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Morals and the Courts: The Reluctant Crusaders

Martin Shapiro

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The role of American courts in choosing moral positions has long been the subject of debate. The works of Cahn and Berns, who have recently pressed for the assignment of moral tasks to the courts, set the stage for the author's discussion of the principles involved and what the courts have done in practice. The author has analyzed four areas of the law—good moral character, moral turpitude, the Mann Act, and obscenity—where the courts have been either invited or commanded to inject their own moral precepts. He concludes that the courts' failure to establish moral standards stems from society's failure to articulate any moral consensus. In addition, the author notes the inadequacies of the case-by-case method as applied to moral judgments. Nevertheless, he rejects the moral censorship formula as being incapable of implementation.

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INTRODUCTION

One of the recurring fashions of American political life, now again at a high point, is the call for more morals in politics. We must have a sense of national purpose. The President must provide moral leadership. Congress must reach decisions not simply acceptable to the competing interests involved, but wise and true as well. Democracy, or at least the American variety, must no longer be considered merely a process. It must have some substantive content. It must embody some set of essential "goods."

It is not surprising under these circumstances that the courts, particularly in such "political" areas as free speech and subversion, have been called upon to do their part in the moralization of American life. Two recent books, *The Moral Decision* by Edmond Cahn[1] and *Freedom, Virtue and the First Amendment* by Walter Berns[2] have been particularly pressing in their assignment of mor-

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1. CAHN, THE MORAL DECISION (1955).
2. BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT (1957).

al tasks to the courts. Professor Cahn insists that judges must face up to the moral decisions which confront them in every case they consider. A mechanical reliance on legal precedents is just an excuse to continue supporting an existing wrong, a self-indulgent shirking of the moral responsibility possessed by every individual.[3] "[T]he path of personal responsibility . . . remains the only path anyone ever found to wise and righteous judgment."[4] The judge may not apply the community's standards of morality or behavior; they are too diverse and indeterminable.[5] Nor may he rely on moral absolutes, for there are none.[6] The moral precepts implanted in the judge by familial and social upbringing may help to organize his thinking, but even they cannot be absolutely binding in any given instance.[7] The judge must finally rely on his sense of injustice—an emotional, intellectual and physiological reaction to wrong which exists in every man by reason of his ability to project himself into others and thus treat them as he would himself.[8] Since Cahn accepts the pragmatic view that the distinction between law and morals rests simply on different modes of enforcement,[9] and a judge's decisions are certainly enforced within the legal mode, the result of his argument is a kind of free legislation by the judge based on his particular moral sentiments.

However, Cahn himself complains of philistine judges who lower the law to their own level, and notes that it is usually the best judges who are most aware of the problems of moral relativism and least willing to make personal decisions.[10] Even granting for the moment the unproved assumption that every judge has the necessary *quantity* of Cahn's visceral-cerebral-empathic sense of wrong, it may well be that the best judges are aware, as Cahn seems to be when he talks about philistines, that the *quality* of that sense may vary widely. No clearer or higher standard may emerge from the collective moral decisions of judges than from consultation of the community's sentiments. How much faith are we to put in the "expanding moral constitution" of judges?[11] Another of the moralists, Professor Fuller, offers as a matter of personal belief the notion that only good (not evil) is coherent and logical, so that a case-by-case "moral working out" of the law leads progressively to good law.[12] The belief that evil cannot

3. CAHN, *op. cit. supra* note 1, at 54.
4. *Id.* at 303.
5. *Id.* at 26–27, 303.
6. *Id.* at 26.
7. *Id.* at 23–27.
8. *Id.* at 16–20, 31. See also CAHN, THE SENSE OF INJUSTICE (1949).
9. CAHN, *op. cit. supra* note 1, at 47–48.
10. *Id.* at 303.
11. *Id.* at 31.
12. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

be coherent and logical is a rather curious one for twentieth-century man. In view of our recent experiences, it may at the very minimum be suggested that only those with the patience of Job would be willing to wait for the allegedly transitory evils of the world to clear away sufficiently to give us a glimpse of that golden day which would confirm man's moral progress. In any event, beliefs of this sort are more likely to be found among Professor Cahn's philistines than among the learned. The rejection by the best judges of Cahn's approach may well suggest that their experience indicates that the arbitrary and undesirable results which immediately ensue from free moral judgment outweigh the dubious long-term advantages.

Walter Berns begins from the premise that a good man is loyal only to a good state and a bad man only to a bad state. Since the goal of the good state is virtue, an ideal relation among men, the task of that state is moral education of the citizenry, the training of good men. Freedom can only be extended to men of good character, men we can trust. Freedom to speak is not freedom to speak ill. Immoral speech interferes with the good state's task of training moral citizens, and is thus disloyal speech. Only persons of good moral character may be trusted with free speech. The argument that the first amendment forbids such regulation is invalid. The Constitution leaves the courts wide leeway in such matters—and the task of judges is to make the Constitution conform to justice, not justice to the Constitution. Therefore, the first amendment must be interpreted as allowing good and forbidding bad speech.

There is of course a strong parallel between Berns' doctrine and the teachings of the Catholic Church. Leo XIII wrote:

> So, too, the liberty of thinking, and of publishing, whatsoever each one likes, without any hindrance, is not in itself an advantage over which society can wisely rejoice. On the contrary, it is the fountainhead and origin of many evils . . . . [T]he state is acting against the laws and dictates of nature whenever it permits the license of opinion and of action to lead minds astray from truth and souls away from the practice of virtue.[13]

But the Pope can add, "The Church of Christ is the true and sole teacher of virtue and guardian of morals."[14] It is the lack of such a universally recognized authoritative source for moral doctrines, coupled with the historical disagreement over the substance of moral "truth," which makes Berns' doctrines philosophically vulnerable and politically suspect. But here we will limit ourselves to the problem of whether the courts can, in view of the present

13. *Immortale Dei,* reprinted in THE CHURCH SPEAKS TO THE MODERN WORLD 175 (1954).
14. *Id.* at 176.

state of moral knowledge, perform the tasks assigned them by Berns.

This coupling of Cahn and Berns is not meant to imply that their doctrines are necessarily in harmony. Professor Spitz places Berns in the secular natural-law school.[15] Cahn rejects objective, fixed, and readily ascertainable moral principles.[16] His moral relativism is softened only by the notion of a progressive improvement and deepening of human moral perception. But, for our purposes at least, both authors have a strikingly similar impact. In spite of the differences in labeling, both answer in about the same way the question of how the teacher himself is to know the difference between right and wrong. No matter what ultimate source they predicate, natural-law theorists like Berns invariably find that the law is ascertainable because it dwells in the consciousness and behavior of the normal man of good will, or the average man, or every man. The judge is presumably such a man. Cahn repeatedly invokes the personal moral sense of the judge and the responsibility, which he shares with every man, of making moral judgments. The judge is thus the "average man of good will" writ large, and derives right or wrong from the same universal moral sense which defines the natural law. The definition of the judicial function is shifted from the application of law to the identification of good and evil. Thus, for both writers, the judge is a moral preceptor and leader responsible for guiding the community to a higher moral level.

I. IS v. OUGHT

The work of Cahn and Berns is, of course, part of the traditional debate over law and morals which is now enjoying a flourishing revival, and it would be difficult to evaluate their approaches to the judicial function without some examination of this general context. Briefly, the struggle is between those who believe that law is simply the body of rules and statutes promulgated by the law-makers and applied by the courts, and those who refuse the name of law to any but those ordinances and decisions which embody the right, the just, and the good. We have recently witnessed a brilliant clash between the morals-in-law approach, in the person of Professor Fuller, and the law-as-what-is-not-what-ought-to-be school, represented by Professor Hart.[17] An examination of their positions ought, therefore, to clarify the problems raised by those who wish to emphasize the moral role of the courts.

15. Spitz, *Freedom, Virtue and the New Scholasticism*, 28 COMMENTARY 313 (1959).

16. CAHN, *op. cit. supra* note 1, at 26–27.

17. See Fuller, *supra* note 12; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

The key to Hart's approach is the notion of penumbral areas, fact situations not specifically covered by existing laws or rules or clearly deducible from existing laws—those cases which lie in the interstices between the general rules. Here he admits that an intersection between "is" and "ought" occurs because judges must decide such cases on the basis of what the law ought to be.[18] But he argues that the "ought" the judges use may be based not on morals but on many other purposes or standards, for instance retaining a dictatorial state in power.[19] Fuller points out that in the real world, "oughts" like maintaining a dictatorial government may be based just as much on morals as the "ought" of overthrowing a dictator, but on morals we dislike.[20]

But this criticism misses the main point. The "ought" may be based not on the individual judge's notions of right and wrong but on his striving for continuity and internal consistency in law. When faced with an interstitial fact situation, he may strive to make a ruling in the best possible conformity with existing law, not in the greatest accord with the relative moral position of the parties. Thus Hart's point is that if we conclude from the penumbral situations that the moral or other "oughts" used are an integral part of law, we obscure the fact that penumbral cases are penumbral precisely because they fall between settled lines of law.[21] Such a conclusion loses sight of the essential influence of settled rules of law on marginal decisions. If "oughts" must be considered in all law, then there are no standard cases and every decision would have to be made in the light of the broadest considerations of social policy, a potentially overwhelming chore for the courts.

Hart, however, does not banish moral responsibility from the judicial realm. He insists that a legal enactment like any other idea or social fact is subject to moral judgment. If it is bad, then the question arises whether an effort should be made to change it or whether it should be obeyed at all. But good or bad, it is law. Thus Hart's concept of law handles the routine situations, leaving the decision-makers free to concentrate their energies on crucial or marginal problems.

Fuller's critique of Hart is based on the value of fidelity to law. Thus Fuller insists that to say that an ordinance is law, but need not be obeyed if it is bad, leads to confusion and a weakening of the drive to obey law.[22] But no less confusion would seem to re-

18. Hart, *supra* note 17, at 607–08, 612.
19. *Id.* at 612–13.
20. Fuller, *supra* note 12, at 636.
21. Hart, *supra* note 17, at 614–15.
22. Fuller, *supra* note 12, at 642, 646–47, 655.

sult from arguing, as Fuller seems to, that something which has all the outward characteristics of law is not necessarily real law—and consequently need not be obeyed—if it is evil. More incisive is Fuller's argument that positivism has found no link between the duty to obey an essentially amoral law and the moral duty of acting rightly.[23] If "is" and "ought" are mixed in defining law, so that law is by definition good law, the duty to obey law and the duty to do good are mutually re-enforcing.

The dispute between Hart and Fuller thus seems to be reduced to the question, will men obey a law if they are not told that all real law is good law? Hart is willing to make obedience to law subject to individual and independent moral judgment.[24] Fuller argues that a philosophy which allows men to obey some laws and not others does not yield sufficient fidelity to law. He insists that this fidelity must be directly enforced by a kind of automatic moral obligation.[25] In short, he is endowing (or trying to endow) the word "law" with a kind of mystical authority to command obedience to whatever directives are so labeled. From this it would seem to follow that any directive which is bad must be caught before the labeling stage. Hart does not endow the label with so much psychological potency. The disagreement here is, of course, a matter for empirical verification, but there would seem to be a natural tendency for lawyers to endow a word so important to them with more power than it commands in a broader society. In any event, the distinction between "all good law is law" and "all law is good law" while perfectly clear in logic is easily blurred in the hands of a skilled propagandist. In the real world, therefore, whatever potency the word "law" may acquire through association with the word "good" is as likely to serve the cynical tyrant as the moral prophet.

In fact Hart and Fuller are much closer to agreement than the tone of their debate indicates. For instance Fuller says that positivism helped Hitler because it taught that any command from above was law, so that German lawyers accepted and enforced Nazi statutes.[26] Surely Hart could reply that the trouble was not that the German lawyers would accept anything from above as law, but that they would enforce any law, right or wrong.[27] A good part of the seeming disagreement simply comes from differing usage of the word "law." If, for "law," we might substitute "X" (defined as any directives which are—when no philosophic debate is

23. *Id.* at 656.
24. Hart, *supra* note 17, at 620.
25. Fuller, *supra* note 12, at 646, 655–67.
26. *Id.* at 659.
27. Hart, *supra* note 17, at 618.

involved—called law,[28] or as "anything that called itself by . . . [the] name [of law], was printed at government expense, and seemed to come 'von oben herab' "[29]) the problem becomes clearer, at least in terms of the judicial process. It is obviously a duty of a judge to relate the X to the case before him. In Fuller's approach, the judge determines that the X is bad. If it is bad, it is not law. His moral duty is to enforce law. Therefore he does not enforce the X. Hart's judge also determines that X (which he calls a law) is bad. His moral duty is to enforce good X's. Therefore he does not enforce this X. Aside from what seems to me the advantage of Hart's system in squarely presenting the judge with a conflict between his moral obligations and his routine duties, there is not much difference here. Both judges enforce the X if it is good and refuse to do so if it is bad.

Of course this is a vast oversimplification, but that it is essentially correct I think can be demonstrated by examining the more specific arguments of the two contestants concerning the actual process of decision-making. Fuller recognizes that judges should not inject too much "ought" into law. He gives the example of a law forbidding the sale of absinthe. The judge must be governed by the purpose (the "ought") of the law, which is the protection of public health. But he may not, according to Fuller, then reason that the purpose of the statute is health, absinthe is not unhealthy, therefore, the sale of absinthe is not forbidden by the statute.

