees to all persons "the equal protection of the laws," the constitutional objection surely deserved more extended treatment. Although obscured by ambiguous language, the deaths may have been decisive in the *Morris* case; for disciplinary purposes a line may have been drawn between the misdemeanor of driving under the influence and the felony of an unintentional killing while committing this misdemeanor. May such a line be drawn constitutionally?

That a state's standards for admission to the bar are subject to scrutiny under the equal protection clause was made plain by the United States Supreme Court in a case originating in New Mexico, *Schware v. Board of Bar Examiners*:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356.[23]

If the equal protection clause applies to standards for admission to the bar, it should apply with all the more rigor to criteria for expulsion from practice with its accompanying disgrace and deprivation of a hard-earned means of livelihood.[24]

An equal protection analysis concedes, for purposes of argument, that under a reasonable classification scheme Morris could have been suspended from the practice of law. The issue is whether the New Mexico Supreme Court could discipline Morris while allow-

22. See authorities cited, 74 N.M. at 686, 379 P.2d at 479.
23. 353 U.S. 252, 238-39 (1957).
24. *Cf.* Cohen v. Hurley, 366 U.S. 117, 145-48 (1961) (Black, J., dissenting).

ing those lawyers who are convicted only of driving under the influence of alcohol (at least in circumstances presenting substantial danger to human life) to continue practicing without interruption.[25] In their classic exposition of the equal protection clause, Tussman and Ten Broek succinctly state the general standard: "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law."[26]

The goals that may be achieved by imposing discipline for non-professional misconduct can easily be identified. In the first place, there is the regulatory objective of removing from the bar attorneys who are unfit to practice law. Indeed, in the landmark case of *Ex parte Wall*,[27] Mr. Justice Field, dissenting, maintained that professional fitness is the only proper criterion for dealing with an attorney's non-professional misconduct:

> It is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them.[28]

But another possible regulatory goal is indicated by Justice Field's reference to a New Jersey case in which counsel "on behalf of members of the bar, called upon the court to relieve them from the reproach of having the man attached to their profession, and from the disgrace of being compelled, in their professional duties, to have intercourse with one whom they would be ashamed to associate in private life."[29] And a third regulatory purpose is apparent in the assertion by the majority in *Ex parte Wall* that discipline can be imposed to protect the court from "scandal and contempt."[30] Apart from these regulatory purposes there is, of course, the possibility that an entire scheme of discipline for non-professional misconduct or the discipline imposed in a particular case will be designed in part

25. An analogous pattern of constitutional analysis can be found in the Supreme Court decisions passing upon state statutes that authorized the sterilization of feeble-minded persons and habitual criminals. While sterilization does not per se constitute denial of substantive due process, Buck v. Bell, 274 U.S. 200 (1927), the criteria for choosing those upon whom sterilization is to be performed may conflict with the equal protection clause, Skinner v. Oklahoma 316 U.S. 535 (1942).

26. Tussman & Ten Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 346 (1949).

27. 107 U.S. 265 (1883).

28. *Id.* at 307.

29. 107 U.S. at 307-08.

30. *Id.* at 288.

to "punish" the attorney in the narrow sense of seeking to effectuate "the traditional aims of punishment—retribution and deterrence."[31]

It will be argued later in this article that neither a desire to punish nor, in general, a fear of hostile public reaction may suffice constitutionally as the sole justification for imposing discipline for non-professional misconduct. If public hostility must be ignored, a classification between conduct that results in death and conduct that might have—but did not—result in death, cannot be justified by asserting either (1) that there would be so much public hostility toward a killer that he could not afford his clients adequate representation, or (2) that to allow the killer to practice would bring general disrepute to the courts and the legal profession. Apart from the constitutional objection to discipline as punishment, the language of the New Mexico disciplinary rules expressly disclaims any punitive purpose.[32] Thus, the classification suggested by the *Morris* opinion will be judged solely on its relationship to fitness to practice law.

Under the standard of fitness to practice, it might be contended that a distinction determined by the occurrence of death is justified by the simple fact that under New Mexico law manslaughter is denominated a "felony,"[33] while driving under the influence is a "misdemeanor."[34] But Morris was convicted under the former New Mexico criminal code that distinguished felonies and misdemeanors on the basis of the place of imprisonment, *i.e.*, the penitentiary or the county jail.[35] Such a distinction obviously lacks

31. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). See State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412, 417-18 (1963):

> Just as a decision to impose discipline involves 'to some extent a punishment,' which, however, is not the 'primary consideration' in disciplinary proceedings . . . so too does a decision to impose discipline interpose to some extent an element of deterrence to others. . . . [Citations omitted.]

While Mr. Chief Justice Warren has quite correctly observed in a recent decision that the concept of "punishment" comprehends the purpose of prevention as well as retribution and deterrence, United States v. Brown, 381 U.S. 437, 458 (1965), a satisfactory analysis of the constitutional position of attorneys demands separate consideration of these purposes. Therefore, unless otherwise indicated, the term "punishment" as used in this article is not intended to include the preventive objective of removing unfit attorneys from practice. This separate treatment of unfitness seems to coincide with the theory of the New Mexico disciplinary rules. See note 47 *infra* and accompanying text.

32. Preamble, N.M. Rules; see text at note 47 *infra*.

33. Under the former criminal code, manslaughter was punishable by imprisonment in the penitentiary. Thus, it constituted a felony. N.M. Laws 1853-54, at 82. The present criminal code classifies involuntary manslaughter as a felony of the fourth degree. N.M. Stat. Ann. § 40A-2-3(B) (Repl. 1964).

34. See note 6 *supra*.

35. See notes 6 & 33 *supra*.

significant relationship to fitness for the practice of law. Although a felony-misdemeanor line founded upon actual periods of imprisonment might conceivably be related to an attorney's capacity because of his absence from practice, the distinction drawn in the present New Mexico criminal code is determined rather by *authorized* periods of imprisonment—more or less than one year.[36] Thus, as occurred in *Morris*, a convicted felon may not be imprisoned for any period of time at all.[37] In testing a classification drawn for extra-criminal purposes, the United States Supreme Court has not deemed itself concluded by the fact that the classification embodies a traditional distinction in the criminal law. Instead, the Court has looked behind the distinction to measure the classification against the statutory purpose. In *Skinner v. Oklahoma*,[38] the Court held invalid an Oklahoma statute providing for the sterilization of habitual criminals that drew a line between those crimes classed as "larceny" and those classed as "embezzlement." Looking to the purpose of the sterilization law, the Court said:

> We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses.[39]

If discipline of Morris by virtue of the unintended killing cannot

36. N.M. Stat. Ann. § 40A-1-6 (Repl. 1964).

37. See note 8 *supra*.

38. 316 U.S. 535 (1942).

39. *Id.* at 542. The Court in *Skinner*, mindful of the far-reaching implications of a scheme of sterilization and the irreparable injury to the individual sterilized, held that a "strict scrutiny" of classifications is necessary. 316 U.S. at 541. While it is difficult to compare sterilization with expulsion from the practice of law, it cannot be denied that suspension or disbarment results in serious and permanent injury. As the New Mexico Supreme Court asserted in State *ex rel.* Wood v. Raynolds 22 N.M. 1, 158 Pac. 413 (1916), "To disbar or suspend . . . [an attorney] from the practice of his profession means the ruination of his professional career, and casts upon his name and standing a stigma which can never be effaced." *Id.* at 12, 158 Pac. at 417.

In *Skinner* it was further observed that for purposes of criminal punishment, Oklahoma treated larceny and embezzlement alike. 316 U.S. at 542. Although *Morris* can be distinguished from *Skinner* in that involuntary manslaughter and drunken driving are not subject to the same criminal penalties, a difference in penalties would appear to be significant for extra-criminal regulation only where there is some difference between the kinds of conduct penalized that would justify the inference that the greater penalty was imposed for the purpose of additional prevention. Such an inference is not justified in the case of involuntary manslaughter resulting from drunken driving. See note 45 *infra*.

be justified by the felony label,[40] it must measure up on its own merits to the test of reasonable relationship to fitness to practice law. Two possible contentions seem worthy of consideration. First, it may be argued that one who has unintentionally killed while driving under the influence has indicated the sort of irresponsibility that is inconsistent with the conscientious discharge of a public trust. Postponing for the present consideration of the offense of driving under the influence in relation to professional competence,[41] it should at least be apparent that such conduct not resulting in death may often indicate an equal degree of irresponsibility. Thus, on this basis, a classification determined by unintended death is seriously "under-inclusive."[42] The vice of such an under-inclusive classification in a case like *Morris* is that it permits a court to avoid the hard question whether drunken driving alone is a kind of misconduct warranting discipline. Avoidance is accomplished by imposing discipline only in those well-publicized situations where the general horror created by the fatalities is likely to avert criticism. The general problem was perceived with notable clarity by Mr. Justice Jackson, concurring in *Railway Express Agency v. New York*,[43] when he said:

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of the regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better

40. In determining that a criminal defendant had been entitled to counsel, the Court of Appeals for the Fifth Circuit has looked behind the line drawn by Mississippi between felonies and misdemeanors. The court emphasized the severe punishment authorized—and imposed—for the commission of the misdemeanor for which the defendant was convicted upon his plea of guilty. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

41. See text p. 357 *infra*.

42. Tussman & Ten Broek, *supra* note 26, at 348.

43. 336 U.S. 106 (1949).

measure to assure that laws will be just than to require that laws be equal in operation.[44]

To determine that the "driving under the influence-involuntary manslaughter" distinction may be constitutionally defective for purposes of discipline is not necessarily to conclude that the classification is unreasonable for purposes of punishment. Although the classification is under-inclusive in terms of deterrence, prevention, and rehabilitation,[45] there is still a substantial body of thought

44. *Id.* at 112-13. Administrative problems may on occasion justify an under-inclusive classification. Tussman & Ten Broek, *supra* note 26, at 349. Thus, Morris could probably not have asserted an immunity from discipline grounded on a claim that some attorneys who have driven under the influence but have not been convicted or even apprehended would remain undisciplined. However, administrative considerations would not appear to justify a failure to discipline all attorneys who have been apprehended and convicted of drunken driving in similar risk-creating circumstances.

45. See Comment, *The Fallacy and Fortuity of Motor Vehicle Homicide*, 41 Neb. L. Rev. 793 (1962). *Cf.* Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1105-06 (1952):

> Civilized social thought regards the penal law as the ultimate weapon for diminishing the incidence of major injuries to individuals and institutions, with only such concessions to retaliatory passions as are practically necessary for the system to survive. In short, while invocation of a penal sanction necessarily depends on past behavior, the object is control of harmful conduct in the future.
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> From the preventive point of view, the harmfulness of conduct rests upon its tendency to cause the injuries to be prevented far more than on its actual results; results, indeed, have meaning only insofar as they may indicate or dramatize the tendencies involved. Reckless driving is no more than reckless driving if there is a casualty and no less if by good fortune nothing should occur. Actual consequences may, of course, arouse resentments that have bearing on the proper sanction. But if the criminality of conduct is to turn on the result, it rests upon fortuitous considerations unrelated to the major purpose to be served by declaration that behavior is a crime.

Macaulay, A Penal Code Prepared by the Indian Law Commissioners 64-65 n.M. (1837), quoted in Paulsen & Kadish, Criminal Law and Its Processes 612-13 (1962):

> 'To punish as a murderer every man who, while committing a heinous offense, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. . . . If the punishment for stealing from a person be too light, let it be increased, and let the increase fall alike on all the offenders. Surely the worst mode of increasing the punishment of an offense is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged.'

Expressly recognizing the fortuitous nature of deaths caused by the misdemeanor of drunken driving, the New York Court of Appeals construed that state's misdemeanor-manslaughter statute to be inapplicable to this misdemeanor. People v. Grieco, 266 N.Y. 48, 193 N.E. 634 (1934). The ALI Model Penal Code has entirely eliminated the misdemeanor-manslaughter doctrine. Model Penal Code § 201.3, comment 1 (Tent. Draft No. 9, 1959). In recent years, the United States Supreme Court has shown an increased willingness to impose constitutional limitations on the substance of state criminal law. See Packer, *Making the Punishment Fit the Crime*, 77

Harv. L. Rev. 1071 (1964). Thus, it would not be surprising if the Court should begin to require some measure of equal protection in setting sanctions for various criminal offenses. Indeed, at least one state court has already taken this step. Rucker v. State, 342 S.W.2d 325 (Tex. Crim. App. 1961).

A comment by Professor Goodhart in the *Law Quarterly Review* [80 L.Q. Rev. 20 (1964)] does undertake to justify on the ground, *inter alia*, of deterrence the imposition of additional punishment for dangerous driving resulting in death. Goodhart first quotes a passage from Sir James Stephen which asserts that when two persons engage in the same negligent conduct but only the one whose conduct causes death is criminally punished, " 'the effect in the way of preventing a repetition of the offense is much the same as if both were punished.' " 3 Stephen, History of the Criminal Law of England 311 (1883). Even if Stephen were not talking about *negligent* conduct, his view must be regarded as unsound. Would the deterrent effect of punishing only every fiftieth thief who is apprehended be "much the same" as punishing each of the thieves? See Macaulay, *supra*. On the issue of deterrence, Goodhart then argues by reference to the law of attempts under which unsuccessful criminal conduct is not punished as severely as that which succeeds. The analogy is not very persuasive. If a person is determined to commit a robbery, is it likely that he will be deterred by being told that success will result in twice as great a punishment as failure? Deterrence in the case of such intentional crimes would seem to result almost entirely from the penalty provided for commission of the substantive offense. See Model Penal Code § 5.05, comment 2 (Tent. Draft No. 10, 1960). The additional increment in punishment for success can only be explained as retribution. See Waite, The Prevention of Repeated Crime 8-9 (1943). When the element of retribution is eliminated and attention is focused on prevention and rehabilitation, attempts and substantive crimes should be punished alike. Model Penal Code § 5.05, *supra*.

Only in those jurisdictions where abandonment is not a defense to a prosecution for attempt does the additional punishment for success tend toward deterrence. The offender is encouraged to desist in order to avoid the more serious punishment. 41 Neb. L. Rev., *supra*, at 814. A comparable deterrent effect could be achieved in a dangerous driving case only when the driving is reckless, *i.e.*, done with a conscious awareness of a risk to human life. Without this awareness, the use of a lesser punishment for dangerous driving alone to provide a *locus penitentiae* would be unsuccessful; a more severe penalty for killing can have no impact on the person unless he is aware of the risk created. But even conceding that when there is consciousness of risk to human life the threat of a more severe penalty if risk becomes reality may, to some extent, serve to stop the reckless driver, it is difficult to believe that it would match the deterrent effect of a general increase in punishment for the lesser offense. Thus, Professor Goodhart's discussion of deterrence does not avoid the underlying problem of weighing the desirability of retribution against equality in individual prevention and rehabilitation.

By reference to the facts of an unreported English case, Goodhart suggests two justifications other than deterrence for the imposition of more severe punishment when dangerous driving has resulted in death or serious injury. A young woman, driving dangerously, had collided with another automobile, "killing two women passengers and seriously injuring a man." Goodhart goes on to report:

> She was fined £50 and banned from driving for five years. The husband of one of the dead women commented: 'As far as I'm concerned these two were very cheap lives. It costs you more if you kill a pheasant in Suffolk.' The man who had been injured in the crash added: 'I'm crippled for life. My hip now has a plastic joint and I'll never be able to walk properly again.' The young woman said: 'I think I was lucky. I quite expected to go to prison.'

The reactions of the husband and the injured man probably reflect only a desire for retribution. But if there is any problem concerning compensation, surely this should be treated apart from the issue of the severity of criminal punishment. The young woman's

holding that for purposes of avoiding self-help, reinforcing societal inhibitions, and providing an outlet for feelings of aggression, retribution is a legitimate aim of criminal punishment.[46] But retribution is wholly out of place in a scheme whose express purpose is "the protection of the public, the profession, and the administration of justice, and not the punishment of the person disciplined."[47]

The second possible justification for a disciplinary classification based upon an unintended killing while driving under the influence is that the attorney will be so emotionally distraught by the deaths that he will be unable to practice effectively. But in the absence of psychiatric evidence substantiating what on its face appears highly doubtful—that a disabling mental state invariably follows such a homicide—this classification appears "over-inclusive."[48] While the dragnet approach of over-inclusive treatment may on occasion be defended under emergency situations that preclude individual determinations in terms of regulatory purpose,[49] no such administrative necessity would seem to prevent psychiatric examination of individual attorneys whose mental competence is in question. Indeed, individual examination of attorneys is contemplated in New Mexico in cases of narcotics addiction and alcoholism.[50]

Assuming that a distinction based solely on the results of Morris' conduct would violate the equal protection clause of the fourteenth amendment, it is not entirely clear that this issue could have been utilized to attack the *Morris* decision had it been appealed to the United States Supreme Court. One problem is whether the equal protection issue was adequately presented to the New Mexico Supreme Court. The briefs filed on behalf of Morris do not mention the equal protection clause, but counsel for Morris raised a substantive due process argument under the fourteenth amendment,[51]

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reaction is hardly surprising in a cultural atmosphere where retributive punishment has long been both accepted and acceptable. Indeed, the public at large has even been conditioned to look with equanimity on criminal punishment that bears no relationship to *any* recognized objective of the criminal law. No doubt a good many laymen, believing that "ignorance of the law is no excuse," would be surprised by the Supreme Court's decision in Lambert v. California, 355 U.S. 225 (1957). If public expectations are truly thoughtless, a society should be able to survive their disappointment.

46. See, *e.g.*, Alexander & Staub, The Criminal, the Judge, and the Public 214-23 (1956).

47. Preamble, N.M. Rules.

48. Tussman & Ten Broek, *supra* note 26, at 351-53.

49. *Id.* at 352. See Hirabayashi v. United States, 320 U.S. 81 (1943).

50. N.M. Rule 3-4.02. No comparable provision appears in the American Bar Association Model Rules.

51. Brief for Respondent, pp. 26-30, *In re* Morris, 74 N.M. 679, 397 P.2d 475 (1964).

and the problem of inequality was pointed out to the court, albeit not under the constitutional heading of equal protection.[52] Moreover, it might truthfully be argued that the equal protection defect only came to light upon examination of the New Mexico court's opinion. Another problem lies in the ambiguity of the court's opinion. It might have been contended before the Supreme Court that if discipline imposed for driving under the influence is conceded to be constitutional, the decision should be sustained on that ground. However, if the Court had determined that the ground actually relied upon by the New Mexico court involved a denial of equal protection, the Supreme Court would probably not have looked behind that ground to another unstated—but constitutional —basis. The decision would have been reversed and remanded for further proceedings.[53] The New Mexico Supreme Court would then have been compelled to decide whether driving under the influence was, without reference to the consequences of that conduct, sufficient ground for imposing discipline.[54] If the United States Supreme Court could not have determined from the New Mexico court's opinion whether the decision rested on the unconstitutional classification, it might have vacated the judgment of the New Mexico court and remanded for clarification of the opinion.[55]

A more basic question is whether the equal protection clause protects against inequality by judicial interpretation. Although no cases seem to be directly in point, the broad language of *Yick Wo v. Hopkins*[56] and *Shelley v. Kraemer*[57] surely indicates the existence of such protection as a general proposition. The decision in *Shelley* has been subjected to considerable criticism, but the criticism has been directed to the fact that the discrimination in that case was by private individuals rather than by a state agency. The notion that judicial action is state action is clearly valid when the unacceptable classification is drawn by the court itself. Thus, Morris could have presented a strong constitutional argument had he been able to show instances in which the New Mexico Supreme Court had refused to discipline attorneys for drunk driving convictions; or perhaps, coupling administrative with judicial action (treating the bar commissioners as an arm of the court), if he had shown a refusal by the commissioners to recom-

52. *Id.*, p. 16.
53. See Konigsberg v. State Bar of California, 353 U.S. 252 (1957).
54. See Konigsberg v. State Bar of California, 366 U.S. 36 (1961).
55. *Cf.* Minnesota v. National Tea Co., 309 U.S. 551 (1940).
56. 118 U.S. 356 (1886).
57. 334 U.S. 1 (1948).

mend such discipline.[58] But the record in *Morris* contained no such evidence. Hence the claim of unreasonable classification would have been limited to the face of the New Mexico court's opinion, and a determination that the mere prospect of unequal treatment justified reversal would have been necessary. Fortunately, such a determination in the *Morris* case need not have carried the implication that any judicial decision containing an ill-considered dictum is vulnerable to constitutional attack. Although it is a fundamental assumption of the common law adjudicatory process that the law will work itself pure on a case-by-case basis, it could well have been concluded that in *Morris* the New Mexico court was acting *not* as a participant in the common-law process but as a legislative body, either pursuant to authority granted by the New Mexico legislature or by virtue of its self-proclaimed and jealously guarded "inherent power . . . to determine what constitutes grounds for the discipline of lawyers."[59] For better or worse, most courts of last resort are probably still influenced by the tradition that in common law cases the giving of guidance for the future is merely incidental to the function of deciding the particular cases before them.[60] This influence must account in part for the manner in which the prospective force of dicta is usually discounted. Although the distinction may only be one of degree, dicta in the opinion of a court construing rules that it has itself formulated and that are obviously intended to have prospective effect may reasonably be accorded greater weight. Additionally, it may be crucial that the New Mexico court seems to have reasoned through the equality issue, though failing to recognize its full implications.[61] The conclusion that convicted drunk drivers whose conduct has not led to such tragic consequences are not subject to discipline is therefore a particularly reliable kind of dictum in terms of prospective application, *i.e.*, a dictum that represents a step in the process of reasoning to the court's actual holding.