> A statute or a rule of common law has, either explicitly, or by virtue of its relation with other rules, something that may be called a structural integrity. . . . Within the limits of that structure, fidelity to law not only permits but demands a creative role from the judge, but beyond that structure it does not permit him to go.[30]

Elsewhere[31] he has argued that criticism of his mixture of "is" and "ought" would be justified only if the—

> . . . view I am advocating permitted the interpreter of a statute or precedent to read into it any purpose he saw fit. No such abandonment of ordinary principles of interpretation is here proposed or implied. All that is asserted here is (1) that a law must be interpreted in the light of some purpose; (2) that this purpose should not be subjected to a false 'logic' derived from experience in dealing with non-purposive facts.[32]

He has also indicated that the "structure" or "core" of law beyond

28. *Id.* at 620.
29. Fuller, *supra* note 12, at 659.
30. *Id.* at 670.
31. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457 (1954).
32. *Id.* at 470–71.

which the judges may not go—and which expresses the purposive element of the legal system against which individual statutes must be tested—is, in the United States, embodied in a written constitution.[33] I think it would be fair to say that Fuller is suggesting a moral obligation on the part of judges to interpret and apply the law in particular instances in accordance not with their own notions of right or wrong but according to the purposes of the statute and the provisions of the Constitution. How far is this from Hart's notion that, in applying law to penumbral situations, reference must be had to the standard or general applications?[34] Isn't the "ought" which Fuller urges and Hart admits in these situations the one which demands that decisions ought, whenever possible, to be in accordance with the body of law or Constitution as it is?[35]

Furthermore Fuller's concept of natural law as simply a declaration of the purposive elements in law,[36] and his description of the Catholic doctrine of natural law as simply another form of positivism,[37] indicate that he favors a tentative trial and error approach to the injection of morals into law which is hardly compatible with extreme emphasis on the moral rather than legal duties of judges. The position Fuller seems to arrive at is that judges must make some moral judgments, but that they may not impose any absolute or dogmatic theory of morals on law or substitute their personal moral purposes for those embodied in the statute or Constitution. I do not find Hart in basic opposition to such an approach. There seems at most a difference in emphasis. Hart, stressing the legal facets of decision-making, would bind the judge somewhat closer to literal interpretation. Fuller, focusing on the moral facets, would give him a little looser rein.

33. Fuller, *supra* note 31, at 463.

34. Hart, *supra* note 17, at 614–15. Fuller professes to find a direct opposition between himself and Hart on the question of statutory construction. He accuses Hart of attempting to define words without due regard to context. But of course much of Hart's work has been devoted to relating the contextual method of definition to law. See Auerbach, *On Professor H. L. A. Hart's Definition and Theory in Jurisprudence*, 9 J. LEGAL ED. 39 (1956). Again the difference seems to me to be one of emphasis. Hart, in attempting to discover standard contexts, is simply putting more emphasis than Fuller would on the obvious connection between the meanings of the same word used in varying contexts.

35. The qualification "whenever possible" is included because neither man holds that a judge is morally bound to enforce a patently immoral statute no matter what its relation to existing law. Although Fuller accuses positivism of banishing moral duty from the legal process, Hart and other positivists certainly do not view law as an entirely self-contained process immune from moral influence. See Bodenheimer, *Analytical Positivism, Legal Realism and the Future of Legal Method*, 44 VA. L. REV. 365 (1958); Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957).

36. Fuller, *supra* note 31, at 463.

37. Fuller, *supra* note 12, at 638, 660.

The Hart-Fuller exchange represents a kind of microcosm of the present debate over law and morals. Certainly after the work of the realists no one is saying that moral judgments are or can be excluded from judicial decisions. But neither is anyone willing to say that the body of statute and case law is or can be totally ignored by the judges. Therefore, those who desire the Supreme Court or any court to act as a moral censor in deciding the speech cases do not bolster their argument by demonstrating either that judges do or should make moral judgments or that morals and law are inevitably interrelated. These points are admitted by all sides. The crucial questions are: should the moral rather than the legal role of the judge be particularly emphasized, and, when a conflict arises between statute or Constitution and a judge's personal predilections, which should take precedence?

The validity of the suggestions put forward by Cahn, Berns and others who champion a primarily moral role for the courts cannot be tested by a logical analysis of the relation of law to morals, for such analyses inevitably resolve themselves into questions of degree which cannot be settled abstractly. The very fact that all such arguments do reduce themselves to issues of "more" or "less" suggests that Berns' and Cahn's prescriptions must be evaluated in the light of an examination of just how far courts are actually able and willing to go in interjecting moral concepts into legal decisions. The remainder of this paper is therefore devoted to an examination of some of those areas of the law (good moral character, moral turpitude, transportation of women for immoral purposes, obscenity) into which judges have been most clearly invited or commanded to inject moral precepts. It may strike the reader that such materials are loaded. But it should be remembered that the point at issue is not whether courts do or should exercise their moral sense. The dispute is over whether courts should put maximum emphasis on their moral predilections. The bodies of case law discussed here are precisely those in which maximum emphasis is likely to arise and, therefore, those which seem most directly related to the problem.

In addition, these areas allow us to test most of the rationales for increasing the judiciary's moral role. Obscenity law, for instance, involves differentiating between good and bad thought, and balancing the state's interest in morality against freedom of speech. Judges working in several of the categories make use of the community's standards rather than taking Cahn's path of personal responsibility. The law of moral character and moral turpitude presents an opportunity for a long series of individual judgments which bear on Cahn's and Fuller's notion of the progressive improvement and consolidation of moral decisions. Moral turpitude

statutes require courts to distinguish between legal and moral wrongs, and Mann Act cases call for distinctions between moral and immoral purposes of otherwise innocent acts. These examples could be multiplied, but the applicability of most of the material to the initial problem should become clear in the course of the discussion. Finally, on occasion a court is described as refusing to make a moral judgment, for instance when it follows precedent or relies on a traditional legal category. I am well aware that such an action has a moral content of its own, but the point is again one of more or less—does the court seek to emphasize or de-emphasize its moral functions?

II. GOOD MORAL CHARACTER

Since the Naturalization Act of 1790,[38] the requirement that an alien demonstrate good moral character as a prerequisite for obtaining United States citizenship has been part of our law.[39] Federal district courts and various state courts, as the final recipients of naturalization petitions, have been required to determine whether aliens met this requirement.[40] Until 1952—and, therefore, in most of the cases discussed here—the statutes provided no specific criterion as to what was or was not good moral character.[41]

We may begin with the proposition that it is petitioner's character, not his reputation or behavior, which must be proved good.[42] But at this early juncture the difficulties and confusions that we shall find throughout the morality cases begin to appear. First of all, "good character" has, in law, frequently meant something very close to good reputation,[43] so that the distinction—even at the technical level—is not easy to make. Secondly, a man's character is not a piece of evidence which may be labeled "exhibit A" and

38. Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103.

39. Good moral character is also required under the provisions for discretionary relief from deportation and under other provisions for continued residence of aliens. See LOWENSTEIN, THE ALIEN AND THE IMMIGRATION LAW 116, 138, 153, 263 (1958).

40. See ANSON, CONTRACTS § 416 (5th Amer. ed. 1930); PROSSER, TORTS 18–22 (1st ed. 1941); 1 WIGMORE, EVIDENCE § 55 (3d ed. 1940); Wechsler & Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1273 (1937).

41. Note, *Naturalization—Good Moral Character as a Prerequisite*, 34 NOTRE DAME LAW. 375 (1959).

42. See Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 850 (1951); Note, *Good Moral Character in Naturalization Proceedings*, 48 COLUM. L. REV. 622, 623 (1948); Developments in the Law, *Immigration and Nationality*, 66 HARV. L. REV. 643, 710 (1953).

43. Anderson v. State, 72 Ga. App. 487, 34 S.E.2d 110 (1945); Eidson v. State, 66 Ga. App. 765, 19 S.E.2d 373 (1942); *In re* Vandiveer, 4 Cal. App. 650, 88 Pac. 993 (Dist. Ct. App. 1906).

deposited with the clerk, nor even verified by the testimony of witnesses. Therefore, the courts have been forced to admit evidence as to both reputation[44] and past behavior,[45] while acknowledging that neither may reflect "character."[46]

A similar "round robin" has been played over a statutory five-year requirement. Because the statutes have provided that good moral character exist within the five years prior to the granting of citizenship,[47] there has been some doubt whether behavior before the five-year period might be considered. Of course no serious question would arise if the statute dealt with crimes committed within a certain time period, for acts committed one day before the period began would clearly not be relevant.[48] But when "moral character" is involved, the problem immediately becomes more complex. Who would be willing to ignore the fact that a man committed murder five years and one day ago, in determining whether his moral character has been good during the last five years? Confronted with this dilemma, some courts have refused to consider conduct before the five years,[49] while others have held that the burden of proof is on the alien only for the five years;[50] still others have found conduct prior to the five-year period relevant[51] and sufficient for a finding of bad character even without criminal conduct within the five-year period,[52] or relevant but not sufficient without recent misconduct,[53] or relevant but subject to

44. *In re* Kielblock's Petition, 163 F. Supp. 687, 688 (S.D. Cal. 1958); Petition of B——, 154 F. Supp. 633, 634 (D. Md. 1957).

45. Note, *supra* note 41, at 378.

46. Petition of Smith, 71 F. Supp. 968, 972 (D.N.J. 1947); *In re* Spenser 22 Fed. Cas. 921 (No. 13234) (C.C.D. Ore. 1878); United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031 (1909). Prior to 1940 the statute read "behaved as a man of good moral character." 34 Stat. 596 (1906). Since 1940 the wording has changed to "be of good moral character," 54 Stat. 1142 (1940), as amended, 8 U.S.C. § 1427(a) (1958), without any discernable change in the opinions. See Note, *supra* note 42, at 623.

47. 34 Stat. 596 (1906); 66 Stat. 239 (1952), 8 U.S.C. § 1427(a) (1958).

48. Criminal statutes act in precisely this fashion since most are governed by a statute of limitations. Of course evidence of criminal actions beyond the time limit may, in some instances (*e.g.*, conspiracy) be introduced but must be linked to some overt act within the time period.

49. Repouille v. United States, 165 F.2d 152 (2d Cir. 1947); United States v. Francioso, 164 F.2d 163 (2d Cir. 1947). See also United States v. Rubia, 110 F.2d 92 (5th Cir. 1940); Application of Polivka, 30 F. Supp. 67 (W.D. Pa. 1939).

50. Petition of Zele, 140 F.2d 773 (2d Cir. 1944).

51. Ralich v. United States, 185 F.2d 784 (8th Cir. 1950).

52. *In re* Lipsitz, 79 F. Supp. 954 (D. Md. 1948); Petition of Gabin, 60 F. Supp. 750 (N.D. Cal. 1945). See Persichetti, *Good Moral Character as a Requirement for Naturalization*, 22 TEMP. L.Q. 182 (1948), and cases cited therein.

53. Johnson v. United States, 186 F.2d 588 (2d Cir. 1951); Marcantonio v. United States, 185 F.2d 934 (4th Cir. 1950); *In re* Balestrieri, 59 F. Supp. 181 (N.D. Cal. 1945).

considerations of reformation.[54] In 1952 Congress attempted to end the confusion by specifically authorizing the courts to consider conduct before the five-year period, but did not specify what weight such consideration should be given;[55] thus it solved few of the courts' problems. The five-year provision is, after all, only a minor point of law, but the continued confusion about it is illustrative of what may occur when courts are directed to make judgments governed by moral concepts like "character" rather than by legal classifications.

The same kind of confusion is evident in the courts' attempts to decide what actions are indicative of bad moral character. The following have been uniformly held to show failure to meet the character requirements: perversion, forgery, arson, smuggling, murder, burglary, extortion, narcotics peddling, abandonment, nonsupport of legitimate and illegitimate children, pimping, bribing officials, and obtaining relief on false pretenses. But persons guilty of desertion, divorce (granted on grounds of cruelty),[56] multiple traffic violations, drunk driving, rape, keeping a house of ill fame, indecent exposure,[57] perjury, petty larceny,[58] embezzlement, drunkenness, fighting, multiple minor arrests, giving false information to officials, assault, wife beating, and violation of Sunday laws have had mixed receptions in the courts.[59]

The liquor and sexual morality cases have been omitted from the list because they merit special attention. The decisions in cases in which an alien has applied for citizenship after violation of the liquor laws are extremely contradictory.[60] A single conviction for drunkenness has been sufficient to prevent naturalization,[61] as has one conviction under the Volstead Act for possession of liquor for personal consumption.[62] On the other hand, an alien with a record of multiple convictions during Prohibition which seemed to indicate something more than possession for personal consumption

54. *Ex parte* Bigney, 285 Fed. 669 (D. Ore. 1923).

55. 66 Stat. 243 (1952), 8 U.S.C. § 1427(e) (1958).

56. See particularly, Application of Polivka, 30 F. Supp. 67 (W.D. Pa. 1939).

57. See particularly, *In re* Markiewicz, 90 F. Supp. 191 (W.D. Pa. 1950).

58. See particularly, *In re* Liknes Petition, 151 F. Supp. 862 (S.D.N.Y. 1957).

59. *Compare* United States v. Gerstein, 284 Ill. 174, 119 N.E. 922 (1918), *and* United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031 (1909), *with In re* Hopp, 179 Fed. 561 (E.D. Wis. 1910). The information above, except where especially noted, has been condensed from LOWENSTEIN, *op. cit. supra* note 39; Fields, *Conflicts in Naturalization Decisions*, 10 TEMP. L.Q. 272 (1936); Note, *supra* note 42; Developments in the Law, *supra* note 42; Note, 24 ST. JOHN'S L. REV. 299 (1950).

60. Fields, *supra* note 59, at 287.

61. *Ibid.*

62. *In re* Raio, 3 F.2d 78 (S.D. Tex. 1924).

has been adjudged of good moral character.[63] But a finding of multiple violations has also caused denial of naturalization.[64] If we shift our attention from quantity to quality, we find that one man who had violated a state beverage control act was excused because his act was not "vicious" but "purely a statutory crime,"[65] while two others who kept their saloons open in the face of unenforced Sunday closing laws were not of good moral character.[66] Another saloon keeper in the same situation made the grade.[67]

The story now moves, in the great American tradition of story telling, from liquor to sex. Let us begin with the simplest problem, fornication. An unmarried alien who (in a moment of "excessive frankness," as Judge Hand put it[68]) admitted occasional casual relations with single women was admitted to citizenship.[69] But intercourse with prostitutes caused the Court of Appeals for the Third Circuit to split evenly on a finding of good moral character.[70] Is the commercial aspect the essence of vice? Apparently not, for a noncommercial violation of the Mann Act has also led to loss of naturalization.[71] Does the question turn on the regularity

63. Petition of Gani, 86 F. Supp. 683, 686 (W.D. La. 1949).

64. United States v. Turlej, 18 F.2d 435, 438 (D. Wyo. 1927). The court was obviously embarrassed by finding a man not to possess good moral character because of acts which it was forced to admit a substantial portion of the population committed. Therefore, the court technically based its decision on the point that multiple violations of an important law showed that the alien was not attached to the principles of the constitution, one of the other qualifications for citizenship. The court apparently was willing to call a large part of the populace disloyal but not immoral.

65. *In re* Paoli, 49 F. Supp. 128, 131 (N.D. Cal. 1943).

66. See cases cited in note 46 *supra*. In both instances the court readily admitted that all of these gentlemen's competitors were also open on Sunday. Hrasky, it must be confessed, seems to have been a hardened soul. He had continued to keep his saloon open on Sunday up to the very day he asked for naturalization, and he even admitted that he did not wish to see the law enforced. Gerstein had willingly closed his saloon when the authorities informed him and his competitors that the law would subsequently be enforced. He did not seem to oppose the enforcement of the law. Alas, these glimmers of respectability were not enough.

67. *In re* Hopp, 179 Fed. 561 (E.D. Wis. 1910). He, too, stayed open on Sunday in violation of a traditionally unenforced law. But his was a good, respectable, family-type, German saloon. In addition, he professed a desire that the Sunday law be enforced—presumably so that he, too, might spend the Sabbath in the bosom of his family, drinking rather than dispensing beer. He remained open, he insisted, only because he would otherwise lose customers to his competitors. Whether it was the nature of Mr. Hopp's saloon or his desire to obey the law (thwarted only by the cruel demands of competition) that was critical we do not know, but the court found his character to be sufficiently pure.

68. Judge Hand could hardly have meant this as legal advice, for giving false or misleading information to officials may (or may not) in itself be sufficient to disqualify an alien on moral grounds.

69. Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949).

70. United States v. Manfredi, 168 F.2d 752 (3d Cir. 1948).

71. Petition of Reginelli, 86 F. Supp. 599 (D.N.J. 1949).

of the forbidden conduct? An alien who continued an illicit relationship over a period of five years, with no extenuating circumstances shown, has been held to be of good moral character.[72] On the other hand, a prolonged relationship with a woman who refused to marry petitioner was sufficient to block his naturalization, because he knew that the liaison could not be legalized.[73] Does the fornicator lack good moral character? Maybe. Maybe not.

The adultery cases offer even greater difficulties. The early tendency of the courts was to consider adultery per se sufficient to bar a finding of good moral character.[74] In a 1935 case, a single act of adultery prompted by lust was enough to prevent naturalization,[75] and that decision has remained good law ever since.[76] The judgment seems particularly harsh in view of the fact that it rested on a charge of adultery in an uncontested divorce action in New York—where adultery is the only ground for divorce.[77] But some adulterers have succeeded in being naturalized.[78] In one such case, Judge Swan found that long-continued, stable, and outwardly respectable adulterous relationships—under certain conditions—might not reflect on the alien's character sufficiently to block naturalization.[79] Marriage (in violation of state law) to the correspondent named by petitioner's husband in a divorce suit ten years earlier has been held insufficient for an adverse finding.[80] Similarly, remarriage in good faith after divorces which were legally invalid have recently been held no bar to naturalization.[81]

But responsible and long-continued relationships are not necessarily enough.[82] Thus an alien was found lacking in good moral

72. *In re* Kielblock's Petition, 163 F. Supp. 687 (S.D. Cal. 1958).

73. Petition of Pacora, 96 F. Supp. 594 (S.D.N.Y. 1951).

74. United States v. Unger, 26 F.2d 114 (S.D.N.Y. 1928); United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925); Nickovich v. Mollart, 51 Nev. 306, 274 Pac. 809 (1929).

75. Estrin v. United States, 80 F.2d 105 (2d Cir. 1935).

76. Johnson v. United States, 186 F.2d 588, 589 (2d Cir. 1951).

77. The same situation existed in *Unger* and *Wexler,* cited *supra* note 74.

78. See Fields, *supra* note 59, at 283.

79. Petitions of Rudder, 159 F.2d 695 (2d Cir. 1947). See also United States v. Rubia, 110 F.2d 92 (5th Cir. 1940). In *Rudder,* the paramours of the petitioners had failed to secure necessary permission of the court to remarry after a divorce, or had lived with petitioners while separated from their husbands and had married them as soon as freed by death or divorce, or alien had not begun to cohabit until seven years after separation from a wife who refused to divorce him.

80. *In re* Mayall's Petition, 154 F. Supp. 556 (E.D. Pa. 1957).

81. Petition of Smith, 71 F. Supp. 968 (D.N.J. 1947); *In re* Schlau, 41 F. Supp. 161 (S.D.N.Y. 1941) in effect overruling *In re* Spiegel, 24 F.2d 605 (S.D.N.Y. 1928) and Petition of Horowitz, 48 F.2d 652 (E.D.N.Y. 1931). (*Smith* involved a Mexican divorce, the others rabbinical divorces). See also Petition of R——, 56 F. Supp. 969 (D. Mass. 1944); LOWENSTEIN, *op. cit. supra* note 39, at 116.

82. See Fields, *supra* note 59, at 288.

character because he had lived for a long period with a woman who was, to his knowledge, incapable of marrying him.[83] Others have failed to meet the standard because they did not take the steps available to legalize their continuing relationships by properly dissolving previous ties,[84] or because they had begun the new relationships too soon after leaving the old.[85] And repeated intercourse between an alien and a married man where no responsible relationship has been established indicates lack of good moral character.[86] But occasional adulterous relationships with prostitutes, at a time when the alien had a wife and children living in Italy, left the Court of Appeals for the Third Circuit evenly divided over a district court order admitting the alien to citizenship.[87]

Very little rationality or morality emerges from these attempts of the courts to fulfill a moral role. A man who commits a single act of adultery in a moment of passion is not of good moral character; a man who repeatedly resorts to prostitutes may be acceptable. A man who leaves his wife and takes up with another woman two years later is not worthy of citizenship—but seven years later is all right; however, if he obtains an invalid Mexican divorce, no time lapse may be necessary. If a man lives with a woman who refuses to marry him, he is bad; if he chooses one who is waiting for her husband to die, he may be all right. The alien who gets a mail-order divorce from Mexico in order to remarry in violation of the law of his state is moral. The husband who does not contest a charge of adultery so that he may be divorced legally in his own state is immoral.

In 1952 Congress apparently wearied of this puzzle, and specifically directed that proof of adultery would thereafter preclude a finding of good moral character.[88] While a few courts have concluded that this legislation has relieved them of their discretion and have, therefore, interpreted the adultery provisions strictly,[89]

83. Petition of Axelrod, 25 F. Supp. 415 (E.D.N.Y. 1938).

84. *In re* Matura, 87 F. Supp. 429 (S.D.N.Y. 1949); United States v. Intrieri, 56 F. Supp. 374 (M.D. Pa. 1944); United States v. Marafioti, 43 F. Supp. 45 (S.D.N.Y. 1942).

85. Johnson v. United States, 186 F.2d 588 (2d Cir. 1951).

86. United States v. Cloutier, 87 F. Supp. 848 (E.D. Mich. 1949).

87. United States v. Palombella, 168 F.2d 903 (3d Cir. 1948).

88. 66 Stat. 163 (1952), 8 U.S.C. § 1101(f)(2) (1958).

89. Petition of Da Silva, 140 F. Supp. 596 (D.N.J. 1956) (alien who obtained Mexican divorce and remarried committed adultery and bigamy under laws of his state of residence and did not meet requirements of the Act of 1952; intent and mitigation not discussed); Petition of F——G——, and E——E——G——, 137 F. Supp. 782 (S.D.N.Y. 1956). *In re* Matura's Petition, 142 F. Supp. 749 (S.D.N.Y. 1956) has been cited as such a case, but Matura had begun living with a woman before he had obtained a Mexican divorce, so that he had knowingly committed adultery. There were also elements of desertion and non-support which have been grounds for denying good moral character.

others have held that Congress could not have intended that mere technical adultery be a bar to good moral character.[90] Thus even statutory specificity does not yield much certainty when the statute is concerned with a general moral requirement.

Incest would at first glance seem a much easier problem than adultery. Thus it is not surprising to find that incest by a father with his teen-age daughters has resulted in revocation of citizenship.[91] And incest as defined by the laws of Pennsylvania has been held a bar to good moral character even though the marriage of an uncle to his niece was valid in Russia when performed.[92] However, in *United States v. Francioso*,[93] a similar marriage—but one illegal even when performed—did not prevent naturalization. Where these three cases leave the law is impossible to say.

The courts in the moral character cases, motivated by the confusion in the case law[94] and by the hope of escaping the moral role imposed by statute (which has been the principal cause of confusion), have attempted to work out general rules which would allow them to avoid making moral judgments on their own. Thus several early decisions indicated that any violation of the law showed lack of good character, since moral men did not break the law.[95] But the courts came to recognize that if Congress had intended so harsh a standard it could easily have said so, and that in adopting a phrase such as "good moral character" Congress must have meant to assign to the courts some task other than the purely legal one of determining whether a statute had been violated.[96] Therefore, several decisions attempted to introduce a moral classification of crimes, holding that only the commission of crimes "malum in se"[97] or those involving "moral turpitude"[98] barred a finding of good moral character. But, since these terms seem to

90. Dickhoff v. Shaughnessy, 142 F. Supp. 535 (S.D.N.Y. 1956); Petition of Greenidge and Petition of Racine (both unreported, see Dickhoff v. Shaughnessy); *In re* Greulich's Petition, 37 N.J. Super. 371, 117 A.2d 316 (Hudson County Ct. 1955).

91. United States v. Vander Jagt, 135 F. Supp. 676 (W.D. Mich. 1955).

92. United States *ex rel.* Devine v. Rodgers, 109 Fed. 886 (E.D. Pa. 1901).

93. 164 F.2d 163 (2d Cir. 1947).

94. Note, *supra* note 41, at 379.

95. *In re* Spenser, 22 Fed. Cas. 921 (No. 13234) (C.C.D. Ore. 1878); United States v. Gerstein, 284 Ill. 174, 119 N.E. 922 (1918); United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031 (1909); Note, *supra* note 42, at 624. See also *In re* Mayall's Naturalization, 154 F. Supp. 556 (E.D. Pa. 1957).