Because the opinion of the New Mexico Supreme Court in the *Morris* case suggests a failure to perceive the necessity of providing

58. A showing that the bar committee on ethics had failed to initiate proceedings against attorneys convicted only of driving under the influence might have been sufficient to raise the constitutional issue. See note 44 *supra*, and *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1954) (claim of bar committee discrimination in charging tax conviction lacked factual support). *Cf.* Note, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103 (1961).

59. Preamble, N.M. Rules. See note 5 *supra*.

60. See Selinger, *Beneficiaries of Sales Warranties in New York: Some Questions and Comments on New Legal Doctrine*, 4 B.C. Ind. & Com. L. Rev. 309 (1963).

61. See text accompanying note 19 *supra*.

equal protection *within* the legal profession, it is not surprising that the court omitted consideration of the conditions under which lawyers who engage in non-professional misconduct may, as a class, be subjected to treatment different from that accorded other citizens who engage in similar misconduct. This problem is discussed in the next section of this article.

II

CONSTITUTIONAL LIMITATIONS ON THE IMPOSITION OF DISCIPLINE

A. Equal Protection for Lawyers: Special Punishment and Special Regulation

Discipline of a lawyer for non-professional misconduct cannot constitutionally be justified as punishment. The basis for this proposition rests, as did the objection to the possible classification in *Morris*, on the equal protection clause of the fourteenth amendment. The argument may be stated as follows: Because a state's interest in deterrence or retribution with regard to non-professional misconduct is precisely the same whether the conduct is done by a lawyer or by another, lawyers cannot be singled out for a special punishment, *i.e.*, expulsion from their calling and means of livelihood.[62] A state may not give effect to a general punitive objective by dealing only with lawyers any more than it may act to prevent fires in wooden laundry buildings by denying licenses only to resident Chinese aliens,[63] or may conserve its fish by refusing to license only those fishermen who are resident Japanese aliens.[64] Some judicial opinions imposing discipline on attorneys for non-professional misconduct seem to rely, at least in part, on the assumption that double punishment is necessary when an attorney has violated the criminal law. Thus, in the *Morris* case, the court stresses Morris' "breach of his oath to obey the laws."[65] Other opinions assume that an attorney

62. *Cf.* Cohen v. Hurley, 366 U.S. 117, 135-37, 148-49 (1961) (Black, J., dissenting).

63. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

64. Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

65. 74 N.M. at 684, 397 P.2d at 478. *Accord*, *In re* Margolis, 269 Pa. 206, 112 Atl. 478 (1921); *In re* Smith, 133 Wash. 145, 233 Pac. 288 (1925). *Contra*, Bartos v. District Court, 19 F.2d 722 (8th Cir. 1927). See also *In re* Van Arsdale, 44 N.J. 318, 208 A.2d 801 (1965) (attorney's training and knowledge require special awareness of tax obligations).

Some courts have justified double punishment of attorneys by reference to Canon 32, ABA Canons of Professional Ethics, which provides that "[the lawyer] must . . . observe and advise his client to observe the statute law . . . ." See, *e.g.*, Cleveland Bar

in his non-professional activities may be required to observe a degree of rectitude superior to that expected of other citizens.[66] Both assumptions do violence to the principle of equal protection. A court "has no regulatory power over the private life of members of the Bar."[67] In the area of non-professional misconduct, to uncover a punitive purpose in imposing discipline is to reveal an unconstitutional imposition.[68]

Logically, then, it is necessary to see when, for constitutional purposes, it may be established that a punitive objective underlies disciplinary proceedings for non-professional misconduct. In this respect it is useful to consider the pattern of analysis that has been followed by the United States Supreme Court in testing against the constitutional bar on *ex post facto* laws[69] legislation that excludes persons from various callings. Until the last term of Court,[70] a similar pattern was followed in testing such legislation against the bill of attainder prohibition.[71] The classic interpretation of the prohibition against *ex post facto* laws is that of the Court in *Calder v. Bull.*[72] *Ex post facto* laws include "every law that makes an action done before the passing of the law, and which was innocent when

Ass'n v. Bilinski, 177 Ohio St. 43, 201 N.E.2d 878 (1964); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963).

66. See, *e.g.*, *In re* Genser, 15 N.J. 600, 105 A.2d 829 (1954); *In re* Chartoff, 16 App. Div. 2d 277, 227 N.Y.S.2d 578 (1962). *But see* Bartos v. District Court, *supra* note 65; *In re* Renehan, 19 N.M. 640, 145 Pac. 111 (1914).

67. Bartos v. District Court, 19 F.2d 722, 727 (8th Cir. 1927).

68. With regard to *professional* misconduct—whether or not constituting a criminal offense apart from the professional aspect—the situation is quite different. Focusing on the deterrent aim of punishment, it may well be that for legal institutions to function effectively certain conduct on the part of lawyers must be discouraged though no objection exists to similar conduct by other citizens. Thus, what would otherwise be considered good, hard-hitting competition may properly be condemned as "ambulance chasing" when carried on by attorneys. Cohen v. Hurley, 366 U.S. 117 (1961); *cf.* Semler v. Board of Dental Examiners, 294 U.S. 608 (1935). Insofar as the extent of punishment for general criminal offenses represents a balance between the need to deter and fundamental considerations of fairness, when a crime also constitutes professional misconduct the legal profession's "special opportunities for deleterious conduct," Cohen v. Hurley, *supra*, at 126-27, may well justify imposing additional punishment on the lawyer to assure a more profound deterrent effect.

Under a governmental scheme of separation of powers, it would seem that an inherent judicial power to punish, distinguished from the power to control professional fitness, could extend only to professional misconduct.

69. The *ex post facto* prohibition applies to Congress and to the states. U.S. Const. art. I, §§ 9, 10.

70. See United States v. Brown, 381 U.S. 437 (1965). For a discussion of the *Brown* decision, see text pp. 331-34 *infra*.

71. The bill of attainder prohibition applies to Congress and to the states. U.S. Const. art. I, §§ 9, 10.

72. 3 U.S. (3 Dall.) 385 (1798).

done, criminal, and punishes such action," and "every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."[73] The prohibition

73. *Id.* at 390.

If the conclusion that an intention to punish renders discipline for non-professional misconduct unconstitutional per se is incorrect, it might still be contended that a finding of punitive intent in *Morris* would place that decision in conflict with the *ex post facto* prohibition. Punitive intent would be found to exist in *Morris* if the deaths were crucial to discipline; see note 86 *infra*. The retroactivity problem is raised by the New Mexico Supreme Court's determination that discipline could be imposed for criminal conduct not involving moral turpitude. Of course, one cannot be certain that a different result would have been reached had the court deemed itself bound by the traditional standard. Yet, the court's decision not to pursue the question of moral turpitude, despite its position that a finding of criminal turpitude would automatically require discipline, indicates some doubts regarding the nature of Morris' conduct. Thus, it is at least possible that the imposition of discipline can be traced to the court's determination that turpitude was not required. Was this conclusion merely a matter of interpreting the enacted rules for disciplinary proceedings, or did it amount to the *ad hoc* formulation of an entirely new rule that was then applied retroactively?

As the court in *Morris* points out, the key provision of the enacted rules is that referring to "the commission of any act contrary to honesty, justice or good morals"; the court's decision is squarely placed on that provision and not on the nebulous catchall provisions of rule 3-2.02. However, the court's conclusion that these terms signify a broader concept than "moral turpitude" stands unsupported by authority or reasoning, and Justice Noble's argument that the terms are synonymous is quite persuasive. See note 21 *supra* and accompanying text. It may, therefore, be reasonably inferred that the draftsmen of the comparable ABA rule intended to limit discipline, at least for the most part, to conduct involving turpitude. True, New Mexico rule 3-2.05 provides that "the fact that an act is *malum prohibitum* rather than *malum in se* shall not, in and of itself, constitute a defense to a charge of misconduct." But because the operative word is "act" and not "crime," rule 3-2.05 can be reconciled with the foregoing interpretation by construing it to apply only to *professional* misconduct, *e.g.*, "ambulance chasing" or advertising.

That the prohibition against *ex post facto* laws might be invoked to bar the retrospective application of a judicially created sanction is at least suggested by Mr. Justice Black's repudiation of the theory that membership in the bar is "subject to withdrawal for the 'breach' of whatever vague and indefinite 'duties' the courts and other lawyers may see fit to impose on a case-by-case basis." Cohen v. Hurley, 366 U.S. 144, 147 (1961) (dissenting opinion). See also *In re* Sawyer, 360 U.S. 622, 646 (1959) (Black, J., dissenting). On principle, the *ex post facto* objection to an additional punishment for the prior crime in *Morris* would *not* be that Morris was denied fair warning concerning sanctions that could be imposed if he committed manslaughter. Aside from Morris' position that the deaths were inadvertent and hence could not be deterred by the threat of punishment, even as it might relate to the conscious disregard of a known risk of danger to human life resulting from his driving under the influence, the claim would be inadmissible. A fair-warning objection would imply that the criminal law should allow citizens an informed choice either to refrain from criminal or potentially criminal conduct or to suffer or risk suffering the penalty, from which follows the proposition that the prisons are full of fine upstanding folk who have simply decided to exercise their freedom of choice. Obviously, it matters to society because it matters to the victims whether one chooses to refrain from committing assaults or chooses to go to jail. The real objection to the imposition of additional punishment for a past crime is that the purpose of deterring criminal conduct cannot be served by sanctions pro-

against bills of attainder can best be understood as one aspect of the constitutional principle requiring separation of governmental powers: "A bill of attainder is a legislative act which inflicts punishment without a judicial trial."[74]

In the landmark case of *Ex parte Garland*,[75] decided in 1866 with a companion case, *Cummings v. Missouri*,[76] the Supreme Court was called upon to apply the *ex post facto* and bill of attainder prohibitions to the exclusion of an attorney from practice for nonprofessional misconduct. By an 1865 act of Congress, no attorney was permitted to practice in the federal courts without taking an oath that he had not done specified acts to further the Confederacy. Garland, a pre-war member of the Supreme Court bar and later a confederate legislator, was seeking to continue his practice before the Court without taking the oath. Relying in part on its reasoning in *Cummings*, the Court granted Garland's petition. In *Garland* and *Cummings*, one question for the Court was whether exclusion from the practice of law, or from the ministry, or from other professional activity,[77] could ever be considered a punishment. Rejecting the argument that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all," the Court held that "disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator or guardian, may also, and often has been, imposed as punishment."[78] Thus, while the permissibility of characterizing other governmental actions as punishment may still be the subject of considerable dispute,[79] the possibility of such characterization was early accepted in the case of expulsion from the practice of law.[80]

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mulgated after the conduct has occurred. The additional punishment may deter future criminal conduct, but for this purpose application of the punishment to past criminality is unnecessary.

74. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

75. 71 U.S. (4 Wall.) 333 (1866).

76. 71 U.S. (4 Wall.) 277 (1866).

77. Included was a prohibition on "*acting as a professor or teacher in any educational institution, or in any common or other school.*" *Id.* at 280. (Emphasis by the Court.)

78. 71 U.S. at 320. *Accord*, United States v. Lovett, 328 U.S. 303, 315-18 (1946).

79. A prolonged controversy has occurred within the Court whether deportation may ever be regarded as punishment. The majority opinions in the following cases held that deportation can never be so regarded: Marcello v. Bonds, 349 U.S. 302, 319 (1955) (Douglas, J., dissenting); Galvan v. Press, 347 U.S. 522, 532 (1954) (Black, J., dissenting); Haraisades v. Shaughnessy, 342 U.S. 580, 598 (1952) (Douglas, J., dissenting).

80. See Cohen v. Hurley, 366 U.S. 117, 145-48 (1961) (dissenting opinion).

The Court in *Garland* and *Cummings* did not, however, invoke the prohibitions against *ex post facto* laws and bills of attainder merely because the governmental action could be utilized as punishment. Additionally, these opinions would appear to require that a punitive purpose be established. As Mr. Justice Frankfurter put the matter in a later *ex post facto* case,

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.[81]

Thus, the usual process for detecting punitive purpose has been to look to the relationship between the governmental action and some non-punitive regulatory purpose. It is not enough that the action merely purport to be regulatory.[82] In *Garland* and *Cummings* the Court found a punitive purpose behind the form of establishing qualifications for various professions.

To avoid a finding of punitive intent, some substantial relationship between the action and the regulatory purpose is required. In *Garland* and *Cummings*, this determination turned on whether the specified acts of rebellion bore a substantial relationship to fitness to engage in the professions concerned. In the Supreme Court's view they did not; and the Court's exposition of this lack of relationship deserves quotation at some length.

> Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to

81. DeVeau v. Braisted, 363 U.S. 144, 160 (1960). *Accord*, Flemming v. Nestor, 363 U.S. 603, 616 n.9 (1960).

82. Trop v. Dulles, 356 U.S. 86, 94-95 (1958):

> [T]he Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it 'technically is not a penal law.' How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! . . . Doubtless even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute.

In *Trop* the Court applied the eighth amendment proscription against cruel and unusual punishment to invalidate a statute providing for the denaturalization of persons convicted of deserting from the armed forces in time of war.

> mean 'any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success.' It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counselor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether the parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.[83]

The Supreme Court, in the *ex post facto* and bill of attainder areas, has not, however, been willing to characterize as punitive a legislative standard for the exclusion of persons from a profession merely because the standard may serve to exclude some persons who are fit to continue in practice along with those who are unfit. In *Ex parte Wall*, Mr. Justice Field in his dissenting opinion asserted that "a conviction of a felony or a misdemeanor involving moral turpitude implies the absence of qualities which fit one for an office of trust, where the rights and property of others are concerned."[84] Subsequently, in *Hawker v. New York*,[85] the Supreme

83. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1866).
84. *Ex parte* Wall, 107 U.S. 265, 307 (1883).
85. 170 U.S. 189 (1898).

Court was presented with an *ex post facto* challenge to a New York statute making unlawful the practice of medicine by anyone who had been convicted of a felony. Nothwithstanding a dissenting opinion by Mr. Justice Harlan in which the sweeping nature of the statutory standard was emphasized,[86] a majority of the Court found a sufficient relationship between a felony conviction[87] and lack of the good character necessary for the practice of medicine:

> But if a State may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. . . . Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conductive to the desired result. These are questions for the legislature to determine. . . .
>
> It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience. . . .
>
> That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be

86. The statute in question . . . takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practice medicine. The offender may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his fellow-men, and be recognized as one capable, by his skill as a physician, of doing great good. . . .
170 U.S. at 204 (dissenting opinion).

87. Dr. Hawker had been convicted of the crime of abortion before the disciplinary statute was enacted. Because abortion would constitute professional misconduct by a physician, a finding of punitive purpose would not per se render discipline constitutionally invalid. However, if such a purpose had been found the discipline would have violated the *ex post facto* prohibition.

> deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. . . .
>
> It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist.[88]

On the issue of attributing a punitive purpose to the legislature, it is not difficult to reconcile the decision in *Hawker* with those in *Garland* and *Cummings*; innocent over-generalization is a common human failing from which legislators are not immune. In *Hawker*, unlike *Garland* or *Cummings*, it could fairly have been said that a characteristic which a legislature might properly regulate—unfitness for professional practice—was possessed by at least a substantial percentage, if not a majority, of those individuals falling within the legislative classification. Therefore, it would have been highly speculative to conclude from the over-generalization alone that the legislative action resulted from a punitive objective[89]

88. 170 U.S. at 195-97. Compare DeVeau v. Braisted, 363 U.S. 144, 158-60 (1960).

89. The quest for punitive purpose in the *ex post facto* and bill of attainder cases has not always been ended by a finding of a substantial relationship between the governmental action and a regulatory purpose. At least when the regulatory purpose would be a creature of judicial reasoning lacking foundation in any demonstrable legislative intent, the Court may be willing to invalidate the governmental action by relying upon empirical proof showing that the imposition of discipline was motivated by a desire to punish. Flemming v. Nestor, 363 U.S. 603 (1960), upheld an act of Congress terminating the payment of old-age benefits to aliens deported on certain grounds, including (in Nestor's case) one-time membership in the Communist Party and the commission of certain criminal offenses. Aliens deported for arguably less blameworthy reasons continued to receive benefits. Answering the claim that the history and terms of the legislation suggested a punitive purpose, Mr. Justice Harlan, writing for the majority in *Nestor*, relied upon a supposed purpose of the social security system to raise national purchasing power—a purpose that is not effectuated by payments abroad. Justice Harlan's position was that "judicial inquiries into congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." 363 U.S. at 617. For Justice Harlan the legislative history was too "meagre" to overcome the presumption of constitutionality. In the view of Mr. Justice Brennan, one of four dissenting Justices in *Nestor*, the majority's regulatory justification was based on "implication and vague conjecture." 363 U.S. at 649. Justice Brennan's analysis of the kinds of conduct to which termination of benefits was and was not attached revealed distinctions consistent only with a punitive design. Taking note of the "emotional climate" surround-

Notwithstanding the decision in *Hawker*, the dissenting Justices in subsequent *ex post facto* and bill of attainder cases echoed Justice Harlan's complaint against legislative standards that operate "without hearing, and without any investigation as to the character or capacity of the person involved."[90] In the *ex post facto* deportation cases, disagreement with the majority holding that deportation could in no event be considered punishment led the dissenters to explore the problem of adequate relationship to regulatory purpose. Mr. Justice Douglas, in *Harisiades v. Shaughnessy*,[91] protested automatic deportation for one-time members of the Communist Party in these words:

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ing Communism in which Congress acted in the early 1950's, as the Court in *Cummings v. Missouri* took note of the climate of the Reconstruction era, 363 U.S. at 637 n.3, Justice Brennan found a congressional purpose to punish. 363 U.S. at 639-40. Compare Trop v. Dulles, 356 U.S. 86, 105 (1958) (Brennan, J., dissenting).

The search for actual punitive purpose gained significant support in a more recent Supreme Court decision, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). In this case, Mr. Justice Goldberg, writing the opinion of the Court, sustained a procedural due process attack on an act of Congress providing for administrative denaturalization of persons who left the country to avoid military service in time of war or national emergency. The conclusion that the enactment was punitive in intent was based primarily on a careful examination of the legislative history of the statute and its forerunners. (Compare United States v. Lovett, 328 U.S. 303 (1946).) Justice Goldberg took no notice of the contention by Mr. Justice Stewart, dissenting in *Mendoza-Martinez*, and relying expressly on the majority's approach in *Nestor*, 372 U.S. at 209, that

> Congress could reasonably have concluded that the existence of . . . a group, who voluntarily and demonstrably put aside their United States citizenship 'for the duration' could have an extremely adverse effect upon the morale and thus the war effort not only of the armed forces, but of the millions enlisted in the defense of their nation on the civilian front.

372 U.S. at 210. (For Justice Brennan's response, see note 184 *infra* and accompanying text.)

As a general proposition, Justice Harlan was correct in asserting that inquiry into legislative motives is a "dubious affair," and it must be conceded that a similar inquiry into judicial motives is an infinitely more dubious affair. Yet, it is not inconceivable that, on occasion, sufficient evidence of an actual punitive motive could be marshaled to invalidate a particular judicial imposition of discipline, despite the existence of a substantial relationship to fitness for the practice of law. *Cf.* Cohen v. Hurley, 366 U.S. 117, 148 n.37 (1961) (Black, J., dissenting). In the *Morris* case, however, the adverse critical response to the mild treatment accorded Morris following his criminal conviction would hardly have sufficed to defeat the imposition of discipline had the New Mexico court asserted a reliance solely on Morris' conduct—conduct that did bear a substantial relationship to fitness for the practice of law. See text p. 357 *infra*. On the other hand, if the fact that deaths resulted from Morris' misconduct were the reason for the imposition of discipline, the lack of a substantial relationship to fitness would itself have established punitive intent, and no inquiry into judicial motivation would have been necessary.

90. Hawker v. New York, 170 U.S. 189, 204 (1898) (dissenting opinion).

91. 342 U.S. 580 (1952).

> [Congress] has ordered these aliens deported not for what they are but for what they once were. Perhaps a hearing would show that they continue to be people dangerous and hostile to us. But the principle of forgiveness and the doctrine of redemption are too deep in our philosophy to admit that there is no return for those who have once erred.[92]

This critical view of deportation of one-time Communists was amplified by Justice Douglas in *Galvan v. Press*.[93] And in *Marcello v. Bonds*,[94] in which the Court upheld automatic deportation for a single violation of the Marihuana Tax Act, Justice Douglas forcefully stated the case for individualized treatment as essential to a finding of adequate relationship to regulatory purpose.

> I would think . . . that, if Congress today passed a law making any alien who had ever violated any traffic law in this country deportable, the law would be *ex post facto*. . . . [T]he bare fact of a traffic violation would not reasonably be regarded as demonstrating that such a person was presently an undesirable resident. It would relate solely to an historic incident. . . . The present Act has the same vice. The alien is not deported after a hearing and on a finding by the authorities that he is undesirable for continued residence here. It is the bare past violation of the narcotic laws that is sufficient and conclusive, however isolated or insignificant such violation may have been. . . . The case is, therefore, different from the earlier deportation cases where the past acts were mere counters in weighing present fitness.
>
> In the absence of a rational connection between the imposition of the penalty of deportation and the *present* desirability of the alien as a resident in this country, the conclusion is inescapable that the Act merely adds a new punishment for a past offense.[95]

As the foregoing opinions clearly demonstrate, to conclude that

92. *Id.* at 601 (dissenting opinion).

93. 347 U.S. 522, 534 (1954) (dissenting opinion):

> It is common knowledge that though some of the leading Socialists of Asia once were Communists, they repudiated the Marxist creed when they experienced its ugly operations, and today are the most effective opponents the Communists know. So far as the present record shows, Galvan may be such a man. Or he may be merely one who transgressed and then returned to a more orthodox political faith. The record is wholly silent about Galvan's present political activities.

Compare Garner v. Board of Public Works, 341 U.S. 716, 729-30 (1951) (dissenting opinions of Burton and Douglas, JJ.).

94. 349 U.S. 302 (1955).

95. *Id.* at 320-21 (dissenting opinion).

a given standard for the expulsion of persons from a calling for non-professional misconduct cannot be attacked as an imposition of special punishment is not at all to be certain that the standard will reach only those who are unfit. The limitations placed by the Constitution on the use of broad standards for regulatory discipline will be considered in the next subsection of this article. However, before leaving the present topic of equal protection for lawyers, one premise that has been implicit in the preceding discussion should be made explicit: The equal protection clause should not be deemed to preclude special *preventive* treatment of lawyers who have engaged in non-professional misconduct. Suppose, for example, that an attorney has repeatedly engaged in the practice of drawing checks on insufficient funds. Finally, after writing a particularly large bad check, the attorney is prosecuted, convicted, and sentenced to prison. Having been automatically suspended from practice upon imprisonment, the attorney petitions for readmission following his release.[96] While many factors may have bearing on the question of the attorney's fitness, certainly the repeated instances of misconduct cut strongly in favor of denying his petition for readmission.[97] Yet, it may be correctly asserted that continuing his suspension after completion of the criminal sentence would amount to isolating the attorney from the mass of non-lawyer bad check artists for special preventive treatment.[98] It may further be argued that it would be improper to continue the suspension because, by serving the criminal sentence imposed by the court, the attorney has already been subjected to that degree of preventive treatment deemed necessary by established public policy, and, according to that policy, has been rehabilitated.[99] These arguments against special preventive treatment for attorneys are not unimpressive, and can only be met by demon-

96. Automatic suspension from practice upon a sentence of imprisonment for more than a minimum term, *e.g.*, thirty days, appears justified as a relatively harmless way to forestall public reaction adverse to the legal profession. See note 193 *infra* and accompanying text.

97. See note 240 *infra*.

98. A prohibition against such special preventive treatment would, of course, bar any disciplinary action for non-professional criminality. *Cf.* Note, 15 Hastings L.J. 339, 347 n.62 (1964):

> An example of this [amendatory] legislation is found in Cal. Bus. & Prof. Code § 6775(a). Previously, disciplinary action could be taken against a licensee 'who has been convicted of a felony.' As a result of the committee's recommendation this language was changed by amendment in 1957 to one 'who has been convicted of a felony arising from or in connection with the practice of engineering. . . .' Cal. Stat. 1957, ch. 1708, § 2, p. 3082.

99. See Dayton Bar Ass'n v. Prear, 175 Ohio. St. 543, 196 N.E.2d 773, 777 (1964) (dissenting opinion) (*semble*).

strating that because of his professional activity an attorney who has not in fact been rehabilitated by the processes of the criminal law presents greater social dangers than unreformed criminals engaged in other callings; the greater dangers would then justify continuation of suspension to achieve "greater preventive certainty."[100] Without attempting to enumerate the manifold positions of professional responsibility that an attorney must assume, one can easily be persuaded that the role of the attorney is indeed one of unusual sensitivity, one reason being that factors of trust, expertise, and judgment can make the attorney's wrongdoing particularly difficult to discover.[101]

B. *Limitations on Legislative Generalization in the Regulation of Fitness*

One approach under the Constitution to invalidating a sweeping legislative generalization was suggested earlier in connection with the *Morris* case:[102] The classification may be attacked as over-inclusive under the equal protection clause of the fourteenth amendment. This approach was illustrated in a series of federal cases in California and Arizona that did not reach the Supreme Court. For many years it was the practice in certain counties in California and Arizona for school boards to segregate all children of Mexican ancestry because many of them had English language difficulties that might retard their education. Nevertheless, there was evidence

100. Cohen v. Hurley, 366 U.S. 117, 126-27 (1961).

In re Renehan, 19 N.M. 640, 669, 145 Pac. 111, 122 (1914):

> This disbarment is not for the purpose of punishing an attorney, but it is for the purpose of protecting the public against a man who, by reason of his confidential relations with his clients, has the power to impose upon them and to defraud them in a way and to an extent which the ordinary citizen could not do. . . .

However, the need for greater preventive certainty does not necessarily justify giving the attorney short shrift procedurally. Cohen v. Hurley, *supra*, at 131-50 (Black, J., dissenting).

101. In other callings requiring public trust, state legislatures have authorized denial or denial of renewal of licenses to applicants who have been convicted of a felony or, in some instances, convicted of any crime. *E.g.*, N.M. Stat. Ann. (Repl. 1961), § 67-15-56(D) (collection agent; fraud, embezzlement, any crime involving moral turpitude); § 67-23-17(A) (public accountant; any felony); § 67-24-29(F) (real estate broker; forgery, embezzlement, obtaining money under false pretenses, conspiracy to defraud); see also Cal. Ins. Code § 704.5 (insurer; felony involving fraudulent act); N.Y. Banking Law § 369-6 (licensed check cashers; felony or any crime); N.Y. Ins. Law § 123-9 (insurance adjuster; felony or any crime involving fraudulent or dishonest practices).

102. See text p. 314 *supra*.

that the scholastic record of the so-called Spanish-speaking pupils was at times superior, both individually and collectively, to that of their so-called English-speaking counterparts. This over-inclusive classification was challenged and struck down in *Gonzales v. Sheely*[103] and *Mendez v. Westminster School Dist.*[104] In the *Gonzales* case the court held that

> such separate allocation [of students with language difficulties] can be lawfully made only after credible examination by the appropriate school authorities of each child whose capacity to learn is under consideration, and the determination of such segregation must be based wholly upon indiscriminate foreign language impediments in the individual child, regardless of his ethnic traits or ancestry.[105]

Another approach to the problem of legislative generalization may be derived from a line of Supreme Court decisions generated by the proliferation of loyalty programs for public employees resulting from the cold war against Communism. Presented with state legislation involving teachers,[106] city employees,[107] and candidates for public office,[108] the Court developed the proposition that under the due process clause of the fourteenth amendment membership in a subversive organization, including the Communist Party, could be made the basis for exclusion only when the employee had been aware of the organization's subversive purposes.[109] These

103. 96 F. Supp. 1004 (D. Ariz. 1951).

104. 64 F. Supp. 544 (S.D. Cal. 1946).

105. 96 F. Supp. at 1009.

106. Wieman v. Updegraff, 344 U.S. 183 (1952); *cf.* Adler v. Board of Education, 342 U.S. 485 (1952).

107. Garner v. Board of Public Works, 341 U.S. 716 (1951).

108. Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951).

109. See cases cited notes 106, 107 & 108 *supra*. See also Cramp v. Board of Public Instruction, 368 U.S. 278, 285-87 (1961). *Cf.* American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (belief in governmental overthrow under hypothetical circumstances insufficient to deny labor union office). *But see* Galvan v. Press, 347 U.S. 522 (1954) (stressing the plenary power of Congress over deportation).

One commentator early and persuasively argued against the premise of the public employment cases that a "knowing" member of a subversive organization could be assumed to sympathize with the organization's objectives. The assumption, according to the commentator, was contrary to "human nature." Countryman, *Loyalty Tests for Lawyers*, 13 Law. Guild Rev. 149, 150 (1953). Subsequent cases strongly suggest that in the public employment area the Court would today extend the earlier line of decisions by holding that even a "knowing" member of the Communist Party could not be disqualified from public employment unless he were shown to have been an "active" member. See Aptheker v. Secretary of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961).

cases might be viewed as having tacitly overruled *Hawker v. New York*.[110] Assuming that a classification limited to "knowing" membership in the Communist Party passes the test in *Ex parte Garland*[111] and *Cummings v. Missouri*[112] as having some substantial relationship to fitness for public employment,[113] would not the broader classification, including "innocent" membership, have been validated by *Hawker* (if *Hawker* possessed any continued vitality)? One can hardly be convinced that the addition of "innocent members" rendered the number of members who were unfit for public employment insubstantial, at least when compared with the proportion of unfit doctors within the "felon-doctor" classification in *Hawker*. Yet, *Hawker* could be reconciled with the public employee cases by considering a legislature's capacity to develop more refined, though still general, standards for professional fitness. In drafting standards for public employment loyalty legislation focusing on membership in subversive organizations, the elimination of some members who are *fit* for public employment by the device of requiring knowing membership is both obvious and easy. By contrast, the task of the legislature in redrafting the felony generalization in *Hawker* to liberate even some of the doctors who are fit for practice might be regarded as not quite so obvious or easy be-

110. 170 U.S. 189 (1898), discussed at text pp. 322-25 *supra*.

111. 71 U.S. (4 Wall.) 333 (1866), discussed at text pp. 320-22 *supra*.

112. 71 U.S. (4 Wall.) 277 (1866), discussed at text pp. 320-22 *supra*.

113. Special punishment of public employees is no more defensible constitutionally than special punishment of attorneys. Therefore, the Court should not, perhaps, have taken for granted that any political belief or activity of a disloyal nature bears a substantial relationship to common forms of public employment. Only in the context of a dissent grounded on the first amendment was this assumption challenged:

> The fitness of a subway conductor for his job depends on his health, his promptness, his record for reliability, not on his politics or philosophy of life. The fitness of a teacher for her job turns on her devotion to that priesthood, her education, and her performance in the library, in the laboratory, and the classroom, not on her political beliefs.

Lerner v. Casey, 357 U.S. 399, 415 (1958) (Douglas, J., dissenting).

In 1956, the Court did hold that invocation by a professor at a city college of the privilege against self-incrimination before a congressional committee did not justify, of itself, the inference that he had either committed a crime connected with his conduct as a professor, or was guilty of perjury. Slochower v. Board of Education, 350 U.S. 551 (1956), as construed in Nelson v. County of Los Angeles, 362 U.S. 1 (1960). The Court emphasized, *inter alia*, that the questions concerning past Communist Party membership that Slochower had refused to answer were not directed to his college functions. 350 U.S. at 558.

The problem of finding a substantial relationship between general subversive activity and fitness for a particular calling also exists in the area of attorney misconduct. See, *e.g.*, *In re* Smith, 133 Wash. 145, 233 Pac. 288 (1925) (incitement to anarchy). See also text pp. 339-44 *infra*.

cause of the number of personal factors, which come quickly to mind, involved in making such a determination of fitness.[114] Viewed in this light, the command of the public employment cases is not that the legislature may not generalize in determining fitness, but rather that the legislature must do a reasonably good job of it.[115]

Two recent decisions of the Supreme Court have, nevertheless, cast serious doubt on the authority of *Hawker*, and thereby on the permissibility of legislative generalizations about unfitness, however competently drawn. In the first of these cases, *Aptheker v. Secretary of State*,[116] the Court held unconstitutional under the due process clause of the fifth amendment an act of Congress that in effect required denial of a passport to any member of the Communist Party. In the second case, *United States v. Brown*,[117] the Court held invalid as a bill of attainder an act of Congress that made it a criminal offense for a member of the Communist Party to serve as an officer of a labor union. In *Aptheker*, the Court held the "membership" generalization defective in terms of the regulatory objective of national security not only because the category was not limited by requirements of knowledge of, and commitment to, the Party's aims, but also because it failed to take account of the purpose for which the individual passport was sought and the "security sensitivity" of the area desired to be visited.[118] A requirement that such individual factors be considered in each case obviously cripples any substantial effort at legislative generalization. Similarly, in *Brown*, along with redefining the concept of "punishment" for bill of attainder purposes to include the objective of prevention (in *Brown*, the prevention of political strikes), the Court said the following:

> The command of the Bill of Attainder Clause—that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the

114. See Mr. Justice Harlan's remarks, quoted note 86 *supra*. Yet, some restriction of the felony category may reasonably be required of the legislature. See text at note 149 *infra*.

115. See American Communications Ass'n v. Douds, 339 U.S. 382 (1950), and note 109 *supra*.

116. 378 U.S. 500 (1964).

117. 381 U.S. 437 (1965).

118. 378 U.S. at 511-12. The Court was also disturbed by the anomalous application of the statute that would prevent a Communist from traveling to Europe or Asia for some innocent purpose, such as reading "rare manuscripts in the Bodleian Library of Oxford University," while Communists bent on criminal activity could travel throughout the Western Hemisphere, no passport being required for such travel. *Ibid.*

> task of deciding who possesses those characteristics—does not mean that a legislature cannot use a shorthand phrase to summarize the characteristics with which it is concerned. . . .[119]
>
> * * * *
>
> [But] the designation of Communists as those persons likely to cause political strikes is not the substitution of a semantically equivalent phrase. . . .[120]

Aptheker and *Brown* cannot reasonably be reconciled with *Hawker*, and *Hawker* should therefore be regarded as overruled.[121] Two possible distinctions between the cases may be rejected as without substantial merit:

(1) *The legislation in Hawker does not inflict "its deprivation upon the members of a political group thought to present a threat to the national security."*[122] This distinction may be meaningful in terms of the historical background of bills of attainder,[123] but the

119. 381 U.S. at 454 n.29.

120. *Id.* at 455.

121. In Rehman v. California, 85 Sup. Ct. 8 (Douglas, Circuit Justice), *cert. denied*, 379 U.S. 930 (1964), Mr. Justice Douglas denied an application for bail pending an appeal in the state courts from a conviction for crimes arising from the defendant-physician's *professional* practice. With reference to his earlier order removing as a condition for bail the surrender of the defendant's license to practice medicine, Justice Douglas said:

> A doctor might well go to prison for a misdeed in connection with his practice and yet not automatically lose his right to practice medicine. Deprivation of a professional license should require a hearing, since broader issues than those in the criminal case are involved, *e.g.*, whether the misdeed is of a character to make it unsafe and improvident for the State to entrust a medical license to that person.

85 Sup. Ct. at 9. On the issue of additional punishment for professional misconduct, compare note 68 *supra*.

122. United States v. Brown, 381 U.S. 437, 453 (1965). The quotation in the text represents one distinction drawn by the Court between the legislation in *Brown* and the "conflict of interest" provision of the Banking Act of 1933:

> 'No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve at the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.'

48 Stat. 162, 194, as amended, 49 Stat. 709, 12 U.S.C. § 78 (1964), quoted 381 U.S. at 453.

123. 381 U.S. at 453. However, the Court in *Brown* had earlier expressly rejected "a narrow historical reading" of the bill of attainder prohibition. *Id.* at 447.

concept of due process relied upon in *Aptheker* is not so burdened by history. And it is difficult to see why preventive generalization would be more acceptable in the case of reasonably apprehended danger to a given physician's patients than in the case of reasonably apprehended danger to the security of the nation.[124]

(2) *The legislation in Hawker does not present those who are fit in terms of regulatory purpose with the necessity of giving up a constitutionally protected right to avoid the established generalization*; "*freedom of association is itself guaranteed in the First Amendment*,"[125] *but no such guaranty protects the commission of felonies.* A distinction drawn on the basis of the secondary effect of a particular generalization on a constitutionally protected right is thus suggested by language in *Aptheker*, and the line would provide a convenient stopping place for those who would find unacceptable a broad-gauge requirement of individualized regulatory treatment. Yet, such a distinction would not be faithful to the Court's central thesis in either *Aptheker* or *Brown*. In *Aptheker*, principal emphasis is placed on the direct interference with the right to travel.[126] Moreover, in an aside, the Court seems particularly concerned with another secondary effect of the passport restriction, the effect on an individual's right to work—the very right asserted by Dr. Hawker.[127] It is even more difficult to read *Brown* as limited to generalizations involving secondary effects on protected rights. To do so is to treat as little more than makeweight the Court's extended discussion of the separation of governmental powers im-

124. See Hirabayashi v. United States, 320 U.S. 81 (1943). "[T]he right of self-preservation [is] 'the ultimate value of any society.'" Barenblatt v. United States, 360 U.S. 109, 128 (1959).

125. Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964). The government had contended in *Aptheker* that a member of the Communist Party "could recapture his freedom to travel by simply in good faith abandoning his membership in the organization." *Ibid.*

126. 378 U.S. at 505-07.

> 'The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.'

Id. at 505-06, quoting Kent v. Dulles, 357 U.S. 116, 125-26 (1958).

127. 378 U.S. at 512 n.11. Both appellants in *Aptheker* desired to write, publish, and lecture about their observations abroad. Appellant Aptheker also desired to fulfill invitations to lecture abroad. *Id.* at 511 n.10.

plicit in the bill of attainder prohibition.[128] In *Brown*, the best hint of the Court's thinking regarding a limitation on the necessity for individualized determinations lies in its unwillingness to extend the principle to conflict-of-interest legislation.[129] This unwillingness cannot be explained on the ground that conflict-of-interest legislation has no secondary effect on constitutionally protected rights.[130]

The decisions in *Aptheker* and *Brown* do appear to yield a stopping place, but it is one lying far beyond the legislation in *Hawker*. Apart from an emergency situation precluding individualized treatment,[131] a legislature may generalize if, and only if, it can be reasonably assumed that the generalization will serve as well as any known individualized treatment to identify those persons who fall within the permissible regulatory purpose. For example, in *Dent v. West Virginia*,[132] the Supreme Court upheld state legislation initiating a licensing arrangement for physicians that permitted only doctors who had graduated from a medical school, practiced for ten years, or passed a special examination to continue in practice—notwithstanding the likelihood that some doctors then practicing without such qualifications may have been fit.[133] Similarly, generalizations in conflict-of-interest legislation may be permissible until it can be shown that methods of individualized determination would produce more reliable estimates of the danger involved in particular cases than broad judgments made by the legislature from its "general knowledge of human psychology."[134]

More important, perhaps, than the ultimate reach of *Aptheker*

128. 381 U.S. at 441-46. See also note 119 *supra* and accompanying text.

129. 381 U.S. at 453-56. See note 122 *supra* and accompanying text.

130. For example, the conflict-of-interest provision of the Banking Act, quoted note 122 *supra*, may have the secondary effect of discouraging employment with an underwriting corporation, employment that should be entitled to as much constitutional protection as membership in the Communist Party.