96. Petition of R——, 56 F. Supp. 969, 971 (D. Mass. 1944).

97. Note, *supra* note 41, at 378, and cases cited therein.

98. Petition of Knight, 122 F. Supp. 322 (S.D.N.Y. 1954); *In re* Bookschnis, 61 F. Supp. 751 (D. Ore. 1945); *In re* Paoli, 49 F. Supp. 128 (N.D. Cal. 1943). See also *In re* Liknes Petition, 151 F. Supp. 862 (S.D.N.Y. 1957).

have no more definite meaning than good moral character itself,[99] their use has proved abortive in this field.[100]

By far the most widely used test has been that of community standards, or common conscience, or the standards of the average man. An alien is of good moral character if his behavior meets the standards of the average man in the community. Judge Hand has been given the major credit for the introduction of this approach,[101] but it actually seems to have been used almost from the beginning of litigation on the subject. Thus a federal district court in 1878, attempting to define good moral character, said that "the standard may vary from one generation to another, and probably the average man of the country is as high as it can be set."[102] The court then found that a marriage between uncle and niece, although valid where consummated, nevertheless indicated a lack of good moral character because it was shocking to the standards of public morals of the state in which the alien subsequently resided.[103] Similarly, *In re Hopp*,[104] a federal district court decision which was followed in an important New York state case,[105] found that "a good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. . . . It need not rise above the level of the common mass of people."[106] Judge Wyzanski gave great impetus to the community standards doctrine when in *Petition of R——*[107] he found that an alien, who was technically guilty of fornication as a result of having obtained a legally invalid Mexican divorce and then having remarried, satisfied the character requirement because "in our society, Mexican and Nevada divorces both pass as being more or less respectable and represent the mores of the day."[108]

Judge Hand, who had been using the community standards approach in interpreting the moral turpitude clause which appears with the good moral character requirement in the Naturalization Statute, followed Judge Wyzanski's lead and transferred the technique to a series of good moral character decisions which have

99. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 294–98 (1947).
100. See, *e.g.*, United States v. Cunha, 209 F.2d 326 (1st Cir. 1954).
101. See CAHN, *op. cit. supra* note 1, at 303.
102. *In re* Spenser, 22 Fed. Cas. 921 (No. 13234) (C.C.D. Ore. 1878).
103. United States *ex rel.* Devine v. Rodgers, 109 Fed. 886, 888 (E.D. Pa. 1901).
104. 179 Fed. 561 (E.D. Wis. 1910).
105. *In re* Capozzi, 160 Misc. 200, 289 N.Y. Supp. 869 (Sup. Ct. 1936).
106. 179 Fed. 561, 563 (E.D. Wis. 1910). See also United States v. Unger, 26 F.2d 114 (S.D.N.Y. 1928), and Nickovich v. Mollart, 51 Nev. 306, 274 Pac. 809 (1929) ("Under the accepted standard in this country, a person committing adultery is an immoral person . . . .").
107. 56 F. Supp. 969 (D. Mass. 1944).
108. *Id.* at 971. See Note, *supra* note 42, at 626.

decisively shaped the case law since that time.[109] Judge Hand summed up his approach later as—

> whether the moral feelings, now prevalent generally in this country would be outraged by the conduct in question; that is, whether it conformed to the generally accepted moral conventions current at the time.[110]

> Our duty . . . is to divine what the common conscience prevalent at the time demands . . . . We should have no warrant for assuming that it meant the judgment of some ethical elite . . . .[111]

These sentences describe not only Judge Hand's view but the case law as it stands today.[112]

It seems quite clear that Judge Hand's formulation contains a great many difficulties and potential contradictions. For instance, would all conduct which did not "conform" to community standards "outrage" the moral feelings of the citizenry? This shock test seems as unrewarding here as in the obscenity cases where it was first employed.[113] It simply introduces another fine distinction into an already complex problem.[114] But most courts have ignored the shock notion. More important is the question of which community is to be dealt with when community standards are determined. Some of the most prominent decisions have simply left unspecified whether they were considering local or national stand-

109. See Repouille v. United States, 165 F.2d 152 (2d Cir. 1947); Johnson v. United States, 186 F.2d 588 (2d Cir. 1951). And see Cahn, *supra* note 42, at 842–46.

110. Repouille v. United States, *supra* note 109, at 153, quoting in part his earlier decision in United States v. Francioso, 164 F.2d 163 (2d Cir. 1947).

111. Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951).

112. See the Hand decisions cited *supra* notes 109 & 110; Petitions of Rudder, 159 F.2d 695 (2d Cir. 1947); Estrin v. United States, 80 F.2d 105 (2d Cir. 1935); *In re* Naturalization of Spak, 164 F. Supp. 257 (E.D. Pa. 1958); Petition of B——, 154 F. Supp. 633 (D.Md. 1957); *In re* Mayall's Naturalization, 154 F. Supp. 556 (E.D. Pa. 1957); Petition of Pacora, 96 F. Supp. 594 (S.D.N.Y. 1951); *In re* Markiewicz, 90 F. Supp. 191 (W.D. Pa. 1950); United States v. Cloutier, 87 F. Supp. 848 (E.D. Mich. 1949); Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949); Application of Barug, 76 F. Supp. 407 (N.D. Cal. 1948); *In re* Petition of De Leo, 75 F. Supp. 896 (W.D. Pa. 1948); *In re* Paoli, 49 F. Supp. 128, 131 (N.D. Cal. 1943). See also Matter of C——, 3 I. & N. Dec. 833 (1950).

113. See pp. 947–48 *infra.*

114. Note, *Judicial Determination of Moral Conduct in Citizenship Hearings,* 16 U. CHI. L. REV. 138, 139–40 (1948). The author points out that Judge Hand in Repouille v. United States, 165 F.2d 152 (2d Cir. 1947) found an alien who had killed his deformed, feeble minded and totally helpless child ineligible for citizenship. Yet a public opinion poll on euthanasia had found 32% of the respondents in favor and 54% opposed to the practice, and the jury which had convicted Repouille asked for the utmost clemency. Here the action might be contrary to the prevalent mores, but it seems unlikely that the public's moral feelings were outraged.

ards,[115] and the cases as a whole have been mixed on this question.[116] Judge Hand has preferred the national community.[117] But he concurred in *Estrin v. United States*[118] which rested in large part on the argument that the act (adultery) was a crime in the state in which the alien resided, and he mentions both local and national standards in one of his last "good moral character" decisions.[119] Nor has any evolutionary tendency become evident, for the disagreement which began in the earliest cases[120] has been carried down to the present.[121] The weight of cases seems to be on the side of the local community, but Judge Hand's great authority and the influence of academic comment[122] seem to have kept the national standard alive.

Recently there have been attempts to combine the two standards. In *Petitions of F—G— and E—E—G—*,[123] the court examined the standards "not alone in the community in which he lives, but . . . in the country as a whole."[124] One court has been even more systematic, holding that it will first employ the—

> generally accepted mores or standards of the average citizen of the community in which the petitioner resides . . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the "common conscience" . . . of the country as a whole also looks disfavorably upon such conduct.[125]

115. See, *e.g.*, Petitions of Rudder, 159 F.2d 695, 697, 698 (2d Cir. 1947).

116. See Developments in the Law, *supra* note 42, at 625.

117. Repouille v. United States, 165 F.2d 152 (2d Cir. 1947); United States v. Francioso, 164 F.2d 163 (2d Cir. 1947).

118. 80 F.2d 105 (2d Cir. 1935).

119. Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949).

120. *Cf.* United States v. Unger, 26 F.2d 114 (S.D.N.Y. 1928); United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925); *In re* Hopp, 179 Fed. 561 (E.D. Wis. 1910) ("the community in which the party lives"); Nickovich v. Mollart, 51 Nev. 306, 274 Pac. 809 (1929) (national standards).

121. *Compare* cases cited note 117 *supra with* Brukiewicz v. Savoretti, 211 F.2d 541 (5th Cir. 1954); Petition of B——, 154 F. Supp. 633 (D. Md. 1957); *In re* Markiewicz, 90 F. Supp. 191 (W.D. Pa. 1950); United States v. Cloutier, 87 F. Supp. 848 (E.D. Mich. 1949); Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949); Application of Barug, 76 F. Supp. 407 (N.D. Cal. 1948); Petition of De Leo, 75 F. Supp. 896 (W.D. Pa. 1948); *In re* Mogus, 73 F. Supp. 150 (W.D. Pa. 1947); *Ex parte* Robert, 49 F. Supp. 131 (N.D. Cal. 1943); *In re* Paoli, 49 F. Supp. 128 (N.D. Cal. 1943); Application of Polivka, 30 F. Supp. 67 (W.D. Pa. 1939); Matter of C——, 3 I. & N. Dec. 833 (1950).

122. See, *e.g.*, Note, *supra* note 42, at 628; Developments in the Law, *supra* note 42, at 711.

123. 137 F. Supp. 782 (S.D.N.Y. 1956).

124. *Id.* at 785. Application of Barug, 76 F. Supp. 407, 409 (N.D. Cal. 1948) ("in the light of the standards of society and the conduct of average men of the community in which petitioner resides") seems to make the distinction without being aware of the difference.

125. *In re* Mayall's Naturalization, 154 F. Supp. 556, 560 (E.D. Pa. 1957). The same court repealed this rule in *In re* Naturalization of Spak, 164 F. Supp. 257 (E.D. Pa. 1958).

But this approach creates more problems than it solves. Why start with the local standard and then look at the national standard? It would seem just as logical to start with the national standard and allow appeal to the peculiar mores of local communities. And whichever standard you put first, why shouldn't the government as well as the alien be allowed to appeal from one to the other? It might be argued that the rule as stated is correct because it in effect gives the alien the benefit of the doubt by allowing him naturalization if he satisfies either standard. But why give him the benefit of the doubt on this issue while at the same time insisting, as the courts consistently have, that the burden of proof of good moral character is on the alien and not the government?[126] Finally, if both parties were allowed to appeal from one standard to the other, and the two standards are in conflict, who wins, and why?

In fact, this whole problem of local-versus-national standards illustrates the dilemmas which are created by dealing in moral rather than legal requirements. If national standards are used, an alien who for many years has modeled his conduct on that of his American neighbors may be morally deficient because the mores of his community—the only America he knows—are below the national average. Conversely, the use of local moral standards may make acquiring *national* citizenship dependent upon abiding by the mores of the most depraved community in the nation—or the least depraved. Admission or refusal of citizenship may then depend on the totally fortuitous circumstance of where the alien became domiciled when entering the United States.[127] While it may not be unreasonable to require that the alien know and be governed by the *legal* requirements of the immigration and naturalization acts, it seems harsh to demand that he make complicated calculations of the interrelation between local and national moral standards which might baffle a team of sociologists on a foundation grant.

The dispute over whether the national or local community's standards are controlling serves to dramatize the fact that there may be fundamental differences between them. But, just as important, it suggests that where mores are distinctive to certain com-

126. United States v. Schwimmer, 279 U.S. 644, 649 (1929) (overruled on other grounds by Girouard v. United States, 328 U.S. 61 (1946)); Tutun v. United States, 270 U.S. 568, 578 (1926); Sodo v. United States, 406 Ill. 484, 487, 94 N.E.2d 325, 327 (1950).

127. The facts of *In re* Mayall's Naturalization, 154 F. Supp. 556 (E.D. Pa. 1957), illustrate this point. The alien married a man who had been her accomplice in an act of adultery which had been the grounds for an earlier divorce, thus violating a state statute. If she had been domiciled in (and married in) any state other than Pennsylvania, Tennessee, or Louisiana, no question of her moral character would have arisen on this ground.

munities, the conflict may not be between community and nation but between community and community—that is, no national standard may exist. If, in fact, on certain issues a multitude of local sentiments exist without any visible national uniformity, which standards are the courts to choose? The problem may be avoided by the choice of local rather than national standards as the final criteria of good moral character, but only at the cost which such a choice entails.[128] However, the existence of multiple standards varying according to social class, occupation, race, religion, national origin, etc. cannot be so easily shoved aside. In the face of hundreds of such potential differentiations, even within a local community, are we ever prepared to state what the general standard is?[129]

Strangely enough it has been Judge Hand himself who has most vividly pointed out this fundamental defect in the community standards technique:

> We must own that the statute imposes upon courts a task impossible of assured execution; people differ as much about moral conduct as they do about beauty . . . . Our duty in such cases . . . is to divine what the "common conscience" prevalent at the time demands; and it is impossible in practice to ascertain what in a given instance it does demand.[130]

> Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion.[131]

But it is clear that Judge Hand is not just committing logical suicide. He is saying that adoption of the community standards approach is the best that can be done with the good moral character provisions, but that it is not very good. More than anything else his opinions seem to be pleas to Congress to get him out of the morals business. And these pleas are all the more plaintive because Judge Hand must have been aware that his approach is, in the hands of lesser judges, just as arbitrary as any. Using the intui-

128. See pp. 915–16 *supra.*

129. CAHN, *op. cit. supra* note 1, at 305; Note, *supra* note 41, at 378; Note, *supra* note 114, at 142.

130. Johnson v. United States, 186 F.2d 588, 589 (2d Cir. 1951).

131. Repouille v. United States, 165 F.2d 152, 153 (2d Cir. 1947). See also Estrin v. United States, 80 F.2d 105 (2d Cir. 1935), in which Judge Hand concurred. "No argument is needed to support the assertion that it [adultery] is offensive to the generally accepted moral standards of the community." *Id.* at 105. Note that Estrin's adultery was the only ground for divorce in a state in which thousands of divorces are granted annually, and thus thousands confess to adultery. Prosecution for adultery under the criminal statutes of New York is, however, practically unheard of. That no argument is needed is questionable; that no logical argument is possible is certain.

tive guide to community standards, the judge will generally apply the standards of his own class and locality. And the more bigoted, provincial, and ignorant the judge, the more likely it is that this will occur.

Even if these thorny problems were settled, is the standard set by what the public *does* or by what it *believes to be* right or wrong? There is, of course, a tremendous difference between having to conform to the actual conduct of the average citizen, and having to live up to his professions of what he considers proper conduct.[132] Judge Hand's initial use of the term "common conscience" suggests that it is precept, not practice, which sets the standard, and he has specifically defended this position in several of his later opinions.[133] The argument is neatly summed up in *Petition of F—G— and E—E—G—*:[134]

> Are we to say that the common conscience of the community is merely an expression of what the community as a whole does? That would probably be wrong because innumerable persons commit acts which they themselves would probably consider acts of bad moral character. It is not a question of what the community does, but rather what the community feels.[135]

On the other hand, a fairly large number of decisions have looked to the conduct of the average citizen as a guide in appraising the alien's character.[136] Judge Wyzanski has written that—

> by using in the Nationality Act a phrase so popular as "good moral character" Congress seems to have invited the judges to concern themselves . . . with the norms of society and the way average men of good will act, in short, with what Eugen Ehrlich . . . calls "the ascertainment of the living law."[137]

Of course the coupling of "norms of society" with "the way men

132. CAHN, *op. cit. supra* note 1, at 310; Note, *supra* note 42, at 626.

133. Johnson v. United States, 186 F.2d 588 (2d Cir. 1951), and Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949).

134. 137 F. Supp. 782 (S.D.N.Y. 1956).