131. See Hirabayashi v. United States, 320 U.S. 81 (1943).

132. 129 U.S. 114 (1889).

133. *Cf.* 1 Davis, Administrative Law 497 (1958):

> The way to determine the quality of a bar candidate's training and understanding is not by hearing but by examination, for testimony and cross-examination are intrinsically ill suited to the inquiry.

As techniques for more individualized treatment become available, they should be utilized in place of broader generalizations.

134. United States v. Brown, 381 U.S. 437, 454 (1965). The only exception that has been made under the "escape clause" in the Banking Act conflict-of-interest provision, note 122 *supra*, relates to dealers in securities issued by the federal government or by various federally-created entities. 12 C.F.R. § 218.2 (1963).

If conflict-of-interest legislation is to be effective, it must prevent the conflict from arising. Therefore, a scheme of individualized treatment could not draw upon evidence of the individual's past record in resisting the particular temptation.

and *Brown* is the manner in which these decisions may continue to permit the use of *qualified* generalizations: generalizations that are not conclusive, but do express a legislative judgment concerning the probative value of a given fact with regard to a particular regulatory purpose. The permissibility of such qualified generalization would answer to some extent the complaints of the dissenting Justices in *Aptheker* and *Brown* that the majority holdings make effective regulation impossible because of problems of proof.[135] A legislature may identify even such a broadly generalized element as membership in the Communist Party or the commission of a felony as "one factor" to be considered in making an individualized determination.[136] Beyond this, under the Court's recent decision in *United States v. Gainey*,[137] certain facts may apparently be made prima facie evidence that the individual concerned falls within the legislature's regulatory purpose.[138] Such a qualified generalization would be subject to both the requirements of substantial relationship[139] and competent draftsmanship.[140] It should be required not only that the mathematical probabilities generated by the classification standing alone meet the necessary degree of persuasion,[141]

135. United States v. Brown, 381 U.S. 437, 472 (1965) (White, J., dissenting); Aptheker v. Secretary of State, 378 U.S. 500, 527 (1964) (Clark, J., dissenting).

136. In *Aptheker*, *supra* note 135, the Court refers with approval to Executive Order No. 9835, under which "membership in a Communist organization is not considered conclusive but only as one factor to be weighed in determining the loyalty of an applicant or employee." 378 U.S. at 513.

137. 380 U.S. 63 (1965).

138. The term "prima facie evidence" is here used to denote evidence that standing alone will adequately support but not compel a finding in terms of regulatory purpose. In *Gainey*, *supra* note 137, the Court upheld two statutory provisions authorizing a jury to infer guilt of the substantive offenses of possessing or operating an illegal still from the fact of the defendant's unexplained presence at the site of the still.

139. See Konigsberg v. State Bar of California, 353 U.S. 252, 267 (1957).

140. See Adler v. Board of Education, 342 U.S. 485 (1952). *But see* Barsky v. Board of Regents, 347 U.S. 442 (1954).

141. The Court in United States v. Gainey, 380 U.S. 63 (1965), see note 138 *supra*, emphasized the fact that innocent persons are "rarely" found in the presence of an illegal still. 380 U.S. at 67-68. Of course, the jury in a criminal case must be persuaded beyond a reasonable doubt. That there may be some leeway, however, between the probative value of a statutory "qualified generalization" and the degree of persuasion required is suggested by language in Tot v. United States, 319 U.S. 463, 468 (1943), and by the Court's decision in Mobile, J. & K. C. R.R. v. Turnipseed, 219 U.S. 35 (1910).

New Mexico disciplinary rule 3-1.12 requires clear and convincing proof of an attorney's misconduct. The comparable ABA model rule requires proof only by a preponderance of the evidence. In the absence of a prior criminal conviction, most courts have concluded that clear and convincing proof is the appropriate standard. See, *e.g.*, *In re* Wilson, 76 Ariz. 49, 258 P.2d 433 (1953); State *ex rel.* Joseph v. Mannix, 13 Ore. 329, 288 Pac. 507 (1930); *In re* Chernoff, 344 Pa. 527, 26 A.2d 335 (1942). The higher

but that it be reasonably evident under the circumstances of the particular case that other significant evidence was not readily available to those asserting the individual's unfitness.[142] With these limitations, a qualified generalization may probably be given the further effect of shifting the burden of production, or even the burden of persuasion, on the issue of unfitness.[143]

With reference to the discipline of attorneys for non-professional misconduct, one implication from the foregoing constitutional development is clear. A state may not *automatically* impose discipline for the commission of any felony,[144] or for any crime involving moral

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standard of proof seems justified by the severe consequences that may follow a finding of misconduct. *Cf.* Konigsberg v. State Bar of California, 353 U.S. 252, 257-58 (1957):

> While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

142. *Cf.* Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 N.E.2d 754 (1945). Compare Sargent v. Massachusetts Acc. Co., 307 Mass. 246, 29 N.E.2d 825 (1940). In United States v. Gainey, *supra* note 141, the Court construed the statutory provisions to permit the judge to take the case from the jury even when the defendant's presence at the illegal still was unexplained. Whatever might be the merits of a bar committee's claim of a lack of investigatory resources in disciplinary cases generally (compare the majority and dissenting opinions in Konigsberg v. State Bar of California, 366 U.S. 36, 41-42, 71 n.32 (1961)), and particularly in proceedings involving professional misconduct, see Note, 70 Yale L.J. 288, 293-94 (1960), there is no reason why the bar committee should be able to rely on a prior judgment of conviction without producing a readily available transcript of the testimony offered during the criminal prosecution.

143. The Court in Aptheker v. Secretary of State, 378 U.S. 500 (1964), emphasized that the passport legislation established an "*irrebuttable* presumption." 378 U.S. at 511. (Emphasis added.) Even in a criminal case, when the prosecution has introduced statutorily specified evidence of sufficient probative value, the burden of persuasion may be shifted to the defendant. Yee Hem v. United States, 268 U.S. 178 (1925). Notwithstanding the possible secondary effect on free speech, when a bar committee has introduced evidence of sufficient probative value tending to show unlawful advocacy of governmental overthrow, the burden of persuasion on this issue may be shifted to an applicant for admission to the bar. Konigsberg v. State Bar of California, *supra* note 142, at 80-81 (Brennan, J., dissenting).

144. See, *e.g.*, N.M. Stat. Ann. § 18-1-18 (1953); N.Y. Judiciary Law § 90(4); Utah Code Ann. § 78-51-37 (1953); Va. Code Ann. § 54-73 (Repl. 1958). Mississippi and Alabama provide that disbarment is mandatory upon conviction of any felony, except manslaughter. Miss. Code Ann. § 8667 (1956); Ala. Code tit. 46, § 49 (1958). See also the former rule of the United States District Court for the Southern District of New York, quoted in *In re* Isserman, 345 U.S. 286, 289 n.8 (1953).

In United States v. Brown, 381 U.S. 437 (1965), the Court's discussion of bills of attainder and the separation of powers emphasizes the manner in which legislative action may be characterized by passion rather than by detachment. 381 U.S. at 442-46. Nevertheless, a more fundamental objection to trial by legislation may be the absence of "an adversary proceeding accompanied by traditional judicial safeguards." Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 350 (1962). Viewed in this light, the bill of attainder

turpitude,[145] or for engaging in any other form of non-professional misconduct.[146] Only an individualized determination that the attorney is unfit for practice will be constitutionally sufficient. Furthermore, even as a qualified generalization, a standard that comprehends all felonies appears defectively broad.[147] Too many crimes have nothing to do with an attorney's professional fitness,[148] and the legislature—or a court with power to formulate general rules for discipline—may readily eliminate such irrelevant crimes by limiting its generalization to those crimes that involve, for example, "intentional dishonesty for purposes of personal gain."[149] "The attribute of common honesty is one that . . . every attorney should possess."[150]

The qualified generalization most commonly adopted to justify discipline for non-professional misconduct refers to crimes involving moral turpitude.[151] Occasionally, the term "moral turpitude" has apparently been qualified by the requirement that the turpitude must "tend to show unfitness for practice."[152] So qualified, the stand-

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prohibition would be applicable to generalizations embodied in rules of court as well as in legislation. See Countryman, *supra* note 109, at 151 n.20. On the technical question of raising the prohibition with regard to the rules of a United States district court, see 28 U.S.C. § 2072 (1964) (federal rules enabling act), and Fed. R. Civ. P. 83. No reason is apparent why the due process analysis in Aptheker v. Secretary of State, 378 U.S. 500 (1964), would not apply with full force to rules of court.

145. See, *e.g.*, Cal. Bus. & Prof. Code §§ 6101, 6102; Md. Code Ann. art. 10, § 16 (1957).

146. In contrast to the conflict-of-interest area, see note 134 *supra* and accompanying text, individualized treatment *is* useful in determining whether a given act of non-professional misconduct should be regarded as demonstrating an attorney's unfitness to practice. See text pp. 357-60 *infra*.

147. Typical statutes permit the court to suspend or disbar the attorney upon his conviction of any felony or any misdemeanor involving moral turpitude. See, *e.g.*, Ariz. Rev. Stat. Ann. § 32-267 (1956); Minn. Stat. Ann. § 481.15 (1958); Wash. Rev. Code Ann. § 2.48.220 (1961). See also *In re* Welansky, 319 Mass. 205, 65 N.E.2d 202 (1946).

148. See text p. 353 *infra*.

149. *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768, 771 (1954).

150. *In re* Wells, 293 Ky. 201, 169 S.W.2d 720, 732 (1943).

Of course, qualified generalizations may also comprehend non-criminal dishonesty (*e.g.*, "conduct involving willful deceit or fraud"), and some kinds of criminal misconduct not involving dishonesty (*e.g.*, "a criminal offense showing professional unfitness"). See N.C. Gen. Stat. § 84-28(2) (Repl. 1965), in which the quoted phrases appear.

151. Some statutes and rules impose the moral turpitude limitation with respect to all crimes. *E.g.*, D.C. Code Ann. §§ 11-2102, -2103 (Supp. III, 1964); Rule 4, U.S. Dist. Ct. So. & E. Dist. of N.Y. (McKinney N.Y. Ct. Rules 1965). See also *In re* Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); N.M. Rule 2.04, quoted at note 12 *supra*. Most courts have used the "honesty, justice and good morals" language synonymously with the term "moral turpitude." See cases cited note 21 *supra*. Other statutes limit the moral turpitude requirement to misdemeanors. See statutes cited note 147 *supra*.

152. See Bartos v. District Court, 19 F.2d 722, 726 (8th Cir. 1927) (*semble*).

ard is unobjectionable. However, more often courts have seized upon the ethical connotation of the phrase "moral turpitude" as an invitation to pass censorious personal judgment,[153] or to assume a role as the oracle of community morality.[154] The irrelevance of an individual judge's personal morality speaks for itself,[155] and even if it were possible to divine the prevailing moral climate,[156] its only relevance would be in the court's estimation of potential public reaction if discipline were not imposed. It is unlikely that a court may constitutionally take cognizance of such a factor.[157] Furthermore, the moral turpitude standard is objectionable because of the temptation it provides to derive from an attorney's misconduct in a particular respect a portrait of his entire character more in keeping with dramatic license than with common sense.[158]

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153. See Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292, 294-95 (1930):

> [T]he mutual violent infatuation was continued by this defendant with the wife of an honorable man for nearly three years, until in defiance of moral laws and social observance they were apprehended carrying on their illegal association in a hotel in the business center of Hartford. So far had they gone in this course as to be careless of social observance or even decency. . . . Not a syllable of penitence from the respondent appears in this record for the profession which he has dishonored, or the law which he has outraged, or the social customs and institutions of his country which he has treated with contumely. He has, as the trial judge said in sentencing him, 'deliberately chosen to put his own ideas of law above what you might fairly call the laws of God and man.'

Concerning at least one judge, it should have been hoped that his moral sense was more acute than his appreciation of sardonic humor. See *In re* Smith, 133 Wash. 145, 233 Pac. 288, 289 (1925).

154. See, *e.g.*, *In re* Jacoby, 74 Ohio App. 147, 57 N.E.2d 932, 936 (1943): "[T]he norm of conduct by which an act is judged to determine whether it involves moral turpitude is a standard prevailing in the United States and at the present time." *In re* Hicks, 163 Okla. 29, 20 P.2d 896, 897 (1933) ("the opinions of the good and respectable members of the community"); Bartos v. District Court, 19 F.2d 722, 732 (8th Cir. 1927) (concurring opinion):

> The manufacture and sale of intoxicating liquors has, long before the enactment of the prohibition laws, been considered immoral, and many of the secret societies, such as Masons, Odd Fellows, Knights of Pythias, and similar organizations, have denied them admission long before the adoption of the Eighteenth Amendment and the National Prohibition Act. Should members of the legal profession adopt a lower standard of morality than these organizations?

155. Bartos v. District Court, *supra* note 154, at 725.

156. Compare the majority opinion of Judge Learned Hand with the dissenting opinion of Judge Frank in Repouille v. United States, 165 F.2d 152, 154 (2d Cir. 1947).

157. See text pp. 347-51 *infra*.

158. See *In re* Hicks, 163 Okla. 29, 20 P.2d 896, 897 (1933):

> We cannot understand how an attorney at the bar can be in an immoral state of mind and continue in the practice of immorality and wickedness, and still render efficient and just service to any one calling upon him for his ser-

C. *Limitations on Individualized Determinations of Unfitness*

Even under a scheme of individualized treatment, it should be apparent that the enforcement of a prohibition against the special punishment of attorneys depends ultimately upon the willingness of the United States Supreme Court to strike down unreasonable impositions of discipline in particular cases. After a painfully slow beginning, the Court has come to perceive this obligation.

In 1945, the Court decided the first of the notable bar-admission cases that have proven so deeply divisive on issues of freedom of speech, conscience, and association,[159] and on issues of reasonable qualifications to practice law.[160] *In re Summers*[161] revealed a disturbing reluctance to reexamine a state court's determination of unfitness. A highly respected professor of law, Clyde Summers, had been denied admission to the Illinois bar because, in the view of the state bar committee and the Illinois Supreme Court, Summers' conscien-

vices. Men who are guilty of debased, wicked, and immoral conduct do not have the same idea of righteous conduct that moral men possess.

Shakespeare, Titus Andronicus, act V, iii:

> I am no baby, I, that with base prayers
> I should repent the evils I have done:
> Ten thousand worse than ever yet I did
> Would I perform, if I might have my will:
> If one good deed in all my life I did,
> I do repent it from my very soul.

159. See Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 Law in Transition 155 (1961). Because the problems transcend the immediate question of attorneys' misconduct, this article omits from specific consideration the first amendment issues presented by misconduct that consists of political activity. See authorities discussed in Kalven & Steffen, *supra*. See also *In re* Margolis, 269 Pa. 206, 112 Atl. 478 (1921); *In re* Smith, 133 Wash. 145, 233 Pac. 288 (1925) (both cases involved activity in behalf of the I.W.W.). Thus, there is no discussion of the recent controversy concerning the "balancing" of first amendment freedoms, Konigsberg v. State Bar of California, 366 U.S. 36 (1961), or of the subsisting dispute whether all speech or political speech is entitled to a "preferred position," Kovacs v. Cooper, 336 U.S. 77, 90-96 (1949) (Frankfurter, J., concurring). Against the interests that a state may have in excluding an attorney from practice, this article treats only the attorney's interest in continued professional activity. However, with respect to the weight of this interest, there has been no hesitation in using for precedential purposes Supreme Court decisions hedging about the power of a state to suppress political discussion.

160. It might be argued that a punitive purpose manifested in denial of admission to the bar could raise no problem of inequality; so long as all persons engaging in the proscribed conduct were barred from the profession, there could be no problem of special punishment. Although the rejection of this kind of argument in the present situation may suggest some close questions and the need for further distinctions, it must be rejected as making no flesh and blood sense. Simply too few individuals desire to be lawyers for the punishment to be regarded as equal.

161. 325 U.S. 561 (1945).

tious objection to military service made it impossible for him to take in good faith the required oath to support the constitution of Illinois. Linking the oath to the "good citizenship" requirement of the Illinois rules for admission, and emphasizing deference to that state's decision, Mr. Justice Reed concluded for the majority that Summers' "unwillingness to serve in the [Illinois] militia" justified his exclusion from the bar.[162] In his dissenting opinion, Mr. Justice Black was obviously concerned with the majority's failure to show any special connection between conscientious objection and the practice of law. After stressing Summers' unquestioned professional and moral qualifications, Justice Black said:

> [I]f Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than in force. For a lawyer is no more subject to call for military duty than a plumber, a highway worker, a Secretary of State, or a prison chaplain.[163]

Beyond the absence of any special connection between conscientious objection and the practice of law, Justice Black seems to have made an additional point: Unfitness only under extremely hypothetical and conjectural circumstances should not justify exclusion from the bar.

> The Illinois Constitution itself prohibits the draft of conscientious objectors except in time of war and also excepts from militia duty persons who are 'exempted by the laws of the United States.' It has not drafted men into the militia since 1864, and if it ever should again, no one can say that it will not, as has the Congress of the United States, exempt men who honestly entertain the views that this petitioner does. Thus the probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quantity in mathematics.[164]

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162. *Id.* at 569-73.

> [T]he majority explicitly rested its decision on the naturalization cases [denying citizenship to aliens refusing to pledge military service] such as *Schwimmer* [279 U.S. 644 (1929)] and *Macintosh* [283 U.S. 605 (1931)], but these were overruled a year later in the *Girouard* case [328 U.S. 61 (1946)]. And while it is true that the *Girouard* case went only to the construction of the federal statute and not to its constitutionality, it is difficult to believe that it did not deal a fatal blow to the already shaky prestige of *Summers* as a precedent.

Kalven & Steffen, *supra* note 159, at 160.

163. 325 U.S. at 575.

164. *Id.* at 577.

By 1954, the majority's philosophy of deference to state determinations of unfitness had seemingly led it to entirely abdicate constitutional responsibility in the area of professional discipline. The nadir was reached in *Barsky v. Board of Regents*.[165] A New York statute provided that the license of a physician might be revoked or suspended by the board of regents for the conviction of a crime. Dr. Edward Barsky, national chairman of the Joint Anti-Fascist Refugee Committee, was convicted in a federal court for refusing to produce certain papers for examination by the House Un-American Activities Committee. He was sentenced to a six-month jail term and fined $500. Upon Barsky's release from jail, the board of regents imposed a six-month suspension from the practice of medicine solely on the ground of his criminal conviction, and this decision was sustained by the New York courts. Reasoning from the state's "substantially plenary power to fix the terms of admission,"[166] and relying on an elaborate state procedure that provided wide discretion for mitigation but in no way precluded discipline on the bare record of any criminal conviction, the Court in *Barsky* upheld the suspension against fourteenth amendment attack. The dissenting opinion by Mr. Justice Douglas, joined by Mr. Justice Black,[167] could have been anticipated. But even for Mr. Justice Frankfurter, an ardent champion of deference to factual determinations by state agencies,[168] the Court's decision was more than could be stomached in silence.

> It is one thing . . . to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his

165. 347 U.S. 442 (1954).

166. Many opinions in disciplinary cases have analogized the misconduct justifying expulsion from the bar to the misconduct justifying denial of admission. See, *e.g.*, Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292 (1930); State *ex rel.* Sorensen v. Scoville, 123 Neb. 457, 243 N.W. 269 (1932); Bartos v. District Court, 19 F.2d 722, 731 (8th Cir. 1927) (concurring opinion). The analogy holds only to a point. A greater degree of generalization may be permitted in the admission cases because the applicant is unable to rely on the persuasive evidence of a record in practice. Also, the applicant's interest in being a member of the bar may usually be regarded as somewhat less than that of a current practitioner.

167. 347 U.S. at 472.

168. See, *e.g.*, the statement of his philosophy by Justice Frankfurter in Schware v. Board of Bar Examiners, 353 U.S. 232, 248 (1957) (concurring opinion), quoted in note 172 *infra*. But in *Schware*, as in *Barsky*, Justice Frankfurter found the state's determination wholly lacking in rational justification.

> profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations. A license cannot be revoked because a man is redheaded or because he was divorced, except for a calling, if such there be, for which redheadedness or an unbroken marriage may have some rational bearing. If a State licensing agency lays bare its arbitrary action, or if a State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids.[169]

The majority's approach in *Barsky*, if good law, would in practice allow states to ignore the constitutional premise of equality of punishment. If a physician may be singled out for what can only be explained as special punishment, so may a lawyer. But it seems certain that the *Barsky* decision was so far beyond the boundaries of historic and contemporary constitutional debate that it must be considered an unfortunate aberration.

In those bar admission cases of the present decade that have not been complicated by the state's use of short-cuts to findings of unfitness,[170] a new majority within the Court has demonstrated a

169. 347 U.S. at 470. Justice Frankfurter's language harks back to *Ex parte* Wall, 107 U.S. 265 (1883), in which Mr. Justice Field observed with reference to the discipline of attorneys that

> it is not for every moral offense which may leave a stain upon character that courts can summon an attorney to account. Many persons, eminent at the bar, have been chargeable with moral delinquencies which were justly a cause of reproach to them; some have been frequenters of the gaming-table, some have been dissolute in their habits, some have been indifferent to their pecuniary obligations, some have wasted estates in riotous living, some have been engaged in broils and quarrels disturbing the public peace; but for none of these things could the court interfere and summon the attorney to answer, and if his conduct should not be satisfactorily explained, proceed to disbar him.

107 U.S. at 306-07 (dissenting opinion).

170. The "short-cut" cases are Konigsberg v. State Bar of California, 366 U.S. 36 (1961), and *In re* Anastaplo, 366 U.S. 82 (1961), in which the Court upheld denial of admission to the bar solely because the applicants had refused to answer—on first amendment grounds—bar committee questions concerning present or past membership in the Communist Party. That these cases cannot be reconciled on principle with the Court's more recent decisions in United States v. Brown, 381 U.S. 437 (1965), and Aptheker v. Secretary of State, 378 U.S. 500 (1964), both discussed at text pp. 331-34 *supra*, is demonstrated in the following cogent analysis of the automatic exclusion rule:

> Since the automatic rule actually operates to make refusal an independent ground for rejection, it *must* be regarded as a *substantive* criterion for distinguishing between applicants. . . .
>
> The issue then is whether the rule provides a rational criterion for classifying applicants to the bar. We submit that it does not; it discriminates between applicants on grounds perversely unrelated to their character and intellectual integrity. The automatic rule means that an applicant, regardless of the strength of the rest of his record, can be denied simply because he refuses

greater willingness to scrutinize state findings. *Schware v. Board of Bar Examiners*,[171] a five-to-three decision, reversed a determination by the New Mexico Supreme Court that Schware had failed to establish his "good moral character." Looking behind this stated ground for disqualification to the evidence upon which the state relied, Mr. Justice Black said the following:

> The State contends that even though the use of aliases, the arrests, and the membership in the Communist Party would not justify exclusion of petitioner from the New Mexico bar if each stood alone, when all three are combined his exclusion was not unwarranted. We cannot accept this contention. In the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies—the arrests for offenses for which petitioner was neither tried nor convicted, the use of an assumed name many years ago, and membership in the Communist Party during the 1930's—cannot be said to raise substantial doubts about his present good moral charac-

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> to answer on principle a question he deems improper. If, however, we take the conscientious objector stance seriously—and there is much in American history to suggest that we should—the rule can only operate to prefer applicants who are willing to answer over those who on principle are not. But among those who will answer must be some insensitive to the possible impropriety of the question and many sensitive to it but persuaded to swallow their indignation in order to be admitted; whereas on the other side, assuming good faith, we have those who have this much courage in their convictions. The argument, therefore, is that the automatic rule is arbitrary in that it prefers the servile and insensitive to the courageous—and all under the rubric of a proceeding to determine good moral character.

Kalvan & Steffen, *supra* note 159, at 185-86. (Emphasis by Kalven & Steffen.)

In Cohen v. Hurley, 366 U.S. 117 (1961), the Court upheld the application of a refusal-to-answer-per-se rule to disbar an attorney who had properly claimed the privilege against self-incrimination in a judicial investigation of "ambulance chasing." It appears unlikely that the authority of the *Cohen* decision will survive the Court's recent holdng in Malloy v. Hogan, 378 U.S. 1 (1964), that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States." 378 U.S. at 6. In *Malloy*, the Court made the further observation that

> The Court . . . has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights' . . . . If *Cohen v. Hurley* . . . and *Adamson v. California* . . . suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the *Twining* view of the privilege has been eroded. . . . [Citations cmitted.]

In Griffin v. California, 85 Sup. Ct. 1229 (1965), the Court struck down a provision in the California constitution permitting comment by the prosecution on a criminal defendant's failure to testify. Significantly, in terms of the *Cohen* decision, *supra*, the Court condemned the comment rule because "it cuts down on the privilege by making its assertion costly." 85 Sup. Ct. at 1233.

171. 353 U.S. 232 (1957).

ter. There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law.[172]

In the companion case, *Konigsberg v. State Bar of California*,[173] Justice Black, writing for the majority, again looked to the evidence claimed to support exclusion under the California requirements that the applicant not advocate "overthrow of the government of the United States or California by unconstitutional means" and that he be of "good moral character." In the absence of a state rule disqualifying an applicant solely because he refused to answer bar committee questions, the record as a whole (including good-faith refusals, on first amendment grounds, to answer questions concerning past or present membership in the Communist Party) did not for Justice Black justify the state's adverse determinations concerning character and loyalty.[174]

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172. *Id.* at 246-47. Although concurring in the result because of the New Mexico court's "dogmatic" reliance on Schware's membership in the Communist Party some fifteen years before, Justice Frankfurter expressed a limited view of the Court's role in these cases:

> Of course, legislation laying down general conditions of an arbitrary or discriminatory character may, like other legislation, fall afoul of the Fourteenth Amendment. . . . A very different question is presented when this Court is asked to review the exercise of judgment in refusing admission to the bar in an individual case, such as we have here.
>
> It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar. No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said as it was of 'many honest and sensible judgments' in a different context that it expresses 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.' . . . Especially in this realm it is not our business to substitute our judgment for the State's judgment—for it is the State in all the panoply of its powers that is under review when the action of its Supreme Court is under review.

353 U.S. at 248.

173. 353 U.S. 252 (1957).

174. In his opinion in this case, *Konigsberg I*, Justice Black emphasized:

> There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners.

353 U.S. at 260-61. On remand, the California Supreme Court again referred Konigsberg's case to the bar committee, and that committee conducted a further hearing. At the hearing, though warned that failure to answer material questions would of itself be cause for exclusion, Konigsberg persisted in his refusal to answer questions concerning membership in the Communist Party. The California Supreme Court, by a

divided vote, refused to review the denial of Konigsberg's application. Konigsberg v. State Bar of California, 52 Cal. 2d 769, 344 P.2d 777 (1959). The United States Supreme Court, with four Justices dissenting, affirmed. 366 U.S. 36 (1961) (*Konigsberg II*).

Reference has previously been made to the constitutional flaw in the refusal-to-answer-per-se rule. See note 170 *supra*. Remaining for present consideration is the question whether a state may, as was arguably done in *Konigsberg II*, apply to a pending proceeding a freshly-minted rule of exclusion. If the rule bears no substantial relationship to fitness for practice, and applies to past conduct, the application of the new rule may be attacked directly under the *ex post facto* clause. See note 73 *supra*. Assuming, however, that the requisite relationship is present (as it would have been in *Morris* if the discipline had been based only on Morris' driving under the influence), can there be any objection to retroactive application? And if an objection exists, does it assume constitutional dimensions? Justice Peters of the California Supreme Court, who dissented in *Konigsberg II*, apparently would answer both questions in the affirmative. Referring to what he regarded as the bar committee's adoption of the per se rule by the simple device of warning Konigsberg, he said:

> Rules for admission to practice law are not to be adopted in this cavalier fashion. The only rules passed by the Legislature provide that the applicant must be of good moral character, and must not advocate the forceful overthrow. There is no rule about failing to answer. If California is to adopt a new rule relating to failure to answer questions, such rule or statute should be adopted in the manner rules and statutes are normally adopted. Here the so-called 'rule' was adopted in the middle of a proceeding as an afterthought simply to justify the actions of the Bar Committee in refusing to certify Konigsberg for admission. To sanction such a procedure is not only unfair but, in my opinion, a denial of due process and equal protection.

344 P.2d at 785. A similar position was taken by Justice Black in dissenting from the action of the Supreme Court affirming *Konigsberg II*. 366 U.S. at 57-59. On the other hand, Mr. Justice Harlan, writing for the majority in *Konigsberg II*, disagreed that the per se rule was adopted in California for the first time on remand following *Konigsberg I*. 366 U.S. at 47 n.9. Further, he rejected the contention that California could not constitutionally take action to exclude Konigsberg after the Supreme Court's decision in *Konigsberg I*. It was Justice Harlan's view that

> in the absence of the slightest indication of any purpose on the part of the State to evade the Court's prior decision, principles of finality protecting the parties to this state litigation are, within broad limits of fundamental fairness, solely the concern of California law. Such limits are broad even in a criminal case . . . . In this instance they certainly have not been transgressed by the State's merely taking further action in this essentially administrative type of proceeding.

366 U.S. at 44.

Concerning the problem of creation *and* retroactive application of a new rule in the same case, particularly as it may have been present in *Morris* because of the adoption of a standard broader than moral turpitude, see note 73 *supra*, Justice Harlan's characterization of proceedings involving exclusion from the bar as "essentially administrative" is significant, for an analogous problem of retroactive law-making has existed for some time in the field of administrative law. 2 Davis, Administrative Law §§ 17.07, 17.08 (1958). The landmark decision in SEC v. Chenery Corp., 332 U.S. 194 (1947), and other decisions have established the authority of regulatory agencies to carry out their administrative functions by attaching new consequences to past conduct, despite the disappointment of substantial reliance interests of the regulated parties. Where, as in *Morris*, the reliance interest has been weak because the party's past conduct amounted to the intentional violation of a preexisting legal duty (for Morris, driving under the influence), the retroactive application has caused little difficulty. See NLRB v. Pease Oil Co., 279 F.2d 135 (2d Cir. 1960), distinguishing NLRB v. Guy F. Atkinson

Co., 195 F.2d 141 (9th Cir. 1952). No reliance interest would seem to have been present in *Konigsberg II* because the applicant was given the opportunity to answer the questions after the per se rule had been announced by the bar committee.

Yet, a troublesome problem remains with regard to the simultaneous creation and application of rules in the administrative law cases and in disciplinary proceedings. The problem is one of providing a reasonable opportunity, before application, for critical appraisal of a new rule by those who will be affected. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 Law & Contemp. Prob. 658, 664 (1957). Fairness and wisdom in law-making call for such an opportunity and further for the chance to present to the law-maker a reasoned argument objecting to the proposed rule. The legislative process obviously affords opportunity for widespread study and criticism of proposed legislation. A similar opportunity is provided affected parties under the federal Administrative Procedure Act (60 Stat. 237 (1946), 5 U.S.C. §§ 1001 to 1011 (1958)) with regard to formally proposed rules (§ 4(a), (b), 5 U.S.C. § 1003(a), (b)) and adopted rules that have not yet become effective (§ 4(c), (d), 5 U.S.C. § 1003(c), (d)). See 1 Davis, *op. cit. supra*, at § 6.07.

While retroactive rule-making in the administrative law decisions has been defended by analogy to common law cases departing from the doctrine of stare decisis (2 Davis, *op. cit supra*, at § 17.07), the analogy does not seem to fit the circumstances of *Morris*. Today, judicial abandonment of a line of precedent is almost invariably preceded by a substantial body of professional criticism advocating a different result. Perhaps the opportunity for this consideration of an alternative solution stems from the fact that the new doctrine is itself usually derived from previously announced judicial principles and policies. Hart & Sacks, The Legal Process 587-89 (tent. ed. 1958). With respect to *Morris*, the seemingly single-minded (albeit misleading) attachment of the enacted rules to the moral turpitude standard for discipline based on non-professional misconduct provided little basis for consideration of alternative criteria prior to the actual *Morris* proceeding. Once the proceeding had begun, the policy issues became so bound up with the future of the particular lawyer that it was probably too late for the court to submit a broader standard to the bar for professional criticism before it was applied to Morris. *But cf.* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 931 (1965).

Apart from the question of inherent judicial power, the supreme court in *Morris* did at least nod in the direction of N.M. Stat. Ann. § 18-1-1 (1953), which provides:

> The Supreme Court of the state of New Mexico shall, by rules promulgated from time to time, define and regulate the practice of law within the state of New Mexico. The Supreme Court shall cause such rules to be printed and distributed to all members of the bar, to applicants for admission, and to all courts within the state of New Mexico and the same shall not become effective until thirty (30) days after the same shall have been made ready for distribution and so distributed.

The terms of this statute recognize in two ways the importance of a reasonable opportunity for critical evaluation of disciplinary rules before they are applied. First, it is clear that the court is to proceed by enacted rules and not on an *ad hoc* basis. Second, the rules are to be disseminated to all members of the bar, and, like the federal Administrative Procedure Act, *supra*, a period of time for critical evaluation is specified before the rules are to be effective. The New Mexico Supreme Court complied with these requirements when the 1960 rules were promulgated. See note 5 *supra*. Had the supreme court, in its 1960 rules or in any subsequent rules, abandoned the traditional moral turpitude standard in favor of a broader rule that would more clearly have comprehended Morris' conduct, it cannot be known whether there would have been the kind of widespread criticism that would have impelled the court to undertake a revision. Nor should one categorically deny the court power to take action without notice where only prospective action would be "contrary to the public interest." See

D. *Public Reaction to Misconduct: The Need for Dispassionate Appraisal*

To this point it has been assumed that because discipline for non-professional misconduct cannot be justified as punishment, it can only be justified as a means to secure a competent bar. This, of course, overlooks the frequent assertions by courts and commentators that a principal purpose of discipline of lawyers is the protection of the reputation of the courts and the legal profession;[175] indeed, the publicity given a particular act of misconduct has on occasion been deemed significant.[176] One commentator has recommended that discipline be imposed for "conduct unbecoming a lawyer and a gentleman."[177] A few courts have avoided applying the moral turpitude standard, with its stigma of depravity, by relying upon Canon 29 of the American Bar Association Canons of Professional Ethics: "[The lawyer] should strive at all times to uphold the honor and to maintain the dignity of the profession . . . ."[178]

The use of these various criteria indicates a genuine apprehension of a danger to the administration of justice that would result from a failure to take disciplinary action when misconduct arouses public hostility or contempt. The danger thus perceived, viewed in the abstract, cannot be minimized. A judicial system could hardly be expected to bear up under the strain of coercing enforcement of its every process and judgment. Because public confidence in the ability and willingness of the courts to reach just results undoubtedly promotes voluntary cooperation with judicial procedures, this con-

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Administrative Procedure Act, *supra*, at § 4. Here, the certainty and seriousness of the unfitness should be the predominant considerations.

Nonetheless, the preference should always be in favor of prospective application. See Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952). In general, rules governing discipline should not be applied without prior notice to the bar, through the rule-making procedure if possible, or if not, through an only prospectively operative adjudication. See State v. Bunge, 20 Wis. 2d 493, 122 N.W.2d 369 (1963); *cf. In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956).

175. See, *e.g.*, Wood. v. State *ex rel.* Boykin, 45 Ga. App. 783, 165 S.E. 908 (1932); *In re* Wells, 293 Ky. 205, 168 S.W.2d 733 (1943); *In re* McMullin, 370 S.W.2d 151 (Mo. 1963); *In re* Renehan, 19 N.M. 640, 145 Pac. 111 (1914). See also Drinker, Legal Ethics 44-46 (1953); Bradway, *Moral Turpitude as the Criterion of Offenses That Justify Disbarment*, 24 Calif. L. Rev. 9, 23 (1935); Note, 12 Syracuse L. Rev. 487, 493-94 (1961).

176. Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292, 295 (1930).

177. Bradway, *supra* note 175, at 24-25.

178. See Cleveland Bar Ass'n v. Bilinski, 177 Ohio St. 43, 201 N.E.2d 878 (1964); State *ex rel.* Oklahoma Bar Ass'n v. Ablah, 348 P.2d 172 (Okla. 1959); *In re* Genser, 15 N.J. 600, 105 A.2d 829 (1954); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963).

fidence should be maintained, and, if possible, enhanced. With regard to the reputation of the bar, beyond the questions of professional economics and professional dignity,[179] lie the well-justified assumptions that legal services are of great value in the ordering of individual and community affairs, and that full use of these services requires public confidence in the skill and integrity of practitioners. Mentioned earlier was the related, but distinct, problem that a particular attorney, if allowed to continue practicing, may become the object of such public hostility that his client's interests will be jeopardized.

Before considering the constitutionality of imposing discipline for non-professional misconduct on the basis of public hostility, the dimensions of the hostility problem may realistically be narrowed. It may be assumed that a state will adopt adequate procedures to exclude from practice lawyers who are shown to be professionally unfit. If the existence of such a mechanism is made widely known—as it should be[180]—public reaction based upon *reasonable* apprehensions about the quality of the judicial process and the general professional competence of the bar may be put aside. To the side may also be placed public hostility to a particular client's case arising from a belief that only an unfit lawyer could be found to take it. The remaining sources of public dissatisfaction might be roughly classified as follows:

(1) Suspicion resulting from unreasonable disagreement with the efficacy of the appropriate disciplinary procedure in removing unfit attorneys.

(2) Hostility generated by an undifferentiated belief that because of the attorney's misconduct he is a "bad man" and those with whom he associates—judges, other attorneys, and clients—must also be bad men.[181]

179. Unless the attorney guilty of misconduct is to be branded an untouchable by being barred from a wide area of economic activity, these factors cannot be given much weight.

180. An extensive survey of public opinion concerning the legal profession undertaken by the Missouri bar revealed that only 66% of laymen who had used a lawyer, and 54% of those who had not, knew that lawyers were required by law to practice in accordance with a code of ethics. Missouri Bar & Prentice-Hall Survey 93 (1963).

181. While there is good reason to believe that public confidence in the legal profession and the administration of justice is not as high as one might wish, the most recent and thorough-going study in this area does not single out non-professional misconduct by attorneys as a particularly important factor. On the other hand, professional misconduct by attorneys and doubts regarding the machinery of justice do cause laymen considerable concern. See generally Missouri Bar & Prentice-Hall Survey (1963).

(3) Frustration caused by the refusal of the attorney's associates —judges, other attorneys, and clients—to agree that the attorney should be punished by expulsion from the practice of law.[182]

It is perhaps easiest to see the objectionable nature of discipline based on the public's frustrated desire to inflict punishment. Discipline imposed to appease a demand for punishment cannot realistically be distinguished from punishment itself. This was clearly perceived by Mr. Justice Brennan, concurring in *Kennedy v. Mendoza-Martinez*.[183]

> My Brother Stewart discerns . . . an affirmative instrument of policy and not simply a sanction which must be classed as 'punishment.' The policy objective is thought to be the maintenance of troop morale; a threat to that objective is thought to be the spectacle of persons escaping a military-service obligation by flight; and expatriation of such persons is sustained as a demonstrative counter to that threat. To my mind that would be 'punishment' in the purest sense; it would be naked vengeance. Such an exaction of retribution would not lose that quality because it was undertaken to maintain morale. Indeed, it is only the significance of expatriation as retribution which could render it effective to boost morale—the purpose which, to the dissent, removes expatriation as here used from the realm of the punitive. I do not perceive how expatriation so employed would differ analytically from the stocks or the rack. Because such devices may be calculated to shore up the convictions of the law-abiding by demonstrating that the wicked will not go unscathed, they would not, by the dissent's view, be punitive . . . . I cannot agree to any such proposition . . . .[184]

182. The magnitude of such public frustration should not be exaggerated. Because public hostility in the form of a desire for retribution remains a significant ingredient in determining the extent of criminal punishment, it would seem that if the lawyer's non-professional misconduct is of the sort that will provoke a major outcry, the courts will have responded by fixing a severe criminal sanction. A light sentence, or no sentence at all, may indicate that the court senses public sympathy for the particular offender or an attitude toward the offense approximating "there but for the grace of God go I." The latter seems to be the common and quite reasonable public reaction to prosecutions for motor vehicle homicide. See The President's Highway Safety Conference, Report of Committee on Laws and Ordinances 26 (1949); Karaba, *Negligent Homicide or Manslaughter: A Dilemma*, 41 J. Crim. L., C. & P. S. 183 (1951). Additionally, certain unofficial sanctions may be applied by society. Thus, in a small town a lawyer whose misconduct is objectionable may find an empty waiting room. In the hectic atmosphere of the metropolis, the notoriety surrounding the lawyer's misconduct may soon be dissipated, thus alleviating any public demand for punishment.