135. *Id.* at 785. See also *In re* Markiewicz, 90 F. Supp. 191, 195 (W.D. Pa. 1950) ("generally accepted moral conventions current at the time"); Persichetti, *supra* note 52, at 507.

136. *In re* Hopp, 179 Fed. 561 (E.D. Wis. 1910); *In re* Spenser, 22 Fed. Cas. 921 (No. 13234) (C.C.D. Ore. 1878); Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949); Application of Barug, 76 F. Supp. 407 (N.D. Cal. 1948); Petition of De Leo, 75 F. Supp. 896 (W.D. Pa. 1948); *In re* Mogus, 73 F. Supp. 150 (W.D. Pa. 1947); Petition of R——, 56 F. Supp. 969 (D. Mass. 1944); Application of Polivka, 30 F. Supp. 67 (W.D. Pa. 1939); *In re* Capozzi, 160 Misc. 200, 289 N.Y. Supp. 869 (Sup. Ct. 1936).

137. Petition of R——, 56 F. Supp. 969, 971 (D. Mass. 1944). Ehrlich emphasizes actual conduct in society. See EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 8, 52–53 (1936).

act"[138]—like the earlier synthesis of local and national standards —emphasizes rather than reduces inherent contradictions.

Most of the problems in the moral character cases arise from the same source—the mixture of moral judgments and legal techniques. As judges strive to make moral decisions in courts of law, the "good moral character" cases are inevitably distilled into disputes about particular acts, the kind of problem that courts are best fitted to handle. Moral character then turns on whether a given act was immoral.[139] Now, even admitting that the morality of the act depends on the professed rather than the behavioral standards of the community, is someone who commits an act which everybody commits and everybody says is immoral a person of bad moral character? If so, all natives are of bad moral character and only naturalized aliens (who have presumably met the stricter standard) are of good moral character. Could Senator McCarran *et al.* have meant this? Nevertheless, the courts decide the question of good moral character *vel non* on the basis of the morality of a single act, because they find it impossible to shape their materials for decision in any other way than that used in their normal legal duties.

The adoption of community beliefs rather than actions leads to another and even more difficult problem—the discovery of what moral standards are prevalent in the community. If the community's behavior were at issue, sociological techniques such as the *Kinsey Report* might make the community standards test relatively precise.[140] But such data is clearly not relevant when Judge Hand's formula is applied.[141]

If social attitudes are to be the important factor, opinion polling suggests itself as a natural means of discovering community standards. Polling, although it is subject to certain objections under the hearsay rule because cross-examination is impossible, has been used successfully in some classes of law.[142] Nevertheless it has

138. Similar couplings appear in Application of Barug, 76 F. Supp. 407, 409 (N.D. Cal. 1948), and Petition of De Leo, 75 F. Supp. 896 (W.D. Pa. 1948).

139. See, *e.g.*, *In re* Raio, 3 F.2d 78 (S.D. Tex. 1924), where possession of liquor for personal consumption in violation of the Volstead Act was sufficient to support a finding that the alien lacked good moral character.

140. See Note, *supra* note 42, at 629–30. And see Repouille v. United States, 165 F.2d 152, 154–55 (2d Cir. 1947) (Frank, J., dissenting).

141. See Judge Hand's rejection of such data in Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949).

142. Note, 66 HARV. L. REV. 498–506 (1953); Note, 20 GEO. WASH. L. REV. 211 (1951). The hearsay objection does not seem decisive. Witnesses must frequently testify as to the state of public opinion. Their testimony is based on their impressions and common sense judgments, and they are subject to cross examination both as to their observations and conclusions. Similarly a pollster might be called to testify as to community

been rejected by the courts in the good moral character cases. As Judge Hand has put it, "Theoretically, perhaps we might take as the test whether those who would approve the specific conduct would outnumber those who would disapprove; but it would be fantastically absurd to try to apply it."[143] This is true because "it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers."[144] This objection is not necessarily insurmountable since the universe for polling purposes may be defined in any convenient way and certainly might exclude criminals and convicts. But what Judge Hand seems to imply is that poll results, to be decisive, must be derived by constructing the sample exclusively from persons of good moral character. In that event the universe for a "good moral character" poll could only be determined after we knew what good moral character was. And if the good moral character of the general population is to be determined on the same basis as that of aliens, there would be hardly anyone left to poll.

Professor Cahn offers several other cogent objections to polling. He notes that people do not generally possess ready and considered opinions on difficult moral questions; thus their responses would not be reliable.[145] Also, the community's potential opinion may be more than the sum of individual views tabulated by the pollsters, since community sentiment is the result of the "coming together" of the citizens.[146] In addition, both Judge Hand and Cahn stress the fact that moral judgments must be made on the basis of the particular situation involved, not on general principles.[147] Therefore, except fortuitously, no extant poll would be of any use[148] and new polls would have to be taken for each case. Where the burden of proof is on the alien, and particularly if the community were defined as the nation, the cost factor would eliminate

sentiment. His conclusions are based on sampling and on the logical inferences of statistics, and he too would be subject to cross-examination on his observations and conclusions.

143. Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951).

144. Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949).

145. This problem might be overcome by depth interviewing, but the cost would seem to be prohibitive.

146. See the correspondence between Professors Cahn and Cohen in 11 J. LEGAL ED. 513 (1959).

147. Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951) (Hand, J.). "Nor is it possible to make use of general principles, for almost every moral situation is unique; and no one could be sure how far distinguishing features of each case would be morally relevant to one person and not to another." CAHN, *op. cit. supra* note 1, at 309–10.

148. This is particularly true if special universes had to be constructed for polls in this area.

polling in most instances.[149] And aside from cost, interviewing which required that respondents be informed in detail of the circumstances in the case would be extremely awkward and likely to yield unreliable data.[150]

In 1952, Congress seemed to respond to the courts' cries for help by rewriting the naturalization provisions. It did not abandon the "good moral character" formula, but provided the courts with certain guide posts, by drafting a list of actions and characteristics which would bar a finding of good moral character if they had existed during the past five years.[151] But the statute also provided that "the fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character," and authorized the courts to look beyond the five-year period.[152] We have already noted that the new statute has not cleared up the vagueness in the adultery cases.[153] It leaves the five-year problem just where it was. The insertion in the statute of the term moral turpitude can only create more confusion.[154] This statute has undoubtedly simplified the work of the courts to a certain extent, but it has not allowed them to avoid the task of making character judgments, nor has it provided a comprehensive substitute for the com-

149. Note, 66 HARV. L. REV. 498, 511–12 (1953).

150. Professor Julius Cohen has argued, however, that even granting that it would be impossible to poll the community on each specific moral issue, it would be possible by depth interviewing on specially constructed hypothetical situations to elicit general moral standards which could, by analogical reasoning, govern specific cases, and that this technique is more desirable than simply allowing the judge to guess what community sentiment is. Cohen, Robson & Bates, *Ascertaining the Moral Sense of the Community*, 8 J. LEGAL ED. 137, 140–41 (1955). The results of such a poll are available in COHEN, ROBSON & BATES, PARENTAL AUTHORITY, THE COMMUNITY AND THE LAW (1958). Another commentator points out that the courts have in fact been taking judicial notice of social attitudes, and that such attitudes are too vague and uncertain to satisfy the traditional criteria for matters subject to notice. Therefore, the admission of polls and other sociological studies as evidence would represent a sounder practice. Note, *supra* note 42, at 628–29. Jerome Hall makes a similar point about the vagueness of community sentiment in HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 375 (1947). At the moment, however, approval of polling has not spread from the journals to the reports.

151. 1. habitual drunkards 2. adulterers 3. polygamists 4. prostitutes 5. those aiding illegal entry of others for gain 6. those who have committed a crime involving moral turpitude 7. those convicted of two or more offenses with aggregate sentence of five years or more 8. narcotics peddlers 9. gamblers 10. those who have offered false testimony to gain benefits under the act 11. those imprisoned for 180 or more days during the preceding five years 12. murderers. 66 Stat. 172 (1952), 8 U.S.C. § 1101(f) (1958).

152. 66 Stat. 173 (1952), 8 U.S.C. § 1101(f) (1958).

153. 66 Stat. 243 (1952), 8 U.S.C. § 1427(e) (1958).

154. See pp. 897–939 *infra*. And see LOWENSTEIN, *op. cit. supra* note 39, at 301.

munity standards test. Thus statutory provisions, when they supplement rather than replace "moral" requirements, do not seem to help very much.

The Supreme Court has recently upheld "good moral character" provisions in another area of law,[155] but in the very act of doing so the Court noted that "the term . . . is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer."[156] Congress has imposed upon the courts the duty of applying this term to aliens desiring citizenship. From the very beginning this task has led to great confusion in the case law and to arbitrariness of decision. The courts have for many years been united on only one point, the desire to avoid a role which seems inevitably to lead to this arbitrariness and confusion. The burden of acting as the moral agents of the community has been so intolerable that they have shifted the responsibility back to the community, even at the cost of adopting a legal rule which is incapable of precise application and productive of its own brand of judicial arbitrariness.[157] The "good moral character" decisions indicate that the courts feel so incapable of moral judgment that they will adopt as the lesser evil nearly any technique which allows them to shift their attention from morality to law. Similarly, the tendency of the courts to translate considerations of moral "character" into examinations of particular actions is an indication of the courts' unwillingness to assume the thought-controlling role that some moralists would assign to them.

III. MORAL TURPITUDE

The commission of a crime involving moral turpitude serves as a bar to a finding of good moral character under the naturalization statutes. In addition, an act of moral turpitude committed prior to entry may prevent admission, and conviction for two crimes involving moral turpitude is grounds for deportation.[158]

155. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957). In both cases, past membership in the Communist Party was held insufficient to preclude a finding of good moral character. *Cf.* Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

156. Konigsberg v. State Bar of California, 353 U.S. 252, 263 (1957).

157. No special study has been offered here of the confusion which arises from the community standards cases. Most of the "good moral character" decisions apply the doctrine so that the general survey of those decisions provided above applies to community standards as well. For instance, in the adultery field, *Estrin* and *Petition of R——*, and all the subsequent cases cited use community standards, and the test has been used in the liquor cases from their inception.

158. LOWENSTEIN, *op. cit. supra* note 39, at 213.

The notion of moral turpitude first entered American jurisprudence through the law of slander. In the earliest American case mentioning turpitude, a New York court held that an utterance charging commission of a crime of moral turpitude was slander per se and thus actionable without proof of specific damages.[159] This is substantially the law today in New York[160] and many other jurisdictions.[161] Frequent use is made of the concept in the rules concerning the impeachment of witnesses. In Alabama,[162] Vermont[163] and Maine[164] only a conviction for perjury, subornation of perjury, or a crime involving moral turpitude may go to the credibility of a witness.[165] Similar rules exist in the case law of several other states.[166] The moral turpitude concept is also used in the rules for disbarment and revocations of physicians' licenses in several states,[167] in divorce law,[168] in the measurement of contribution between joint tort-feasors,[169] and in habitual offender acts.[170]

Unlike "good moral character," which is a phrase created for a single statute, moral turpitude—or at least turpitude[171]—is an expression of sufficiently common usage to have collected numerous dictionary definitions which have generally served as the starting point for the judicial opinions in moral turpitude cases.[172]

159. Brooker v. Coffin, 5 Johns. R. 188 (N.Y. 1809). See Comment, 4 DAKOTA L. REV. 29, 30 (1932).

160. Mishkin v. Roreck, 202 Misc. 653, 115 N.Y.S.2d 269 (Sup. Ct. 1952).

161. See Brown v. Du Frey, 1 N.Y.2d 190, 134 N.E.2d 469 (1956), and the cases cited therein; NEWELL, LAW OF SLANDER AND LIBEL 73 (4th ed. 1924); Annot., *Libel and Slander*, 58 A.L.R. 1157, 1161 (1929).

162. ALA. ANN. CODE (Michie 1928) § 7722; 7 ALA. CODE § 434 (1940).

163. VT. GEN. LAWS (1917).

164. ME. REV. STAT. ANN. ch. 113, § 127 (1954).

165. Maine also includes any felony or larceny.

166. Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920); Curry v. State, 17 Ga. App. 312, 86 S.E. 742 (1915); See v. Wormser, 129 App. Div. 596, 113 N.Y.S. 1093 (1908); Merriwether v. State, 55 Tex. Crim. 438, 116 S.W. 1148 (1909); Annot., 95 L. Ed. 899 (1951); Annot., 161 A.L.R. 248 (1946); Annot., 103 A.L.R. 355 (1936).

167. See CAL. BUS. & PROF. CODE § 6101; GA. CODE § 9–501 (1949); Brainard v. Board of Medical Examiners, 30 Cal. App. 135, 157 P.2d 7 (Dist. Ct. App. 1945); *In re* Koptic, 406 Ill. 141, 92 N.E.2d 462 (1950); People v. Meyerovitz, 278 Ill. 356, 116 N.E. 189 (1917). See Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9 (1935); Annot., 81 A.L.R. 1196, 1199 (1932).

168. See Annot., 135 A.L.R. 851 (1941).

169. Fidelity & Cas. Co. v. Christenson, 183 Minn. 182, 236 N.W. 618 (1931).

170. *E.g.*, OHIO REV. CODE § 2949.34 (1953). And see State v. Malusky, 59 N.D. 501, 230 N.W. 735 (1930).

171. The "moral" in moral turpitude seems to be only a redundancy.

172. Jordan v. De George, 341 U.S. 223, 233–34, 239 (1951) (Jackson, J., dissenting). See, *e.g.*, Guarneri v. Kessler, 98 F.2d 580 (5th Cir. 1938); Ng Sui Wing v. United States, 46 F.2d 755 (7th Cir. 1931); Bartos v.