183. 372 U.S. 144 (1963).

184. *Id.* at 189-90. See Trop v. Dulles, 356 U.S. 86, 109-10 (1958) (Brennan, J., concurring).

If the equal protection clause forbids the infliction, under the guise of discipline, of special punishment on lawyers for non-professional misconduct, such unequal treatment cannot be justified by reference to the unfortunate social consequences of frustrating a public demand for inequality. For example, the Supreme Court, in the field of racial segregation, has held that equal treatment cannot be denied because of possible civil disorder resulting from community hostility to desegregation.[185]

Nor would it appear that the other forms of public dissatisfaction are entitled to constitutional recognition as the sole ground for imposing discipline for non-professional misconduct, without regard to any determination of unfitness. At best it is hard to imagine that *Garland, Schware,* or *Konigsberg I* would have been decided differently had the argument been advanced that substantial community dissatisfaction would result if the respective parties in those cases were permitted to practice. Moreover, if public dissatisfaction is to be given consideration at all, its weight must generally be deemed slight when weighed against the attorney's interest in continuing to practice. Rarely could it be said that the public hostility or suspicion presents a "clear and present danger to the administration of justice."[186] Such a conclusion would be particularly hard to reach when the public reaction is unreasonable.[187] Also to be considered are the powers available to courts to control sporadic manifestations of hostility in particular cases, or recalcitrance on the part of losing parties.[188] Conversely, an attorney's interest in continuing to practice would rarely be deemed of so little weight as to be sub-

185. Watson v. City of Memphis, 373 U.S. 526, 535-36 (1963); Cooper v. Aaron, 358 U.S. 1, 6 (1958); Buchanan v. Warley, 245 U.S. 60, 81 (1917). *But see* Wells v. Gilliam, 196 F. Supp. 792 (E.D. Va. 1961) (upholding racial segregation in municipal courtroom to preserve order), 60 Mich. L. Rev. 503.

186. See Cox v. Louisiana, 379 U.S. 559, 564-66 (1965); Wood v. Georgia, 370 U.S. 575 (1962); Bridges v. California, 314 U.S. 252 (1941); *cf.* Cox v. Louisiana, 379 U.S. 536, 550-51 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

187. *Cf. In re* Sawyer, 360 U.S. 622 (1958) (opinion of Brennan, J.):

> Petitioner did not say Judge Wiig was corrupt or venal or stupid or incompetent. The public attribution of honest error to the judiciary is no cause for professional discipline in this country. . . . It may be said that some of the audience would infer improper collusion with the prosecution from a charge of error prejudicing the defense. Some lay persons may not be able to imagine legal error without venality or collusion, but it will not do to set our standards by their reactions. We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others.

Id. at 635.

188. *Cf.* Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied,* 332 U.S. 851 (1948).

ordinated to the threat of public suspicion or hostility. An attorney's interest in practicing surely weighs more heavily than those activities that may be constitutionally restricted to allay harmful public reaction, such as expressing an opinion on a pending case by demonstrating before the courthouse,[189] or using "fighting words,"[190] or undertaking "incitement to riot,"[191] or libeling a racial minority.[192] It may be that only while an attorney is imprisoned is his interest so slight as to be overborne by a concern for public reaction. Withal the bar should be free of the reproach that the "jails are full of lawyers."[193]

III

SOME PROPOSALS FOR A SCHEME OF INDIVIDUALIZED DISCIPLINE

A. The Determination of Unfitness

Under the Constitution, an attorney may be disciplined for nonprofessional misconduct only upon an individualized determination that he is unfit to continue in the practice of law. Each case must be "considered individually on its merits, including mitigating circumstances involved and the previous standing and record of the attorney involved, and the court's appraisal of his future conduct in the light of his past record."[194] To intelligently make such an appraisal, a court must ask two questions: (1) Does the misconduct reveal some flaw in the attorney's personality that if manifested in his professional activity would cause him to violate his obligations to his clients, the courts, or fellow attorneys? (2) Is it likely that the

189. Cox v. Louisiana, 379 U.S. 559 (1965).

190. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

191. Feiner v. New York, 340 U.S. 315 (1951).

192. Beauharnais v. Illinois, 343 U.S. 250 (1952).

193. *In re* Welansky, 319 Mass. 205, 65 N.E.2d 202, 204 (1946):

> A member of the bar whose name remains on the roll is in a sense held out by the Commonwealth, through the judicial department, as still entitled to confidence. A conviction of crime, especially of serious crime, undermines public confidence in him. The average citizen would find it incongruous for the Commonwealth on the one hand to adjudicate him guilty and deserving of punishment, and then, on the other hand, while his conviction and liability to punishment still stand, to adjudicate him innocent and entitled to retain his membership in the bar.

Welansky had been sentenced to a term of 12-to-15 years in prison after his conviction of manslaughter for negligently causing the deaths of 492 persons in the Cocoanut Grove nightclub fire; he was the owner of the nightclub.

194. Dayton Bar Ass'n v. Prear, 175 Ohio St. 543, 196 N.E.2d 773, 775 (1964). See also Bartos v. District Court, 19 F.2d 722, 724 (8th Cir. 1927).

deleterious personality trait will be carried over into the attorney's professional life?

Regarding the assessment of personality from acts of misconduct, one must deal at the outset with a possible argument that whatever the nature of the particular act, any deliberate violation of the criminal law indicates the attorney's lack of respect for duly established rules of conduct.[195] And, as every lawyer knows, the practice of law is hedged about by an extraordinary number of rules. Although the conduct involved in committing the crime of adultery[196] or in manufacturing beer for home consumption during Prohibition[197] has no counterpart in professional practice, it may be claimed that if the attorney is willing to place himself "above the law"[198] in one respect, he will be willing to violate the law in other areas, including the area of professional activity. This picture of an adulterer as the compleat non-conformist is not very convincing. In the absence of some persuasive evidence to the contrary, common experience would suggest that the rejection of a particular rule on moral grounds does not imply a tendency to reject other rules—especially those lacking specific moral content[199]—on other grounds, such as expediency or profit.[200] Nevertheless, it would be asserted that grave dangers to the administration of justice are created even by the presence of an attorney whose inclination toward disobedience is limited to sincere moral disagreement with particular laws. Although the argument for universal obedience is more compelling when applied to participation in the legal system than it is with regard to social life generally,[201] it cannot be entirely accepted while

195. This argument would, of course, not apply to offenses that may be committed inadvertently, *e.g.*, many traffic offenses.

196. See Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292 (1930).

197. See Bartos v. District Court, 19 F.2d 722 (8th Cir. 1927).

198. State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412, 416 (1963). See also Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292, 295 (1930).

199. *E.g.*, *compare* Fed. R. Civ. P. 12 (20 days to answer complaint), *with* N.M. Stat. Ann. § 21-1-1(12) (30 days to answer complaint).

200. *Cf.* Wasserstrom, *The Obligation To Obey the Law*, 10 U.C.L.A.L. Rev. 780, 781, 795-96 (1963). The general respect for law of an attorney who has become involved in professional criminality is quite properly suspect. See, *e.g.*, Underwood v. Commonwealth, 105 S.W. 151 (Ky. 1907) (bootlegging); *In re* McNeese, 346 Mo. 425, 142 S.W.2d 33 (1940) (sale of opium); *In re* Okin, 272 App. Div. 607, 73 N.Y.S.2d 861 (1947) (brothel); *In re* Marsh, 42 Utah 186, 129 Pac. 411 (1913) (brothel). However, the suspicion is not justified in the case of an attorney who correctly, or incorrectly with good reason, believes his "business" to be legal. See *In re* Fischer, 231 App. Div. 193, 247 N.Y. Supp. 168 (1930); *cf.* Bartos v. District Court, 19 F.2d 722 (8th Cir. 1927).

201. On the subject of "civil disobedience," see generally Wasserstrom, *supra* note 200.

institutional techniques operate imperfectly. Assuming that an attorney remains faithful to the overriding objective of securing justice under law, the "administration of justice," in its broadest sense, may profit by occasional and selective non-observance of specific rules.[202]

Among types of misconduct that do not, in themselves, suggest personality defects that would impair an attorney's capacity to properly discharge his professional duties should be included some sexual offenses, for example, adultery,[203] fornication,[204] procurement of an abortion for one's wife,[205] and homosexual relations with a consenting adult; manufacture of beer for home consumption;[206] perpetration of an airline "bomb hoax";[207] objection to military service, conscientious or otherwise;[208] and encouragement to violate conscription laws.[209] However, even sexual misconduct may tend to show unfitness for practice if the attorney has demonstrated contempt for his professional status by capitalizing on it to further his wrongful activity,[210] and certain instances of bizarre sexual behavior may be symptomatic of a more pervasive breakdown of the attorney's self-respect.[211]

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202. *Cf.* Wasserstrom, *supra* note 200, at 801-03. Situations in which non-observance of specific rules might be justified are suggested by some facts appearing in *In re* McMullin, 370 S.W.2d 151, 154 (Mo. 1963), and *In re* Eaton, 60 N.D. 580, 235 N.W. 587 (1931). For background on the *Eaton* episode, see Olson v. Union Central Life Ins. Co., 58 N.D. 176, 225 N.W. 124 (1929).

203. Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292 (1930); *cf. In re* Kienstra, 154 Wash. 153, 282 Pac. 221 (1929).

204. People *ex rel.* Black v. Smith, 290 Ill. 241, 124 N.E. 807 (1919); *In re* Wesler, 1 N.J. 573, 64 A.2d 880 (1949).

205. *In re* Meyerson, 190 Md. 671, 59 A.2d 489 (1948).

206. Bartos v. District Court, 19 F.2d 722 (8th Cir. 1927).

207. Cincinnati Bar Ass'n v. Smith, 174 Ohio St. 452, 190 N.E.2d 267 (1963).

208. *In re* Pontarelli, 393 Ill. 310, 66 N.E.2d 83 (1949). *Cf. In re* Summers, 325 U.S. 561 (1945).

209. *In re* Margolis, 269 Pa. 206, 112 Atl. 478 (1921).

210. See, *e.g., In re* Wilson, 76 Ariz. 49, 258 P.2d 433 (1953) (county attorney consorted with prostitute he was "protecting"); *In re* Gould, 4 App. Div. 2d 174, 164 N.Y.S.2d 48 (1957) (assaulting girls answering bogus "help wanted" advertisements); *In re* Simmons, 395 P.2d 1013 (Wash. 1964) (judge assaulted woman traffic offender with intent to commit rape).

211. See, *e.g., In re* Hicks, 163 Okla. 29, 20 P.2d 896 (1933); *In re* Van Wyck, 207 Minn. 145, 290 N.W. 227 (1940).

Certain extreme instances of eccentric behavior may similarly indicate a general deterioration in the attorney's ability to control his conduct. See, *e.g.*, State *ex rel.* Oklahoma Bar Ass'n v. Ablah, 348 P.2d 172 (Okla. 1959) (innumerable harassing phone calls, made anonymously to avenge social slight); *cf.* State *ex rel.* Nebraska Bar Ass'n v. Rhodes, 177 Neb. 650, 131 N.W.2d 118 (1964) (attorney defending himself called judges "kangaroos" and lay down in courtroom).

Apparently recognizing that discipline for non-professional misconduct is a matter

Other forms of non-professional misconduct raise serious doubts about an attorney's fitness for practice. Perjury,[212] or the suborning of perjury,[213] by an attorney may reveal such a disregard for the obligation to tell the truth under oath that he must be considered unfit to participate in the administration of justice. Because an attorney is likely to be responsible for the money or property of his clients, acts of larceny or theft[214] or embezzlement or extortion,[215] doubtless cast suspicion on the perpetrator's professional fitness. An attorney's non-professional involvement in schemes designed to defraud other private citizens[216] or governmental bodies[217] suggests a willingness to overreach his clients, their adversaries, and others with whom he must deal in his practice. The professional integrity of an attorney who, for a share of the proceeds, acts as intermediary for thieves[218] or kidnappers[219] may understandably be

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of fitness rather than punishment, courts generally have refused to excuse acts of misconduct on the ground that they resulted from alcoholism. *E.g.*, Wood v. State *ex rel.* Boykin, 45 Ga. App. 783, 165 S.E. 908 (1932); *In re* Wells, 293 Ky. 201, 168 S.W.2d 730 (1943); *In re* Osmond, 174 Okla. 561, 54 P.2d 319 (1935); *In re* McGarry, 68 N.M. 308, 361 P.2d 718 (1961); *In re* Evans, 94 S.C. 414, 78 S.E. 227 (1913). And at least one court gives no weight to the claim that the misconduct was caused by mental illness. See *In re* Gould, 4 App. Div. 2d 174, 164 N.Y.S.2d 48 (1957); *In re* Bivona, 261 App. Div. 221, 25 N.Y.S.2d 130 (1941); *In re* Dubinsky, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938).

While a tendency toward personal violence would fairly raise doubts concerning an attorney's fitness for a profession that frequently involves him in adversary proceedings, most instances of violence by attorneys appear "situational." *E.g.*, *In re* Rothrock, 16 Cal. 2d 449, 106 P.2d 907 (1940); State v. Metcalf, 204 Iowa 123, 214 N.W. 874 (1927); Smith v. State, 9 Tenn. (1 Yerg.) 228 (1829). See generally text pp. 357-58 *infra*.

212. *In re* Nearing, 16 App. Div. 2d 516, 229 N.Y.S.2d 567 (1962).

213. Florida Bar v. King, 174 So. 2d 398 (Fla. 1965).

214. *In re* King, 232 Minn. 327, 45 N.W.2d 562 (1950); *In re* Lieb, 1 N.J. 567, 64 A.2d 880 (1949); *In re* Ross, 279 App. Div. 665, 108 N.Y.S.2d 247 (1951).

215. *In re* Lynch, 238 S.W.2d 118 (Ky. 1951) (embezzlement); State *ex rel.* Sorensen v. Scoville, 123 Neb. 457, 243 N.W. 269 (1932) (extortion).

216. Criminal convictions: *In re* Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); *In re* McCarthy, 42 Mich. 71, 51 N.W. 963 (1879); *In re* Jacoby, 74 Ohio App. 147, 57 N.E. 2d 932 (1943). No criminal prosecutions: Mauer v. State Bar of California, 219 Cal. 271, 26 P.2d 14 (1933); *In re* Wilson, 79 Kan. 450, 100 Pac. 75 (1909); *In re* Stone, 334 S.W.2d 351 (Ky. 1960); *In re* Wells, 293 Ky. 201, 168 S.W.2d 730 (1943); *In re* Chartoff, 16 App. Div. 2d 277, 227 N.Y.S.2d 578 (1962); *In re* Hunt, 14 App. Div. 2d 397, 221 N.Y.S.2d 527 (1961); *In re* Spier, 269 App. Div. 1058, 59 N.Y.S.2d 162 (1945); *In re* Shapiro, 263 App. Div. 659, 34 N.Y.S.2d 285 (1942); *In re* Isaacs, 17 App. Div. 181, 158 N.Y. Supp. 403 (1916); *In re* Barnard, 59 Wash. 2d 912, 367 P.2d 26 (1961).

217. Fellner v. Bar Ass'n of Baltimore, 213 Md. 243, 131 A.2d 729 (1957); *In re* Williams, 221 Minn. 554, 23 N.W.2d 4 (1946); *In re* Rotwein, 20 App. Div. 2d 428, 247 N.Y.S.2d 775 (1964); Dayton Bar Ass'n v. Prear, 175 Ohio St. 543, 196 N.E.2d 773 (1964); *In re* Bassett, 401 P.2d 33 (Ore. 1965).

218. People *ex rel.* Chicago Bar Ass'n v. Jackson, 322 Ill. 618, 153 N.E. 621 (1926); *In re* Osmond, 174 Okla. 561, 54 P.2d 319 (1935).

219. *In re* Richards, 333 Mo. 907, 63 S.W.2d 672 (1933).

questioned. Perhaps the most disturbing cases of non-professional misconduct, to the extent that they may be so classified, are those involving misfeasance in public office.[220] An attorney who degrades, usually for private gain, a position of special trust and responsibility that he has voluntarily assumed cannot be thought to have high regard for the bar's standards of professional conduct.[221]

Only superficially resembling those previously noted acts of misconduct that are motivated by expectations of personal gain are some cases of income tax evasion or of drawing checks on insufficient funds. Tax violations, among the most common causes for disciplinary proceedings, have received curious treatment in the courts. The Missouri Supreme Court, for example, has declared that failure to file a federal income tax return is per se an offense involving moral turpitude and imposes long suspensions from practice.[222]

220. A difficult question concerns the propriety of initiating disciplinary proceedings against a public office-holder under circumstances when the imposition of suspension may have the effect of removing him from office. *Compare In re* Strahl, 201 App. Div. 729, 195 N.Y. Supp. 385 (1922), *with In re* Stolen, 193 Wis. 602, 214 N.W. 379 (1927). Because present occupancy of public office offers no assurance that such occupancy will continue, and because the public should be notified of the attorney's incompetence, disciplinary action should not be delayed during his incumbency. Nor is there merit in the position that even if an official act demonstrates unfitness, it may not be made the basis for discipline unless it was capable of commission by non-official attorneys. See *In re* Wehrman, 327 S.W.2d 743 (Ky. 1959); Note, 13 Vand. L. Rev. 811 (1960). Once the attorney has been suspended, the effect of the suspension on his holding of office must be determined by construction of the applicable statutes concerning qualifications and removal from office (*e.g.*, is bar membership expressly made a continuing qualification?). Whether other established removal procedures should be deemed exclusive might also depend upon the nature of the misconduct (*e.g.*, did it amount to misfeasance in office?).

221. A number of cases involve the solicitation or acceptance of bribes. *E.g., In re* Wilson, 76 Ariz. 49, 258 P.2d 433 (1953); *In re* Ransom, 18 App. Div. 2d 431, 239 N.Y.S.2d 990 (1963); *In re* Crum, 55 N.D. 876, 215 N.W. 682 (1927); *In re* Chernoff, 344 Pa. 527, 26 A.2d 335 (1942); Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353 S.W.2d 401 (1961); *cf.* State v. Peck, 88 Conn. 447, 91 Atl. 274 (1914). Other forms of misfeasance may similarly suggest a lack of fidelity to the obligations of office, *e.g.*, People *ex rel.* Chicago Bar Ass'n v. Gorman, 346 Ill. 432, 178 N.E. 880 (1931) (slander), but some instances of nonfeasance may not, *e.g., In re* Graves, 347 Mo. 49, 146 S.W.2d 555 (1941).

Improper conduct in seeking judicial office may indicate a low regard for the role of the judiciary in the legal system. *E.g., Ex parte* Grace, 244 Ala. 267, 13 So. 2d 178 (1943); *In re* Strahl, 201 App. Div. 729, 195 N.Y. Supp. 385 (1922); *In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956). Participation in the unlawful removal of a prisoner from jail for the purpose of lynching him, *Ex parte* Wall, 107 U.S. 265 (1883), or running the prisoner out of town, State *ex rel.* McLaughlin v. Graves, 73 Ore. 331, 144 Pac. 484 (1914), may imply an absence of respect for the legal system as a whole. See also *In re* Malmin, 364 Ill. 164, 4 N.E.2d 111 (1936) (attempt to extort from the Secretary of the Interior the governorship of Virgin Islands).

222. *In re* Lurkins, 374 S.W.2d 67 (Mo. 1964); *In re* McMullin, 370 S.W.2d 151 (Mo. 1963).

But the supreme court of a neighboring state, Kentucky, and most courts that have passed upon the question have held that absent an intent to defraud, failure to file does not involve moral turpitude.[223] Without a finding of fraud, the Kentucky court now seems content to dismiss a case without any disciplinary action whatever;[224] other courts in this situation seem impelled to find some ground for discipline, though the ground be unconstitutional[225] and the discipline slight.[226] The latter courts seem to sense that in terms of fitness to practice the moral turpitude standard, with its quest for fraudulent intent, is inadequate. Yet, their opinions have failed to define the deleterious personality traits that may be indicated by the failure to file an income tax return, even when the offense is not characterized by fraud. In some instances the failure to file is admittedly motivated by lack of funds to pay the tax when it is due;[227] an attorney who seeks to "cover up" rather than "face up" to such problems may do great harm to the interests of his clients.[228] Similarly, the attorney who "borrows" money or pays preexisting debts by writing checks on insufficient funds must realize that he is merely postponing the day of reckoning.[229] Other tax cases involving failure to file reveal the kind of disorganized behavior with regard to continuing responsibilities that would alarm any client whose affairs demanded systematic attention.[230] It is not to be suggested that in disciplinary

223. Kentucky State Bar Ass'n v. Brown, 302 S.W.2d 834 (Ky. 1957); Kentucky State Bar Ass'n v. McAfee, 301 S.W.2d 899 (1957). The opinions in both Kentucky cases indicate that each attorney involved had received a prison sentence in the criminal trial, but it is not clear whether these sentences had been served. See also *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1954); Baker v. Miller, 236 Ind. 20, 138 N.E.2d 145 (1956); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963); *In re* McShane, 122 Vt. 175 A.2d 508 (1961).

224. Kentucky State Bar Ass'n v. Brown, *supra* note 223.

225. See, *e.g.*, Cleveland Bar Ass'n v. Bilinski, 177 Ohio St. 43, 201 N.E.2d 878 (1964); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963).

226. See, *e.g.*, State v. Roggensack, *supra* note 225; *In re* McShane, 122 Vt. 442, 175 A.2d 508 (1961).

227. See, *e.g.*, *In re* McMullin, 370 S.W.2d 151 (Mo. 1963).

228. *Cf.* Costigan v. Adkins, 18 F.2d 803 (D.C. Cir. 1927).

229. See, *e.g.*, *In re* Belluscio, 38 N.J. 355, 184 A.2d 864 (1962); *In re* McGarry, 68 N.M. 308, 361 P.2d 718 (1961); *In re* Chartoff, 16 App. Div. 2d 277, 227 N.Y.S.2d 578 (1962); *In re* Dubinsky, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938); State *ex rel.* Joseph v. Mannix, 133 Ore. 329, 288 Pac. 507 (1930). See also MacDonald, *A Psychiatric Study of Check Offenders*, 116 Am. J. Psychiatry 438, 441 (1959):

> The incurably optimistic overindulged oral character like Mr. Micawber is always expecting something to turn up 'I have signed checks because I was sure my financial position would take a turn for the better before they were due for presentation.' . . .

230. See, *e.g.*, *In re* Lurkins, 374 S.W.2d 67 (Mo. 1964); State v. Bunge, 20 Wis. 2d 493, 122 N.W.2d 369 (1963); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963); *In re* McShane, 122 Vt. 442, 175 A.2d 508 (1961).

cases judges should attempt to function as psychiatrists, but courts that have heretofore been willing to characterize an attorney's personality as "depraved" should not be reluctant to describe it as "disorganized."

Finally, brief attention may be directed to cases like *In re Morris*[231] and *In re Welansky*[232] in which an attorney's misconduct has caused unintentional injury or death. Because the tragic results do not reflect on the attorney's personality,[233] investigation must focus upon the causative behavior. One possibility in these cases is that the attorney has merely acted inadvertently. Another possibility is that the attorney has exhibited reckless disregard for the interests of others, in the sense that he has consciously ignored apprehended risks.[234] Regardless of the manner in which simple inattention should be treated in the criminal law, it is clear that the trait is not one to be prized in a member of the bar; and the greater and more obvious the risk that escaped the attorney's attention, the greater the danger his obtuseness may create in practice. But putting aside those attorneys whose non-professional misconduct manifests utter stupidity, the *reckless* attorney, more than his *careless* colleague, jeopardizes the interests of those who must rely on him professionally. Therefore, in the case of reckless misconduct a court should demand special assurance that this personality trait will not be carried over into the attorney's professional life.

The nature of a court's task in predicting whether a personality trait revealed in non-professional misconduct will infect the attorney's professional activities can best be illustrated, perhaps, by reference to the facts of two disciplinary proceedings in which the attorneys involved were suspended from practice. *In re Nearing*[235] arose from a 1958 investigation by a New York grand jury of the celebrated television quiz program, "Twenty-One." Before the grand jury, Vivienne Nearing, an attorney and erstwhile winning contestant, initially testified to the bona fides of the program. But in a second appearance before the grand jury she admitted that the program had been a harmless hoax on the viewing public. Upon her plea of guilty, Nearing was convicted of second degree perjury.

231. 74 N.M. 679, 397 P.2d 475 (1964).

232. 319 Mass. 205, 65 N.E.2d 202 (1946). See note 193 *supra*.

233. See text p. 311 *supra*.

234. In Massachusetts, a manslaughter conviction could be obtained without a showing of recklessness as it is defined in the text. Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944).

235. 16 App. Div. 2d 516, 229 N.Y.S.2d 567 (1962).

Subsequently, she was charged with "conduct prejudicial to the administration of justice" and suspended from practice for six months by the appellate division of the supreme court. Ignoring the court's apparent concern for public reaction,[236] and looking entirely to the question of Nearing's fitness, her failure to be truthful under oath should be considered "situational" and not likely to recur in her professional activity. Non-professional perjury has its counterpart in the professional area, but the situation that Nearing was attempting to hide bears no resemblance to any that she would foreseeably encounter in practice.[237] Thus, judged solely by her act of misconduct, the likelihood that Nearing would commit perjury in her professional activity does not appear substantially more probable that it would be for an attorney who had not been so involved.[238]

The second case, *In re McMullin*,[239] involved a criminal conviction for failure to file federal income tax returns. Following a three-month period of imprisonment, the Missouri Supreme Court suspended McMullin indefinitely for the commission of an offense involving moral turpitude, though leave to apply for readmission after three years was granted. McMullin candidly admitted that he had not filed because he did not have the money to pay the taxes when the returns were due, so his misconduct did not arise from the sort of extraordinary web of personal circumstances that marked the *Nearing* case. Yet, the fact that McMullin had obtained official extensions of time for filing his returns belies any serious design to conceal his tax liability; his conduct would be better characterized as a lack of careful attention to the resolution of his tax problems. Could unfitness reasonably be inferred from this single act of mis-

236. 229 N.Y.S.2d at 569:

> [T]he protection of the public involves something more than the application of sanctions to the individual involved. It is accomplished through notice to the profession that certain conduct will not be tolerated and is thereby an assurance to the public that, as far as known, certain taints do not exist, because, if discovered, they would be eradicated . . . . [Citations omitted.]

237. In contrast, the lack of funds to pay non-professional obligations, which may result in a failure to file tax returns or in the writing of bad checks, see text p. 356 *supra*, may often have its counterpart in practice, see note 228 *supra* and accompanying text.

238. Other factors tending to indicate that Nearing's non-professional misconduct would not be duplicated in practice were her prior outstanding professional record, see note 243 *infra*, and her subsequent extraordinary candor and full cooperation in the investigation, see note 244 *infra*. For other instances of "situational" non-professional misconduct, see Florida Bar v. King, 174 So. 2d 398 (Fla. 1965); *In re* Meyerson, 190 Md. 671, 59 A.2d 489 (1948); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963).

239. *In re* McMullin, 370 S.W.2d 151 (Mo. 1963).

conduct? Additional facts appearing in the *McMullin* opinion support a negative answer. For from suggesting habitual carelessness,[240] McMullin's private life before and after his misconduct reflects both vitality and industry.[241] And his previous professional record, though shamefully deprecated by the judge presiding at his criminal trial,[242] suggests exceptional diligence in handling his client's affairs.[243] Any remaining doubts concerning McMullin's willingness to confront his responsibilities should have been assuaged by his plea of guilty to the criminal charge and his remarkable act of voluntarily submitting himself to the Missouri court for the imposition of appropriate discipline.[244] Obviously, predictions about future professional con-

240. Many decisions imposing discipline have emphasized the habitual nature of the attorney's misconduct. See, *e.g.*, Fellner v. Bar Ass'n of Baltimore, 213 Md. 243, 131 A.2d 729 (1961); *In re* Belluscio, 38 N.J. 355, 184 A.2d 864 (1962); *In re* Dubinsky, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938); State *ex rel.* Joseph v. Mannix, 133 Ore. 329, 288 Pac. 507 (1930); *In re* Chernoff, 344 Pa. 527, 26 A.2d 335 (1942); *cf.* Marsh v. State Bar of California, 2 Cal. 2d 75, 39 P.2d 403 (1934) (misconduct following earlier discipline for similar conduct); Dayton Bar Ass'n v. Prear, 175 Ohio St. 543, 196 N.E.2d 775 (1964) (misconduct while on criminal probation for similar misconduct); *In re* Brown, 64 S.D. 87, 264 N.W. 521 (1936) (misconduct during suspension for similar conduct). With respect to habitual careless driving, research has disclosed a significant correlation with lack of responsibility in the careless driver's other affairs. Tillman, *A Person Drives as He Lives,* 1959 Ins. L.J. 171.

241. In some decisions the general character of the attorney's private life has apparently been given weight in determining the magnitude of discipline. See, *e.g.*, *In re* Fischer, 231 App. Div. 193, 247 N.Y. Supp. 168 (1930); State *ex rel.* McLaughlin v. Graves, 73 Ore. 331, 144 Pac. 484 (1914); *In re* Evans, 94 S.C. 414, 78 S.E. 227 (1913). *But see* Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292 (1930); *In re* Meyerson, 190 Md. 671, 59 A.2d 489 (1948).

242. 370 S.W.2d at 152-53. One might well conclude that public comment by the judiciary on the low professional status of attorneys who represent criminal defendants (coupled with the gratuitous advice that such attorneys should charge higher fees) does more harm to the legal profession and the administration of justice than the presence at the bar of an attorney who has failed to file some income tax returns.

243. In some decisions the character of an attorney's professional record has apparently been given weight in determining the magnitude of discipline. See, *e.g.*, Bartos v. District Court, 19 F.2d 722 (8th Cir. 1927); *In re* Crum, 55 N.D. 876, 215 N.W. 682 (1927); *In re* Rotwein, 20 App. Div. 2d 428, 247 N.Y.S.2d 775 (1964); State *ex rel.* McLaughlin v. Graves, 73 Ore. 331, 144 Pac. 484 (1914); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963). *But see* Grievance Comm. v. Broder, 112 Conn. 263, 152 Atl. 292 (1930).

244. Compare the conduct of the attorney in a later Missouri case, *In re* Lurkins, 374 S.W.2d 67 (Mo. 1964).

The attorney's behavior following his act of misconduct has been considered in a number of decisions. *Compare, e.g.*, *In re* Wells, 293 Ky. 205, 168 S.W.2d 733 (1943) (bar committee recommendation of discipline not opposed). *In re* Graves, 347 Mo. 146 S.W.2d 555 (1941) (submitted voluntarily for discipline); *In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956) (apology for unjustified political attack); *In re* McShane, 122 Vt. 442, 175 A.2d 508 (1961) (cooperation with tax authorities); State v. Bunge, 20 Wis. 2d 493, 122 N.W.2d 369 (1963) (began to have tax returns prepared), *with, e.g.*, *In re* Wells, 293 Ky. 201, 168 S.W. 730 (1943) (no restitution); Fellner v. Bar Ass'n

duct cannot be made with certainty, but it scarcely seems that the court would have been taking a substantial risk had it determined that McMullin was fit to continue in practice.

B. The Relationship of Disciplinary Proceedings to the Processes of the Criminal Law

1. Proceedings in the Absence of a Prior Criminal Conviction.

Misconduct That Is Not Criminal. The discussion in the previous subsection concerning grounds for a determination of unfitness draws no distinction between non-professional misconduct that is punishable under the criminal law, whether or not actually punished, and misconduct that is not criminal. In estimating fitness, such a distinction would not generally be justified. Yet, when the conduct providing an alleged basis for discipline arises from a private business transaction, its non-criminal nature may be of significance. Consider, first, the situation of an attorney who, pursuant to a non-professional agency agreement, receives certain sums of money to be expended for specified purposes. If the attorney retains the money for his personal benefit, the violation of his fiduciary obligation would carry many of the same grave implications about his professional fitness as does misfeasance in public office.[245] Suppose, however, that the attorney properly pays out the moneys received, and his "misconduct" consists only of failing to account for the funds with the special promptness and precision required of attorneys in handling professionally the funds of others.[246] So long as the circumstances made it clear that the attorney was not acting in his professional capacity,[247] his conduct was appropriate for the role he had assumed. Thus, one could not fairly infer that upon reas-

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of Baltimore, 213 Md. 243, 131 A.2d 729 (1957) (no admission of guilt in face of overwhelming evidence); *In re* Shapiro, 236 App. Div. 659, 34 N.Y.S.2d 285 (1942) (no restitution); *In re* Cohen, 169 App. Div. 544, 155 N.Y. Supp. 517 (1915) (flight from jurisdiction); State *ex rel.* Joseph v. Mannix, 133 Ore. 329, 288 Pac. 507 (1930) (no restitution).

245. See text at note 221 *supra.*

246. See *In re* Genser, 15 N.J. 600, 105 A.2d 829 (1954). For the proposition that an attorney is subject to a special standard in accounting for funds, the court in *Genser* cites Canon 11 of the ABA Canons and the following language from *In re* Honig, 10 N.J. 74, 89 A.2d 411, 413 (1952):

> 'All fiduciaries are held to a duty of fairness, good faith and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others.'

105 A.2d at 832.

247. Apparently this was not the case in *In re* Genser, *supra* note 246.

suming his role as attorney he would not adjust his conduct to conform to the higher professional standard. Compare with this situation the troublesome case of an attorney who willfully breaches an "arm's length" commercial contract.[248] Although no fiduciary duty is involved, such conduct may differ only in degree from a criminal act of fraud in its overtones of danger to those whose interests are professionally enmeshed with the attorney's. But an argument can be made that because simple breach of contract is not subject to criminal sanctions, such conduct should be considered an acceptable, though undesirable, concomitant of business relations. In this respect, breach of contract may be said to resemble an agent's failure to render a prompt and meticulous account and, therefore, to offer little evidence of professional unfitness. Considerations of similar import may account in part for the paucity of reported disciplinary proceedings involving breach of contract.[249]

Criminal Misconduct That Has Not Been Prosecuted. The reported cases indicate that in recent years disciplinary proceedings for non-professional misconduct have seldom, if ever, been initiated prior to the disposition of an anticipated or pending criminal charge. One good reason for such delay may be seen in the observation of Lord Denman that "we should be cautious of putting parties in a situation where, by answering, they might furnish a case against themselves, on an indictment to be afterwards preferred."[250] A related reason, given by Mr. Justice Field dissenting in *Ex parte Wall*,[251] is that "to disbar an attorney for an indictable offence not connected with his professional conduct, before trial and conviction . . . . is to give the moral weight of the court's judgment

248. *Cf. In re* Chartoff, 16 App. Div. 2d 277, 227 N.Y.S.2d 578 (1962).

249. See *In re* Renehan, 19 N.M. 640, 145 Pac. 111, 121-22 (1914). Although instances of non-professional fraud by attorneys must be far outnumbered by instances of non-professional breach of contract, there are a considerable number of reported disciplinary cases involving fraudulent conduct. See cases cited note 216 *supra*.

250. Anonymous, 5 B. & Ad. 1088, 110 Eng. Rep. 1095 (K. B. 1834), quoted by the majority in *Ex parte* Wall, 107 U.S. 265, 276 (1883), in an opinion that nonetheless left the door open for hasty disciplinary proceedings in an indefinite number of cases. Apparently no indictment did follow the proceedings in *Wall*. See Drinker, Legal Ethics 44 n.17 (1953).

It is often asserted that an attorney may be compelled to testify in a disciplinary proceeding. See, *e.g.*, Fellner v. Bar Ass'n of Baltimore, 213 Md. 243, 131 A.2d 729 (1957); *In re* Chernoff, 344 Pa. 527, 26 A.2d 335 (1942); *cf.* ABA Model Rule 1.05. However, he may probably assert his privilege against self-incrimination, and his refusal to answer on any ground probably cannot be given artificial probative weight. See note 179 and text p. 344 *supra*.

251. 107 U.S. 265 (1883).

against him upon the trial on an indictment for that offence."[252] Practically, the absence of premature proceedings is probably explained by the relative ease with which the fact of misconduct may be established following a criminal conviction. To be distinguished from premature disciplinary proceedings are those cases in which no criminal charge has been brought or is reasonably foreseeable. In these cases the courts have taken the position that the profession is not compelled to "harbor all persons of whatever character who have gained admission to it and are fortunate enough to keep out of jail or the penitentiary."[253] If the only explanation for failure to prosecute a criminal offense was a considered decision by the appropriate prosecuting authority either that there was insufficient evidence of misconduct or that even in the absence of punishment the offender presented no real danger of future criminality, the fact that an attorney's alleged non-professional misconduct resulted in no criminal action would constitute good cause for refusal to hear a disciplinary complaint. However, in typical cases, the failure to prosecute can rather easily be explained apart from any such official judgment concerning the evidence or the necessity of preventive treatment. Misconduct involving fraud or the passing of bad checks frequently would not be brought to the attention of the prosecuting authorities because restitution had been made,[254] or because the injured party had instead chosen to seek restitution or revenge by filing a complaint with the bar committee.[255] The relative privacy of the committee hearings[256] may appear particularly attractive to those aggrieved parties who do not care to expose their past gullibility in a public trial.[257] Thus, the courts appear to be justified in going forward with disciplinary proceedings in the absence of prior criminal prosecution.[258]

252. *Id.* at 318.

253. *In re* Wilson, 79 Kan. 450, 100 Pac. 75, 77 (1949). For instances of imposition of discipline without a prior criminal prosecution, see cases cited note 216 *supra.*

254. *Cf. In re* Wells, 293 Ky. 201, 168 S.W.2d 730 (1943) (prosecution discontinued on payment of bad check).

255. See, *e.g., In re* Stone, 334 S.W.2d 351 (Ky. 1960); *In re* Hunt, 14 App. Div. 2d 397, 221 N.Y.S.2d 527 (1961).

256. Model Rule 1.07.

257. See, *e.g.*, Mauer v. State Bar of California, 219 Cal. 271, 26 P.2d 14 (1933); *In re* Raileanu, 225 App. Div. 90, 232 N.Y. Supp. 175 (1928); *In re* Isaacs, 17 App. Div. 181, 158 N.Y. Supp. 403 (1916).

258. See Model Rule 2.04: "If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to discipline." Factors that may have led to an official decision not to undertake criminal prosecution may be considered in the disciplinary proceedings on the issue of unfitness.

Acquittal of the Criminal Charge. Probably as difficult a problem as any in the area of discipline for non-professional misconduct is the effect to be given a prior acquittal of a criminal charge that included the acts claimed as grounds for discipline. Despite the admonition of Mr. Justice Field in *Ex parte Wall* that "if the court, after acquittal, can still proceed for the alleged offense, as a majority of my brethren declare it may, and call upon him to show that he is not guilty or be disbarred, there is a defect in our Constitution and laws which has, up to this day, remained undiscovered,"[259] most courts in recent years have said that an acquittal does not preclude subsequent disciplinary action.[260] Various reasons have been given for denying conclusive effect to an acquittal. One reason is that the jury in the criminal case had to find guilt beyond a reasonable doubt, but only clear and convincing proof is required to support a finding of misconduct in disciplinary proceedings.[261] However, once attention is clearly focused on the ultimate issue of unfitness, this argument must be regarded in some cases as unsound even in theory, *i.e.*, where the acts of misconduct have not been admitted and there are also doubts regarding the implications of the alleged misconduct for the attorney's fitness.[262] As a practical matter, the argument is even more difficult to accept. Assuming that the jury's deliberations were confined to the facts of the alleged offense, a unanimous verdict of acquittal suggests something more than a sliver of doubt.[263] Whatever merit remains in the degree of persuasion argu-

259. 107 U.S. 265, 307 (1883) (dissenting opinion).

260. See *In re* Browning, 23 Ill. 2d 483, 179 N.E.2d 14 (1962), and cases cited therein.

261. *In re* Browning, *supra* note 260; *In re* Chernoff, 344 Pa. 527, 26 A.2d 335 (1942). See also note 141 *supra.*

The lesser burden of persuasion argument is, of course, inapposite to cases in which the criminal charge was dismissed at the stage of preliminary examination for lack of "probable cause." See People *ex rel.* Chicago Bar Ass'n v. Jackson, 322 Ill. 618, 153 N.E. 621 (1926).

It was also suggested in the *Browning* and *Chernoff* cases, *supra*, that an acquittal should not be deemed conclusive because the privilege against self-incrimination is inapplicable to disciplinary proceedings. Reference has previously been made to the questionable nature of this proposition. See notes 170 & 250 *supra.*

262. If "clear and convincing proof of unfitness" may be assigned a probability value of .75, a probability value approaching "beyond a reasonable doubt" (*e.g.*, .95) is necessary with respect to the facts of misconduct even when the adverse implications for fitness of the alleged misconduct are relatively high (*e.g.*, .79).