There are two basic definitions. The first is: an act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow men or to society. The other reflects the clipped style of modern dictionary makers: an act contrary to justice, honesty, or good morals. It hardly seems worthwhile to belabor the potential differences between the two, not only because neither is sufficiently precise to support more than the most imaginative conjecture about real meaning, but also because the dictionaries[173] and the courts[174] either list both of them or choose one or the other seemingly at random.

Obviously these definitions will not carry the courts very far in deciding particular cases. Several attempts have, therefore, been made to borrow common law categories and classifications to fill out the work of the dictionary makers. One early approach was to hold that only common law crimes involved moral turpitude.[175] Because several of the serious crimes of our day were unknown to common law,[176] this rule has not proved satisfactory and has long been dormant. Nor has the attempt to define moral turpitude in terms of the felony-misdemeanor distinction of common law been successful.[177] Today the difference between a felony and a

United States, 19 F.2d 722 (8th Cir. 1927); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E.D. Pa. 1947); United States *ex rel.* Ciarello v. Reimer, 32 F. Supp. 797 (S.D.N.Y. 1940); Ledbetter v. State, 34 Ala. App. 35, 36 So. 2d 564 (1948); Fall v. State Bar of California, 25 Cal. 2d 149, 153 P.2d 1 (1944); Wallis v. State Bar of California, 21 Cal. 2d 322, 131 P.2d 531 (1942); *In re* McAllister, 14 Cal. 2d 602, 95 P.2d 932 (1939); Marsh v. State Bar of California, 210 Cal. 303, 291 Pac. 583 (1930); *In re* O'Connell, 184 Cal. 584, 194 Pac. 1010 (1920); *In re* Alschuler, 388 Ill. 492, 58 N.E.2d 563 (1944); *In re* Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); *In re* Jacoby, 74 Ohio App. 147, 57 N.E.2d 932 (1943); *In re* Williams, 64 Okla. 316, 167 Pac. 1149 (1917); Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (1948); Traders & Gen. Ins. Co. v. Russell, 99 S.W.2d 1079 (Tex. Civ. App. 1936); *In re* Pearce, 103 Utah 522, 136 P.2d 969 (1943); *In re* Finch, 156 Wash. 609, 287 Pac. 677 (1930). See also NEWELL, LAW OF SLANDER AND LIBEL § 32 (3d ed. 1914) and cases cited therein; Note, 17 IOWA L. REV. 76, 77 (1931); Annot., 95 L.Ed. 899, 901 (1951).

173. 20 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 872 (1887); BLACK, LAW DICTIONARY 1765 (3d ed. 1933); 3 BOUVIER, LAW DICTIONARY 2247 (8th ed. 1914). See also 1 BURDICK, LAW OF CRIME 89 (1946).

174. See cases cited *supra* note 172.

175. See, *e.g.*, Fort v. City of Brinkley, 87 Ark. 400, 112 S.W. 1084 (1908).

176. *E.g.*, embezzlement.

177. United States v. Carrollo, 30 F. Supp. 3, 6 (W.D. Mo. 1939); Brainard v. Board of Medical Examiners, 68 Cal. App. 2d 591, 157 P.2d 7 (Dist. Ct. App. 1945); Rheb v. Bar Ass'n of Baltimore, 186 Md. 200, 46 A. 2d 289 (1946) (nonfelonious failure to make a tax return held grounds for disbarment under moral turpitude provisions); In the Matter of Estate of Browning, 176 Misc. 308, 27 N.Y.S.2d 318 (Surr. 1941) (corrupt influencing of an employee, though a misdemeanor, involved moral turpitude);

misdemeanor can only be established by the seriousness of the punishment. Since it is the nature of the act, not the punishment, that is crucial in the establishment of turpitude,[178] this classification is clearly inapplicable.[179] More important, it is quite evident from the wording of the moral turpitude statutes that legislators did not intend that this definition be employed.[180]

It has, however, been fairly consistently held that an offense which would have been a *crimen falsi* (crime of falsification) under the common law involves moral turpitude.[181] But the *crimen falsi* category is so narrow that it can do no more than specify a few of the acts which fall within the turpitude classification. Furthermore, the term seems to have a rather vague meaning in common law and, like felony, is distinguished from other prohibited acts largely on the basis of the severity of punishment;[182] thus it is subject to the same difficulties as the felony-misdemeanor distinction. Finally, the distinction between malum in se and malum prohibitum has been applied in some of the moral turpitude cases.[183] But the differentiation between malum in se and malum prohibitum is itself subject to so much dispute[184] that it is of little help in clarifying moral turpitude problems.

In re Pearce, 103 Utah 522, 136 P.2d 969 (1943) (conspiracy to enable a house of ill fame to operate, a misdemeanor, is a crime involving moral turpitude); Comment, 6 MIAMI L.Q. 125 (1951); Annot., 95 L. Ed. 899, 901, and cases cited therein. See Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920), which set the early pattern for findings that only common-law offenses—and only those common-law offenses which were classed as felonies, or *crimen falsi*—involved moral turpitude. See also Bartos v. United States, 19 F.2d 722, 725 (8th Cir. 1927) (only crimes "malum in se, infamous offenses, and those classed as felonies involve moral turpitude,—none other").

178. See pp. 929–31 *infra.*

179. See *In re* Jacoby, 74 Ohio App. 147, 57 N.E.2d 932 (1943); Bradway, *supra* note 167, at 20; Comment, *supra* note 177, at 127.

180. The Immigration Act of 1875 read "persons who are undergoing a sentence for conviction in their own country of felonious crimes . . . ." 18 Stat. 477 (1875). The acts of 1891, 1903, and 1907 specified conviction for any felony or a misdemeanor involving moral turpitude. See Jordan v. De George, 341 U.S. 223, 238 n.12 (1951) (dissent). Only in 1917 did the felony wording drop out and crime involving moral turpitude become a blanket provision. *Ibid.* Under 68 Stat. 1145 (1954), 8 U.S.C. § 1182(a) (1958), a single conviction for a crime involving moral turpitude will bar entry, but not a single conviction for a misdemeanor classifiable as a petty offense. See also ME. REV. STAT. ANN. ch. 113, § 127 (1954) (only conviction of a felony, larceny *or* a crime involving moral turpitude may go to the credibility of a witness); CAL. BUS. & PROF. CODE, § 6101 (felony or misdemeanors involving turpitude); GA. CODE, § 9–501 (1949) (crimes or misdemeanors involving moral turpitude).

181. Bradway, *supra* note 167, at 16. See also note 177 *supra.*

182. See the discussion of "Infamous Crimes" in AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW (2d ed. 1898).

183. *E.g.,* Bartos v. United States, 19 F.2d 722 (8th Cir. 1927); United States *ex rel.* Chartrand v. Karnuth, 31 F. Supp. 799, 800 (W.D.N.Y. 1940).

184. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 294–98 (1947).

We might then expect that, with dictionary definitions too vague to be effective and with no traditional legal classifications available, the results in the moral turpitude cases would be somewhat mixed—unless, of course, judges do have relatively ordered notions of morality. In fact, we do find the results very mixed. And here the courts have rendered us special assistance in our analysis, for they have insisted that moral turpitude is established by the nature of the crime itself and not by the circumstances,[185] so that any discrepancies which arise cannot be ascribed to facts peculiar to a given case.

Crimes in which fraud and false swearing play an important part have usually been found to involve moral turpitude.[186] So have larceny, robbery, burglary, and receiving of stolen goods.[187] But possession of burglar tools or forcible entry do not involve moral turpitude.[188] Nor does prison breaking.[189] Violation of the federal racketeering law involves moral turpitude.[190] But a catalog of gangster activities such as carrying concealed weapons;[191] assault with a deadly weapon; aggravated, simple, or other degrees of assault;[192] disorderly conduct;[193] violation of the narcotics laws;[194] bookmaking and conducting lotteries;[195] murder; and

185. See pp. 929–31 *infra.*

186. Jordan v. De George, 341 U.S. 223 (1951); Chanan Din Khan v. Barber, 147 F. Supp. 771 (N.D. Cal. 1957); Libarian v. State Bar, 38 Cal. 2d 328, 239 P.2d 865 (1952) (extortion); *In re* Rothrock, 25 Cal. 2d 588, 154 P.2d 392 (1944) (knowingly drawing NSF checks); Huff v. Anderson, 212 Ga. 32, 90 S.E.2d 329 (1955); *In re* Sutton, 213 Minn. 76, 5 N.W.2d 396 (1942) (embezzlement); *In re* Comyns, 132 Wash. 391, 232 Pac. 269 (1925) (using mails to defraud).

187. United States *ex rel.* Rydberg v. Reimer, 17 F. Supp. 414 (S.D.N.Y. 1936); *In re* Thompson, 37 Cal. App. 344, 174 Pac. 86 (Dist. Ct. App. 1918). See Annot., *supra* note 172, at 906–07, and cases cited therein; Bradway, *supra* note 167, at 16, and cases cited therein.

188. United States *ex rel.* Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958). See Comment, 3 So. CAL. L. REV. 46, 51 (1929).

189. United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E. D. Pa. 1947).

190. United States *ex rel.* Circella v. Neelly, 115 F. Supp. 615 (N.D. Ill. 1953).

191. Annot., *supra* note 172, at 912.

192. United States *ex rel.* Ciarello v. Reimer, 32 F. Supp. 797 (S.D. N.Y. 1940); United States *ex rel.* Griffo v. McCandless, 28 F.2d 287 (E. D. Pa. 1928); Ciambelli *ex rel.* Maranci v. Johnson, 12 F.2d 465 (D. Mass. 1926); Burford v. Commonwealth, 179 Va. 752, 20 S.E.2d 509 (1942). See Comment, *supra* note 188, at 51; Note, 43 HARV. L. REV. 117, 119 (1929).

193. Annot., *supra* note 172, at 912.

194. *Id.* at 910; United States *ex rel.* Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926); White v. Andrew, 70 Colo. 50, 197 Pac. 564 (1921).

195. See Hofferman v. Simmons, 177 Misc. 962, 32 N.Y.S.2d 244, (Munic. Ct. 1941).

manslaughter have been found free of turpitude.[196] However, voluntary manslaughter,[197] first degree manslaughter,[198] assault with a deadly weapon or with intent to kill or rob,[199] assault while intoxicated,[200] violation of the narcotics act,[201] and conspiring to smuggle opium[202] have been found to involve turpitude. Other such horrendous offenses as adulterating butter,[203] cheating on an expense account,[204] refusing to answer the House Un-American Activities Committee,[205] counselling draft evasion,[206] and conscientious objection[207] are base and vile. Not surprisingly, rape involves moral turpitude,[208] but so does that club of the outraged parent, statutory rape.[209] Mailing information on birth control in violation of a statute involves turpitude.[210] Mailing obscenity does not.[211] But abetting a lewd entertainment does.[212] Libel does[213] and does not.[214]

Aside from the obvious conflicts in the homicide, assault, and libel areas, several categories of cases exhibit special difficulties. Just as in the moral character cases, the courts seem to have a great deal of trouble with liquor and sex. Fornication does not usually involve moral turpitude,[215] but sometimes it does.[216] Adul-

196. Vidal y Planas v. Landon, 104 F. Supp. 384 (S.D. Cal. 1952); United States *ex rel.* Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929).
197. Holloway v. Holloway, 126 Ga. 459, 55 S.E. 191 (1906).
198. Annot., *supra* note 172, at 903.
199. Weedin v. Tayokichi Yamada, 4 F.2d 455 (9th Cir. 1925).
200. United States *ex rel.* Mazzillo v. Day, 15 F.2d 391 (S.D.N.Y. 1926).
201. Menna v. Menna, 102 F.2d 617 (D.C. Cir. 1939); Brainard v. Board of Medical Examiners, 68 Cal. App. 2d 591, 157 P.2d 7 (Dist. Ct. App. 1945); State Board of Medical Examiners v. Friedman, 150 Tenn. 152, 263 S.W. 75 (1924).
202. *In re* Shepard, 35 Cal. App. 492, 170 Pac. 442 (Dist. Ct. App. 1917).
203. Dabold v. Chronicle Publishing Co., 107 Wis. 357, 83 N.W. 639 (1900).
204. Farley v. McBride, 74 Neb. 49, 103 N.W. 1036 (1905).
205. Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954).
206. *In re* Hofstede, 31 Idaho 448, 173 Pac. 1087 (1918).
207. *In re* Pontarelli, 393 Ill. 310, 66 N.E.2d 83 (1946).
208. Annot., *supra* note 172, at 910.
209. Bendel v. Nagle, 17 F.2d 719 (9th Cir. 1927); Pino v. Nicolls, 119 F. Supp. 122 (D. Mass. 1954).
210. *In re* Dampier, 46 Idaho 195, 267 Pac. 452 (1928); Comment, *supra* note 188, at 51.
211. Sims v. Callahan, 269 Ala. 216, 112 So. 2d 776 (1959).
212. Kravis v. Hock, 135 N.J.L. 259, 51 A.2d 441 (Sup. Ct. 1947).
213. *In re* Humphrey, 174 Cal. 290, 163 Pac. 60 (1917); State *ex rel.* Mays v. Mason, 29 Ore. 18, 43 Pac. 651 (1896).
214. See cases cited in Annot., *supra* note 172, at 912.
215. *Ex parte* Rocha, 30 F.2d 823 (S.D. Tex. 1929); Bradway, *supra* note 167, at 17.
216. *Ex parte* Isojoki, 222 Fed. 151 (N.D. Cal. 1915).

tery sometimes does not[217] but generally does.[218] The bigamy decisions are mixed.[219] The liquor decisions exhibit even more confusion.[220] Drunkenness does and does not involve moral turpitude.[221] Conflicting results are also evident in the drunk driving cases.[222] Violations of state and national prohibition laws have frequently been found to involve moral turpitude even when they consisted entirely of manufacture and possession for personal consumption.[223] But it has also been decided that such violations do not involve moral turpitude.[224]

The liquor decisions are further complicated by the fact that many of the prosecutions occurred initially under the tax provisions of various liquor laws, so that it is uncertain whether the turpitude in question was the violation of liquor regulations or the attempt to defraud the government of tax revenues. Thus there is a line of precedents, involving the possession, concealment, or smuggling of

217. United States *ex rel.* Huber v. Sibray, 178 Fed. 144 (W.D. Pa. 1910), *rev'd on other grounds,* 185 Fed. 401 (3d Cir. 1911).