263. One would suppose that a sliver of doubt probably would not have been appreciated by every juror and would have provided those who did perceive the doubt with little means to persuade the others. More likely than acquittal in a sliver of doubt case would be a hung jury, see, *e.g.*, *In re* Wilson, 76 Ariz. 49, 258 P.2d 433 (1953), or a conviction of a lesser included offense, if this device is available.

ment seems overbalanced by the attorney's justifiable expectations resulting from an acquittal when the only issue at the criminal trial was the existence of the facts relied upon in the disciplinary proceedings. A second argument for ignoring the jury's verdict of acquittal emphasizes the superior fact-finding abilities of the "trained minds of judges."[264] It may be true that on the question of predicting future professional misconduct members of the legal profession possess special competence, but well-established public policy requires deference to a jury's fact-finding capabilities. A third argument focuses on the possibility that acquittal by the jury resulted from a reason other than a finding that the attorney did not do those acts relied upon in the subsequent bar proceeding. Such a reason would be the presence in the criminal case of a factual issue that is not crucial to a finding of misconduct by the bar committee.[265] Other reasons are suggested in the majority's opinion in *Ex parte Wall*: "a prevailing popular excitement; powerful influences brought to bear on the public mind, or on the mind of the jury."[266] In these circumstances, the interests of the public and those of the individual attorney seem closely enough balanced that the only acceptable solution involves attempting to gauge from the criminal record whether there was a substantial likelihood of the jury's failure to come to grips with the facts essential to a finding of misconduct.[267]

2. Disciplinary Proceedings Following a Criminal Conviction.

The Conclusive Effect of the Criminal Conviction. Model Rule 2.06 provides:

> Conviction of a crime involving moral turpitude shall be conclusive proof of the guilt of the respondent, and a plea or verdict of guilty

264. *In re* Chernoff, 344 Pa. 527, 26 A.2d 335, 338 (1942).

265. For example, the value of the stolen goods in a prosecution for the crime of grand larceny.

266. 107 U.S. 265, 287 (1883). See also *In re* Richards, 333 Mo. 907, 63 S.W.2d 672, 678 (1933).

267. Such a flexible approach has apparently been adopted by the Illinois Supreme Court. See *In re* Browning, 23 Ill. 2d 483, 179 N.E.2d 14 (1962), 50 Ill. Bar. J. 797. The reversal on appeal of a criminal conviction for reasons other than insufficiency of the evidence should afford no basis for barring a subsequent disciplinary proceeding. See Florida Bar v. King, 174 So. 2d 398 (Fla. 1965).

With regard to prior acquittals, even in the area of professional misconduct, a technical double jeopardy claim would presumably founder at the outset if a rule asserting that *no* disciplinary proceeding is for the purpose of "punishment" is taken seriously. See Preamble, N.M. Rules (ABA Statement of Principles of Professional Discipline) and text at note 47 *supra*; Best v. State Bar of California, 57 Cal. 2d 633, 371 P.2d 325 (1962). *But see* text p. 331 and notes 31 & 68 *supra*.

> or a plea of *nolo contendere,* where followed by a judgment of conviction, shall be deemed to be a conviction within the meaning of this rule.[268]

Of course, the conclusive effect of a conviction should be limited to those elements that were essential to a determination of guilt.[269] With this qualification, and in view of the "strict rules for the protection of the defendant"[270] governing criminal cases, it would seem reasonable to enforce a rule of preclusion following *any* contested criminal conviction. When applied to contested cases, the model rule's restriction to crimes involving moral turpitude appears unjustified; the nature of the offense bears no evident relation to the reliability of the trier-of-fact's determination of guilt. The moral turpitude requirement can perhaps be explained by the draftsman's effort to deal in a single section with the preclusive effect of convictions following a contest and convictions following pleas of guilty and *nolo contendere.*[271] In attaching conclusive effect to convictions following pleas of guilty or *nolo contendere,* it may have been thought that an attorney charged with a crime not involving moral turpitude would often choose not to contest the prosecution—for reasons other than guilt. Such rules of non-preclusion may have merit in situations in which serious consequences are sought to be attached to conviction of a minor offense typically punished by a small fine, for example, a minor traffic violation. But the usual grist of the disciplinary mill is of a far different variety. Crimes not involving moral turpitude that are properly used as grounds for discipline seem invariably punishable by substantial fines or prison terms; conviction of such a crime should be deemed conclusive in disciplinary proceedings, whether or not the criminal charge was contested by the attorney.

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268. 81 A.B.A. Rep. 487-88 (1956). New Mexico rule 3-2.06 does not differ in any material respect. The model rule provision resolves a conflict of authority concerning the probative value on the issue of misconduct to be accorded a conviction in jurisdictions that, like the model rules, did not make the fact of conviction itself ground for discipline. *Compare In re* Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); *In re* Welansky, 319 Mass. 205, 65 N.E.2d 202 (1946); State *ex rel.* Sorensen v. Scoville, 123 Neb. 457, 243 N.W. 269 (1932) (the foregoing cases considered conviction conclusive evidence), *with* State v. O'Leary, 207 Wis. 297, 241 N.W. 621 (1932) (prima facie evidence).

269. *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1954).

270. State *ex rel.* Sorensen v. Scoville, 123 Neb. 457, 243 N.W. 269 (1932).

271. Jurisdictions in which the fact of conviction is not itself made a ground for discipline (as it is not under the model rules) have generally refused to give conclusive effect to conviction following a plea of *nolo contendere.* See, *e.g.*, Fellner v. Bar Ass'n of Baltimore, 213 Md. 243, 131 A.2d 729 (1957). See also Annot., 152 A.L.R. 253, 287-90 (1944).

The Consequences of Conviction and the Determination of Unfitness. Without extensive research, an elaborate psychological analysis of convicted attorneys is impossible, but attorneys convicted of crimes resulting from relevant non-professional misconduct might be thought to fall primarily into two categories of criminal offenders. Within the classifications suggested by Guttmacher and Weihofen,[272] attorneys guilty of non-fraudulent tax offenses and the drawing of checks on insufficient funds (for the purpose of avoiding pressing obligations) should probably be classed as "occasional or accidental criminals" possessing "a weak ego structure which can be temporarily overwhelmed."[273] In contrast, attorneys who carefully contrive fraudulent schemes may probably be classed as "normal criminals" whose criminality stems from environmental factors involving weak ethical standards.[274] Punishment imposed on the attorney who is an "occasional or accidental" offender may often consist of only a fine, or a suspended sentence and probation, or a deferral of sentencing.[275] Because of the "deterrent effect of the experience from apprehension to conviction" and the "stability of the surroundings and personality make-up of the defendant,"[276] these offenders may be deemed to present an insufficient risk of future harm to warrant the preventive treatment of imprisonment. Such a judicial finding should be accorded considerable weight in a subsequent

272. Psychiatry and the Law, ch. 16 (1952).

273. *Id.* at 385.

274. *Id.* at 385-86. Recent studies have revealed a great diversity of personal backgrounds and of professional environments within the legal profession. See generally Carlin, Lawyers on Their Own (1962); Smigel, The Wall Street Lawyer (1964); Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law*, 16 J. Legal Ed. 127 (1963).

275. See, *e.g.*, *In re* Morris, 74 N.M. 679, 397 P.2d 475 (1964). For an account of the criminal prosecution in Morris, which resulted in a deferred sentence, see note 8 *supra* and accompanying text. See also *In re* Van Arsdale, 44 N.J. 318, 208 A.2d 801 (1965); State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963).

276. National Council on Crime and Delinquency, Probation Services in Pennsylvania 156 (1957), quoted in Rubin, Weihofen, Edwards & Rosenzweig, The Law of Criminal Correction 170 n.81 (1963).

In at least one case, the publicity, humiliation, and loss of position resulting from a prior criminal prosecution were considered in mitigation of the discipline to be imposed. Florida Bar v. King, 174 So. 2d 398 (Fla. 1965). Concerning circumstances under which it is appropriate to impose a fine as the sole criminal penalty, the Model Penal Code provides that

> the Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

Model Penal Code § 7.02(1) (Proposed Off. Draft 1962).

disciplinary proceeding to determine unfitness.[277] An attorney convicted of more calculated criminality will probably be sentenced to imprisonment. Preventive treatment of this kind may well be necessary in the case of an offender whose present environment encourages anti-social conduct, and thus is not likely to contribute to his rehabilitation. Assuming that such an attorney has been automatically suspended from practice during his period of imprisonment,[278] and must petition for termination of the suspension, how much weight should be given his confinement in passing upon his fitness to resume practice? One might suspect that the answer to this question is "rather little." First, good conduct in prison, where opportunities for wrongdoing are at most of a very elemental kind, offers little assurance that when occasions for more sophisticated malefactions are again present, they will not be seized upon. Second, it may be doubted whether an attorney whose legal education and professional experience have failed to develop acceptable standards of personal conduct will have been reoriented by a term in prison.[279] However, one must concede that in some instances of "one-time" misconduct, the unpleasant prison experience may have served to reinforce pre-existing ethical standards that had been purposefully abandoned.

C. *Appropriate Treatment for the Unfit Lawyer*

When the attorney's non-professional misconduct has led the court to determine that he is unfit to practice, it must then seek a disposition fair to the attorney and adequate to protect the public, the profession, and the courts from professional misconduct.[280]

Given a prior determination of unfitness, a disposition solely by reprimand or censure, public or private, seems questionable. It may be supposed that a reprimand will have the salutary effect of transforming the unfit to fitness overnight, but such a transformation is unlikely. When the disciplinary proceeding follows conviction of a criminal offense, the shame and embarrassment attending a repri-

277. While the attorney's fitness must remain the primary concern of disciplinary proceedings, some consideration might be given to the fact that a mode of criminal treatment relying on continuity of environment will probably not be furthered by suspending the attorney from practice.

278. See note 96 *supra* and note 193 *supra* and accompanying text.

279. However, weight should be given an attorney's response to psychiatric treatment received during imprisonment.

280. Model rule 3.01 contemplates that the bar committee exercising the adjudicatory function should not only determine whether or not the attorney's misconduct warrants discipline, but that it should make recommendations to the court regarding the form and severity of discipline to be imposed.

mand would be negligible compared to the condemnation and disgrace that resulted from the public trial and conviction, events that by hypothesis have failed to assure the attorney's fitness. Even when no criminal prosecution resulted from the non-professional misconduct, it seems unlikely that a reprimand would have substantial impact on an attorney whose years of law study and professional experience have failed to inculcate acceptable ethical standards. Because a reprimand neither removes an attorney from practice nor, in all probability, accomplishes his rehabilitation, it seems a particularly unreliable device for protecting the public; and in terms of anticipated public reaction, a reprimand clearly implies "the retention in the profession of proven irresponsibles."[281]

If the court determines that the attorney is presently fit to practice, the disciplinary charges should be dismissed.[282] When the attorney is found to be fit, a reprimand directed to the nature of his non-professional misconduct can only be explained as a special punishment to which the individual is subjected because he is a member of the legal profession. Yet, so long as bar committees fail to limit their preliminary inquiries concerning non-professional misconduct to the single question of unfitness, courts will have to dispose of a number of records that contain no showing of unfitness. Judges are themselves members of the bar and may find it awkward to reject the disciplinary recommendations of their colleagues. Moreover, judges will be aware of the public interest in well-publicized disciplinary cases. For these reasons, some courts may not care to dismiss an insufficient complaint without some criticism of the attorney's behavior. The use of a reprimand under these circumstances, though not desirable, is understandable.[283]

Like the reprimand, permanent disbarment from practice seems an ill-suited disposition when unfitness has been determined by non-professional misconduct. Whether or not such a "death penalty" with respect to the lawyer's professional life may be justified as the ultimate deterrent in cases of professional misconduct, it must be regarded as unnecessarily harsh when discipline is to be imposed

281. Minority Report, Special Comm. on Disciplinary Procedures, 81 A.B.A. Rep. 477, 481 (1956).

282. See, *e.g.*, Bartos v. District Court, 19 F.2d 722 (8th Cir. 1927); Kentucky Bar Ass'n v. Brown, 302 S.W.2d 834 (Ky. 1957).

283. See, *e.g.*, Florida Bar v. King, 174 So. 2d 398 (Fla. 1965). The reprimand imposed in State v. Roggensack, 19 Wis. 2d 38, 119 N.W.2d 412 (1963), was frankly explained as punishment. See note 31 *supra*. A reprimand is a proper if not very promising sanction for professional misconduct.

solely for the purpose of prevention. No attorney should be considered beyond redemption, and even in extreme cases, the fact that an attorney after a long suspension is willing to begin practice anew offers some assurance of future responsibility.

The form of discipline best calculated to protect the public without undue harshness to the attorney is suspension from practice for an indefinite period. If an attorney is automatically supended during a period of imprisonment, and his application for termination of the suspension (treated as an original disciplinary proceeding) is denied, further indefinite suspension would take the form of a continuation of the existing suspension.

Under the Model Rules, an indefinite suspension must be coupled with the setting of "a minimum period which must elapse before the court will entertain a motion by the respondent for termination of suspension."[284] The requirement that a suspended attorney take affirmative steps to regain professional status marks an improvement over the practice of suspending for a fixed period of time with automatic reinstatement thereafter.[285] The model rule affords an opportunity for an evaluation of the attorney's fitness to resume practice. If this opportunity is to be effectively utilized, notice of the petition for termination of suspension should be given to an appropriate bar investigating committee, and by this committee to other interested persons.[286] State or local bar publications should provide a suitable medium for the solicitation of comments on the petition, favorable or unfavorable.[287]

The model rule, however, cautions that the setting of a minimum period of suspension "should not be construed to imply that the respondent will be entitled to the termination of his suspension at the end of such minimum period,"[288] and a later rule places a burden of showing fitness "by clear and convincing evidence" on the

284. Model Rule 3.01.

285. In New York, the appellate division, first department, appears to follow consistently the practice of suspending for a "fixed period." See, *e.g.*, *In re* Rotwein, 20 App. Div. 2d 428, 247 N.Y.S.2d 775 (1964); *In re* Nearing, 16 App. Div. 2d 516, 229 N.Y.S.2d 567 (1962).

286. Under model rule 3.03, notice is given to the bar commissioners, but there is no specific provision for notice to other persons.

287. It would not seem too onerous a requirement for the suspended attorney to submit with his petition for termination of suspension a short summary of information, similar to that required for admission to the bar, covering only the period from the date of his suspension. Availability of this information would facilitate whatever inquiries regarding the attorney's character and conduct the investigating committee considered necessary.

288. Model Rule 3.01.

suspended attorney.[289] Along the same line, it has been suggested that the provision for individual minimum periods of suspension should be abandoned entirely, in favor of the establishment of a uniform minimum period (presumably quite short) for all cases.[290] The "show-me" approach has certain theoretical merits; in its focus on actual evidence of rehabilitation it seems to be at the same time fairer to the attorney and more reliable in terms of the public welfare. Nevertheless, there are good reasons why variable minimum periods should be utilized and why, in the absence of a showing of misconduct during the period of suspension, an attorney should be reinstated as a matter of course. Because an order of suspension removes the attorney from his usual professional milieu, what would be his best evidence of rehabilitation is denied him. Dislocated from his former social and economic surroundings, the attorney, in an ordinary case, will probably be able to produce only a rather unremarkable record of steady work and decorous conduct. To demand clear and convincing proof is to demand the impossible.[291] Thus, any realistic scheme of suspension necessarily must involve a guess by the court regarding the length of the period of clean living that will provide adequate assurance of rehabilitation.[292] This guess may as well be made, and in fairness to the attorney who must plan his affairs,[293] should be made, at the time he is determined to be unfit.

289. Model Rule 3.03.

290. Minority Report, *supra* note 281, at 480.

291. Similarly unrealistic is the earlier requirement that the suspended attorney's application for termination of suspension set forth "facts showing he has rehabilitated himself." Model Rule 3.02(b).

292. *But see* Minority Report, *supra* note 281, at 480:

> [A]ny variation in the minimum period can be justified only on the theory that it must fit the enormity of the offense, and it injects back into the system of discipline to be established exactly what the Statement of Principles says shall *not* be injected—the theory of punishment. . . . [Emphasis by the author of the Minority Report.]

Variations in periods of suspension may also be explained by further reference to factors previously considered in deciding that some discipline should be imposed: the nature of the unfitness disclosed by the particular type of misconduct, see text pp. 354-57 *supra*; the likelihood of "carry-over" to professional activity, see text pp. 357-60 *supra*; and the estimated impact of sanctions that have already been imposed, see text, pp. 366-67 *supra*. The greater the danger to the administration of justice, the greater the assurance of rehabilitation that should be required.

293. The necessity of such planning distinguishes the attorney who is indefinitely suspended from the prisoner who is serving an indeterminate sentence.

In Wood v. State *ex rel.* Boykin, 45 Ga. App. 783, 165 S.E. 908 (1932), the attorney's acts of misconduct were apparently caused by alcoholism. Although it was not denied that he had been sober for a period of four months before disciplinary proceedings were initiated (and for almost two years before the court's decision on appeal), the attorney was disbarred—because his sobriety had extended for only "a

If a reasonable time for comment on the attorney's petition has been given (*e.g.*, thirty days) and the bar investigating committee has not received information sufficient to warrant filing a formal objection to the petition, the suspension should be terminated. If an objection is filed, a hearing should be held before the bar committee exercising adjudicatory functions, with the burden on the investigating committee to show by a preponderance of the evidence that the attorney's conduct during the period of suspension warrants a finding that he remains unfit to practice.[294] Upon the confirmation of such a finding by the court, the suspension should be continued, with leave to reapply at a definite time in the future.

CONCLUSION

Equal protection and individualized treatment for lawyers are more than mere technicalities imposed on the bar by constitutional command; they are assumptions basic to any fair and intelligent scheme of discipline for non-professional misconduct. Yet, they have not received adequate attention by the bar and bench. While one who has surveyed past decisions could not honestly report pervasive injustice, the number of mistakes has been too great to permit indifference. Rule-makers (including the draftsmen of the Model Rules) have not helped the situation by lumping disciplinary proceedings for non-professional misconduct with those for professional delinquencies. Indeed, a useful first step toward careful analysis might be abandonment of the term "disciplinary proceeding" in the non-professional area in favor of the term "proceeding to determine fitness to practice." If such limited jurisdiction over non-professional misconduct seems to the reader inadequate to the job of cleansing the bar of "undesirables," he may be consoled by the fact that "it is a poor sport that is not worth the candle."

However painful the realization, the day is fast arriving when an

few months"—with leave to apply for reinstatement at "the proper time." Compare *In re* Evans, 94 S.C. 414, 78 S.E. 227 (1913), another case involving misconduct caused by alcoholism, in which the attorney was suspended with leave to apply for reinstatement after two years of sobriety.

294. Concerning the need for separating investigatory and prosecuting functions from the adjudicatory function within the bar's disciplinary machinery, see Note, 13 Notre Dame Law. 346, 354 (1962).

The New Mexico rules clearly provide for such separation of functions in both original disciplinary proceedings and in proceedings for the termination of suspension. See N.M. Rules 3-1.02, -1.03, -1.05, -3.03. The comparable provisions in the Model Rules are less specific, but separation of functions is apparently contemplated, at least for original disciplinary proceedings.

attorney in the United States can no longer expect to derive complacent self-satisfaction from being closely identified with the more admired personal qualities of his colleagues at the bar. Absent a sharp reduction in the number of tasks society expects attorneys to perform,[295] further expansion in the size of the legal profession may be anticipated, and the trend toward specialization—by choice and by necessity[296]—will no doubt continue. These factors, and increasing diversity in the social, economic, and cultural backgrounds of attorneys, will inevitably obliterate the nostalgic and fading image of the legal profession as an exclusive and genteel social club. Then, more than ever before, the status of the legal profession will depend on its faithful service to the needs of society.

295. Such a reduction might be accomplished by the formal creation of "an adjunct or subprofessional class" to perform routine legal functions at a more reasonable cost than they can be performed by attorneys. See Schwartz, *Foreword: Group Legal Services in Perspective*, 12 U.C.L.A.L. Rev. 279, 303-05 (1965).

296. With respect to the latter form of specialization, see generally Carlin, Lawyers on Their Own (1962).