218. *Ex parte* Rodriguez, 15 F.2d 878 (S.D. Tex. 1926); United States *ex rel.* Tourny v. Reimer, 8 F. Supp. 91 (S.D.N.Y. 1934).

219. Bradway, *supra* note 167, at 17.

220. See Annot., *supra* note 172, at 909; Annot., 71 A.L.R. 219 (1930).

221. *Compare* Morgan v. Kennedy, 62 Minn. 348, 64 N.W. 912 (1895), *with* Barter v. Mohr, 37 Misc. 833, 76 N.Y.S. 982 (N.Y. City Ct. 1902).

222. Groves v. State, 175 Ga. 37, 164 S.E. 822 (1932); State v. Budge, 126 Me. 223, 137 Atl. 244 (1927); State v. Deer, 129 N.E.2d 667 (Ohio C.P. 1955); Flowers v. Benton County Beer Bd., 202 Tenn. 56, 302 S.W. 2d 335 (1957).

223. Rudolph v. United States, *ex rel.* Rock, 6 F.2d 487 (D.C. Cir. 1925); Rousseau v. Weedin, 284 Fed. 565 (9th Cir. 1922); Riley v. Howes, 17 F.2d 647 (D. Me. 1927), *rev'd on other grounds,* 24 F.2d 686 (1st Cir. 1928); Kurtz v. Farrington, 104 Conn. 257, 132 Atl. 540 (1926); State v. Bieber, 121 Kan. 536, 247 Pac. 875 (1926); Underwood v. Commonwealth, 32 Ky. L. Rep. 32, 105 S.W. 151 (Sup. Ct. 1907); Jakula v. Starkey, 161 Minn. 58, 200 N.W. 811 (1924); *In re* Callicotte, 57 Mont. 297, 187 Pac. 1019 (1920); State *ex rel.* Young v. Edmunson, 103 Ore. 243, 204 Pac. 619 (1922).

224. United States *ex rel.* Iorio v. Day, 34 F.2d 920 (2d Cir. 1929); Bartos v. United States District Court, 19 F.2d 722 (8th Cir. 1927); Skrmetta v. Coykendall, 16 F.2d 783 (N.D. Ga. 1926), *aff'd,* 22 F.2d 120 (5th Cir. 1927); Fort v. City of Brinkley, 87 Ark. 400, 112 S.W. 1084 (1908); State v. Jenness, 143 Me. 380, 62 A.2d 867 (1948); Burton v. State, 176 S.W.2d 197 (Tex. Crim. App. 1943). An interesting sidelight on these cases is the curious attitude of some courts toward the morality of getting caught. In *Bartos,* the plaintiff had been manufacturing beer for home consumption in violation of prohibition laws. Although the court might have excused him on the basis that his violation involved strictly personal use, see Skrmetta v. Coykendall, *supra,* it chose instead to stress the fact that Bartos had been informed by the enforcement officers that there was no danger of arrest. Similarly, in Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949), Gani's conviction for violation of the prohibition laws was found not to involve moral turpitude largely because so many people committed violations and so few were caught. It seems, then, that not the nature of the offense, but the chance of getting caught sometimes defines moral turpitude.

liquor, which have based findings of moral turpitude on the theory that such conduct is properly viewed as defrauding the United States of tax revenue.[225] These cases have, however, elicited strong dissents which emphasize the liquor law violation rather than the tax evasion aspects of the situation. Indeed, the dissenters are prepared to find that the evasion of liquor regulations (whether in the guise of prohibitory statutes or of taxes) is so much a part of the American tradition as to make ridiculous the charges of moral turpitude.[226] What is interesting about this combination of taxes and prohibition is that it leads to a body of case law which suggests that a man who makes whiskey when it is legal to do so and fails to pay the tax on it is immoral, while a man who makes whiskey when it is illegal to do so and doesn't pay the tax on it is not immoral.

The decisions just discussed are founded on the premise that tax evasion involves moral turpitude because of the fraudulent elements present,[227] and that liquor tax evasion is no different from any other form of tax evasion. But it is not even clear that all tax evasion involves turpitude. Several cases have decided that violations of the income tax statutes evince moral turpitude,[228] but others have reached the opposite conclusion.[229]

Just as in the good moral character cases, courts dealing with moral turpitude have tried various means to escape the melee of morality for the relative certainty of law. Attempts to equate moral turpitude with the violation of a criminal statute[230] were inevit-

225. Maita v. Haff, 116 F.2d 337 (9th Cir. 1940); United States *ex rel.* Berlandi v. Reimer, 113 F.2d 429 (2d Cir. 1940); Guarneri v. Kessler, 98 F.2d 580 (5th Cir. 1938).

226. See Judge Hand dissenting in *Reimer*, and Mr. Justice Jackson dissenting in Jordan v. De George, 341 U.S. 223, 241 (1951): "I have never discovered that disregard of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst."

227. Fraud has generally been held to involve moral turpitude.

228. Chanan Din Khan v. Barber, 253 F.2d 547 (9th Cir. 1958); Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957); *In re* Hallinan, 48 Cal. 2d 52, 307 P.2d 1 (1957); Louisiana State Bar Ass'n v. Steiner, 203 La. 1073, 16 So. 2d 843 (1944); Rheb v. Bar Ass'n of Baltimore, 186 Md. 200, 46 A.2d 289 (1946); *In re* Seija's Petition, 52 Wash. 2d 1, 318 P.2d 961 (1957).

229. United States *ex rel.* Giglio v. Neelly, 208 F.2d 337 (7th Cir. 1953); United States v. Carrollo, 30 F. Supp. 3 (W.D. Mo. 1939); United States *ex rel.* Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926); Kentucky State Bar Ass'n v. McAfee, 301 S.W.2d 899 (Ky. 1957). And see Baker v. Miller, 236 Ind. 20, 138 N.E.2d 145 (1956). This last case argues that conviction of violation of 26 U.S.C. § 145(b) does not require proof of fraud; therefore, no moral turpitude can be inferred from such a conviction.

230. Riley v. Howes, 17 F.2d 647 (D. Me. 1927), *rev'd on other grounds*, 24 F.2d 686 (1st Cir. 1928); Kurtz v. Farrington, 104 Conn. 257, 132 Atl. 540 (1926); Barretta v. Barretta, 182 Misc. 852, 853, 46 N.Y.S. 2d 261, 262 (Sup. Ct. 1944).

ably abortive, for obviously the legislators must have meant something different from "crime" when they wrote "crime involving moral turpitude."[231] We have already noted the difficulty of applying common law categories. While some judges have felt that it was proper to examine the particular circumstances surrounding the criminal act,[232] the most common method of alleviating the burden of moral judgment has been to refuse to look at the particular act at all. Thus it is the nature of the crime of which the individual is convicted (*i.e.*, the statutory or common-law elements of the offense), not his particular actions or the circumstances surrounding them, that determines whether turpitude is involved.[233] Moral turpitude must be inherent in the crime, and this requirement is not met unless conviction in every case necessarily evidences immorality.[234] In examining a conviction for signs of moral turpitude, therefore, the court will not look beyond the record—defined as the indictment or information, plea, verdict, and sentence.[235] In a sense this seems just the opposite of the good moral

231. See United States *ex rel.* Berlandi v. Reimer, 30 F. Supp. 767, 768 (S.D.N.Y. 1939); United States v. Carrollo, 30 F. Supp. 3 (W.D. Mo. 1939); United States *ex rel.* Mongiovi v. Karnuta, 30 F.2d 82 (S.D.N.Y. 1929); *In re* Cruickshank, 47 Cal. App. 496, 190 Pac. 1038 (Dist. Ct. App. 1927); State v. Deer, 129 N.E.2d 667 (Ohio C.P. 1955); *In re* Burch, 73 Ohio App. 97, 102, 54 N.E.2d 803, 806 (1943). See also Coykendall v. Skrmetta, 22 F.2d 120 (5th Cir. 1927); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537–38 (E.D. Pa. 1947).

232. See United States *ex rel.* Rizzio v. Kenney, 50 F.2d 418 (D. Conn. 1931); Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929) (dissent); Rudolph v. United States *ex rel.* Rock, 6 F.2d 487 (D.C. Cir. 1925); Brainard v. Board of Medical Examiners, 68 Cal. App. 2d 591, 157 P.2d 7 (Dist. Ct. App. 1945); *In re* Pearce, 103 Utah 522, 136 P.2d 969 (1943). See Annot., 81 A.L.R. 1196 (1932); Comment, *supra* note 177, at 127; Comment, *supra* note 188, at 52. The courts seem most willing to look at the circumstances when professional licenses are involved.

233. Bermann v. Reimer, 123 F.2d 331 (2d Cir. 1941); United States *ex rel.* Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E.D. Pa. 1947); United States *ex rel.* Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929); Lorenz v. Board of Medical Examiners, 46 Cal. 2d 684, 298 P.2d 537 (1956); *In re* Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); People v. Meyerovitz, 278 Ill. 356, 116 N.E. 189 (1917); *In re* Finch, 156 Wash. 609, 287 Pac. 677 (1930); Annot., *supra* note 42, at 902–03; Developments in the Law, *supra* note 42, at 656. *Cf.* Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D. N.Y. 1958). "The circumstances of the 1914 petty larceny conviction including the relative pettiness of the offense, the age of the defendant and his commitment to the House of Refuge, must be considered. . . ." *Id.* at 438. But note that none of these factors concern the circumstances directly related to the act. In fact the final decision rests on the youth of the offender, and juvenile crimes have not usually been considered to involve moral turpitude. See United States *ex rel.* Guarino v. Uhl, 107 F. 2d 399 (2d Cir. 1939).

234. United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947); Lorenz v. Board of Medical Examiners, 46 Cal. 2d 684, 687, 298 P.2d 537, 538 (1956).

235. United States *ex rel.* Zaffarano v. Corsi, 63 F.2d 757 (2d Cir.

character cases, but note that the shift here is still from the less to the more legal. In the moral character cases, the courts sought to move from the general moral considerations of character to the particular assessment of individual acts, which they could handle by analogy to crimes. Here, where all the acts are criminal so that the analogy is no help, they shift from an examination of acts to an analysis of the law itself.

The inherent difficulties of this approach are readily apparent in the cases. First of all, although the court professes to be unconcerned with the particular facts of the case, the indictment is frequently used as if it were a factual record. In other words, the judges are not totally at home with their self-imposed limitation of looking only to the record. So they tend to dwell on that part of the record which is most like the facts.[236] The trouble is that the indictment is not the facts, but only the allegations of the prosecutor. Certainly it would be impossible to argue that conviction of the defendant meant that the jury or trial judge found everything alleged in the indictment to be true. Therefore, the first fruit of looking to the record rather than to the facts is simply a distorted view of the facts.

A second problem is illustrated by the petty larceny cases. The courts, seeking to deal with whole classifications rather than with particular acts, have uniformly ruled that larceny, whatever the amount, involves moral turpitude.[237] They usually support their holdings by citation to Blackstone, who asserted that God had decreed that certain crimes (among them larceny) were evil in and of themselves.[238] But it seems unlikely that a commentator who could laud the English law for its justice and reason when it listed one hundred twenty capital offenses,[239]—including the

1933); Petition of Knight, 122 F. Supp. 322 (S.D.N.Y. 1954); Vidal y Planas v. Landon, 104 F. Supp. 384 (S.D. Cal. 1952); United States *ex rel.* Teper v. Miller, 87 F. Supp. 285, 287 (S.D. N.Y. 1949); United States *ex rel.* Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928).

236. See, *e.g.*, Vidal y Planas v. Landon, 104 F. Supp. 384 (S.D. Cal. 1952), where, because of a peculiar feature of Spanish law, the record of conviction includes the trial judge's findings of fact which were fully exploited to justify a conclusion that murder did not involve moral turpitude.

237. Quilodran-Brau v. Holland, 232 F.2d 183 (3d Cir. 1956); United States *ex rel.* Ventura v. Shaughnessy, 219 F.2d 249 (2d Cir. 1955); Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929); Bartos v. United States Dist. Court, 19 F.2d 722 (8th Cir. 1927); Pino v. Nicolls, 119 F. Supp. 122 (D. Mass. 1954); United States *ex rel.* Chartrand v. Karnuth, 31 F. Supp. 799 (W.D.N.Y. 1940); United States *ex rel.* Rizzio v. Kenney, 50 F.2d 418 (D. Conn. 1931); *In re* Henry, 15 Idaho 755, 99 Pac. 1054 (1909). *Cf.* Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958); LOWENSTEIN, *op. cit. supra* note 39, at 215.

238. Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).

239. See also Bartos v. United States Dist. Court, 19 F.2d 722, 724 (8th Cir. 1927) (larceny is evil in itself and "the consensus of opinion . . .

theft of property worth five shillings—really had a direct line to God.[240] The Bible at least stops at an eye for an eye. Of course the court in *Tillinghast v. Edmead*[241] might have felt right at home with Blackstone. It deported a servant for stealing fifteen dollars from her employer. The Immigration Service has cut the price to 50 cents, the value of two stolen neckties.[242] The lowest a federal court has gone is the value (unspecified) of two dozen golf balls, although the judge had some pangs of conscience.[243] The practical seriousness of these results may be realized if it is remembered that a single crime of moral turpitude before entry, or one within five years after entry, or two at any time, are grounds for deportation.[244]

Another difficulty of looking to the crime as defined by law is illustrated by *United States ex rel. Manzella v. Zimmerman.*[245] Manzella, a convicted burglar, found his prison door accidentally unlocked and walked out. He was indicted for and convicted of breaking prison "with force and arms." The judge who had to decide whether the break involved moral turpitude could not look beyond the record and so was not officially cognizant of the unlocked door. But he reasoned that if only the crime as defined by statute was relevant, then the court must consider the least act which might result in conviction. Citing an English decision,[246] which by way of example had held that the dislodging of a single loose brick from a prison wall in the process of escape would be considered a prison break, the court decided that the offense as defined in the indictment might minimally consist of little more than this. Since so little force was involved, the crime did not involve moral turpitude.

Now obviously this argument was simply the long way around

deduces from the commission of crimes malum in se . . . that the perpetrator is depraved in mind . . . because, forsooth, his very act involves moral turpitude."). This verbal shell game is cited with approval in United States *ex rel.* Chartrand v. Karnuth, 31 F. Supp. 799, 800 (W.D.N.Y. 1940).

240. See the dissent in Tillinghast v. Edmead, 31 F.2d 81, 84–85 (1st Cir. 1929).

241. 31 F.2d 81 (1st Cir. 1929).

242. LOWENSTEIN, *op. cit. supra* note 39, at 225.

243. Pino v. Nicolls, 119 F. Supp. 122 (D. Mass. 1954).

244. If an alien should enter Canada or Mexico on vacation, his return to the U.S. is an entry. Therefore, no matter how many years he has been living in the U.S., a single act of petty larceny committed either in the U.S. or elsewhere at any time before his return from vacation will be sufficient to lead to deportation. Developments in the Law, *supra* note 42, at 684–86. Even Congress has been alarmed by the situation and has amended the statutes to allow one petty offense. 68 Stat. 1145, 8 U.S.C. § 1182(a) (1958).

245. 71 F. Supp. 534 (E.D. Pa. 1947).

246. Rex v. Haswell, Russ. & Ry. 458, 168 Eng. Rep. 896 (C.C. 1821).

to arrive by hypothesis at the facts which the judge knew but could not officially recognize. But the result is precedent for future holdings that prison breaking by force of arms, as a class of crime—and, therefore, every conviction for this crime—does not involve moral turpitude. The same result followed a decision by Judge Hand that possession of burglar tools by a teen-ager did not involve turpitude because minimally he might have been intent not on burglary but simply on boyish pranks. It is now good law that the possession of burglar tools does not involve moral turpitude.[247]

Why do the courts stick to a technique which leads to unrealistic, confused, and—by nearly anyone's moral standard—immoral decisions?[248] Simply because this technique severely limits the number of moral decisions which the courts have to make, and shifts most of the decision-making to the normal processes of the criminal law. The courts limit their moral responsibility to a decision as to which crimes involve moral turpitude, based on a hypothetical, generalized set of circumstances. Once these decisions have been reached, moral determinations need not be made in individual cases; the criminal law does that for the judges. The elements of proof and strict procedures of the criminal law winnow out all those who have not committed the minimum acts necessary for conviction—and, therefore, for a finding of moral turpitude. The judge need not say: "I have examined the actions of the person and I find them immoral." Rather he says: "The criminal law has examined the actions of this person and finds them to fall within a condemned category." And when the courts have once decided that a class of crime involves moral turpitude, stare decisis will take care of all subsequent cases automatically.[249] Thus, ideally, only one decision for each class of crime would be necessary.

247. See the cases on burglary cited *supra* note 187. The "minimum" technique has also been used in: United States *ex rel.* Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928); Lorenz v. Board of Medical Examiners, 46 Cal. 2d 684, 298 P.2d 537 (1956); *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1954).

248. The dissenter in Tillinghast v. Edmead, 31 F.2d 81, 84 (1st Cir. 1929), pointed out that under the "no circumstances" rule a mother who had stolen bread for her starving child might be deported.

249. There remains the problem of what to do when previous courts have made conflicting decisions about a given class of crime. One rather clever solution is offered in United States *ex rel.* Griffo v. McCandless, 28 F.2d 287, 288 (E.D. Pa. 1928), which argues that conflict indicates that a given crime involves turpitude under some circumstances but not others; that the court may not look to circumstances; and that, therefore, the court cannot determine whether any given conviction for such crimes involved turpitude. Since the burden of proof is on the government in deportation cases, the alien cannot be deported because the government cannot prove turpitude. Of course if two courts which specifically use the "no circumstances" rule disagree, this solution will not work. And note that the burden of proof is on the alien in naturalization cases.

Of course—even ideally—some court, sometime, must make that one moral decision on each class of crime. Here our old friend the community standards test enters the picture again. The courts allow the community to take this one final judgment off their hands. Just as in the moral character cases, incipient community standards tests began to appear very early. The notion that "whatever was criminal at common law involved moral turpitude" was really an appeal to community opinion, if only the fossilized remains of a long-dead community.[250] And in Roman law, turpitude was established by the judge, who was presumed to be acting as a voice for public opinion.[251] But the modern notion of community standards became evident in cases which found that what was or was not turpitude depended upon the "state of public morals,"[252] upon the "public morals of . . . [a] community,"[253] upon the "general sense of the community,"[254] and upon what was "generally regarded as . . . offensive to the moral sense as ordinarily developed . . . wrong . . . or contrary to accepted rules of morality"[255] or "standards of right conduct prevailing among our people."[256]

Just as in the moral character cases, the community standards test has become the nearly universal rule[257] in moral turpitude cases, through the efforts of Judge Hand. Indeed, his use of the doctrine in the moral turpitude cases antidated his influential "good moral character" opinions.[258] In *United States ex rel. Iorio v. Day*,[259] in finding that a violation of the Prohibition Act did not involve moral turpitude, Judge Hand wrote:

250. See, *e.g.*, Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).

251. 1 BURDICK, LAW OF CRIMES 89.

252. United States *ex rel.* Mylius v. Uhl, 203 Fed. 152, 154 (S.D.N.Y. 1913); Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920); Beck v. Stitzel, 21 Pa. 522 (1853).

253. *In re* Dampier, 46 Idaho 195, 202, 267 Pac. 452 (1928).

254. Beck v. Stitzel, 21 Pa. 522 (1853).

255. Coykendall v. Skrmetta, 22 F.2d 120–21 (5th Cir. 1927).

256. *In re* Finch, 156 Wash. 609, 287 Pac. 677 (1930). See also Kurtz v. Farrington, 104 Conn. 257, 262, 132 Atl. 540, 541 (1926) ("the standards of society"). One early case justified a finding that violation of the prohibition act involved moral turpitude on the basis of the "progressive quickening of the American people's moral attitude towards intoxicating liquor. . . ." State v. Beiber, 121 Kan. 536, 538, 247 Pac. 875, 876 (1926). Even Bartos v. United States Dist. Court, 19 F.2d 722 (8th Cir. 1927), which attacked the earliest "community standards" decisions, professed to be guided in its turpitude determinations by "the consensus of opinion."

257. See Note, *supra* note 192, at 79; Comment, *supra* note 177, at 126; Comment, 1951 U. ILL. L.F. 474, 475.

258. See Cahn, *supra* note 42, at 842, 847.

259. 34 F.2d 920 (2d Cir. 1929).

> We do not regard every violation of a prohibition law as a crime involving moral turpitude. . . . All crimes violate some law; [here] . . . Congress . . . added as a condition that . . . [the particular crime] must itself be shamefully immoral. There are probably many persons in the United States who would so regard either the possession or sale of liquor, but the question is whether this is so by common conscience, a nebulous matter at best. While we must not . . . substitute our personal notions as the standard, it is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel. We cannot say that among the commonly accepted mores the sale . . . of liquor as yet occupies so grave a place . . . .[260]

Professor Cahn points out that, with the confusion about the rights and wrongs of prohibition that existed in 1929, Judge Hand used common conscience as a "scapegoat . . . loaded down with . . . the burden that the judges quite understandably considered too heavy for their own shoulders."[261] But Cahn stresses the "hard cases make bad law" notion too heavily, I think. We can hardly view community standards as a test "whipped up for the occasion" when there are forerunners of it in so many cases distributed over so many jurisdictions and in both moral character and moral turpitude cases. And even Judge Hand, although prior to the *Iorio* case he had not used the community standards test in moral turpitude cases, sought much earlier to introduce it in the obscenity field.[262] Community standards was indeed a scapegoat, but even in 1929 it was a good deal more than an attempt to avoid the dilemmas of prohibition. It was already becoming a general method of getting the courts out of even the narrow range of moral decisions remaining to them after the main burden had been shifted to the criminal law.[263] The doctrine has occasionally been shaken,[264] but it is nevertheless the general test in the turpitude cases.[265] Even the dictionary definitions of which the courts are so fond have been reconstructed to take account of the test by the insertion of "according to the accepted and customary rule of right and duty" after "baseness, vileness and depravity."[266]

260. *Id.* at 921.
261. Cahn, *supra* note 42, at 843.
262. See United States v. Kennerley, 209 Fed. 119 (S.D.N.Y. 1913).
263. See Comment, *supra* note 188, at 52.
264. United States *ex rel.* Berlandi v. Reimer, 113 F.2d 429 (2d Cir. 1940). The particular acts in question seemed to involve large scale commercial smuggling, but under the "minimum acts" doctrine Judge Augustus N. Hand was quite correct in visualizing the crime as something like a Long Island dowager sneaking two bottles of brandy in her luggage.
265. See Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E.D. Pa. 1947); *In re* Jacoby, 74 Ohio App. 147, 57 N.E.2d 932 (1943); *In re* Burch, 73 Ohio App. 97, 54 N.E.2d 803 (1943); *In re* Pearce, 103 Utah 522, 136 P.2d 969 (1943).
266. See Pino v. Nicolls, 119 F. Supp. 122 (D. Mass. 1954); United

All the problems that we encountered earlier, in examining the application of the community standards test to the good moral character cases, appear in the moral turpitude field as well. What does common conscience mean?[267] Which community are we talking about?[268] There have been the usual pleas that legislatures express the common conscience by specifying which crimes involve turpitude.[269] Congress has amended the McCarran Act to allow one misdemeanor classifiable as a petty offense (defined as an offense for which punishment does not exceed six months imprisonment or $500 fine or both).[270] The act also contains the provision that conviction of two or more offenses, where the aggregate sentence is five years or more, is grounds for exclusion.[271] Under these provisions, federal courts will be able to avoid considering some of the convictions for petty larceny, tax evasion, liquor offenses and, at the other end of the scale, homicide which have plagued them in the past. But the legislatures have not yet been willing to relieve the courts of more than a small part of their responsibility.[272]

The Supreme Court put in one of its rare direct appearances in the morals field in *Jordan v. De George,*[273] a moral turpitude case which involved deportation on the ground of conviction for failure to pay liquor taxes on bootleg whiskey. While there seemed

States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537–38 (E.D. Pa. 1947); United States *ex rel.* Ciarello v. Reimer, 32 F. Supp. 797, 798 (S.D. N.Y. 1940); Brooks v. State, 187 Tenn. 67, 76, 213 S.W.2d 7, 11 (1948); BLACK, LAW DICTIONARY (4th ed. 1951); Bradway, *supra* note 167, at 15.

267. Note, *supra* note 192, is especially pleased with "public conscience."

268. See particularly the dissent in *Jordan v. De George,* discussed in text beginning at note 273 *infra.* There have been the usual attempts to derive the community's sentiments from various sources. In *Bartos* the majority found the passage of the Prohibition Act to indicate the community's feelings, but Judge Kenyon (concurring) wasn't sure exactly what feelings the act expressed. Judges have argued that drunkenness could not be a grave affront to the community because the state sold liquor. State v. Deer, 129 N.E.2d 667 (Ohio C.P. 1955). And the possession of slot machines, even in violation of local law was not immoral because the state licensed the machines. Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949).

269. Jordan v. De George, 341 U.S. 223, 245 (1951) (dissent); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947); Bradway, *supra* note 167, at 21–22; Note, *supra* note 172; Note, *supra* note 192; Comment, *supra* note 177, at 128; Comment, *supra* note 257, at 476.

270. 68 Stat. 1145 (1954), 8 U.S.C. § 1182(a) (1958).

271. 66 Stat. 182 (1952), 8 U.S.C. § 1182(a)(10) (1958).

272. In Maine, the Legislature settled the dispute over whether petty larceny involved moral turpitude, and the problem of the felony-misdemeanor distinction, by declaring a witness impeachable for felony, larceny, or a crime involving moral turpitude. ME. REV. STAT. ANN. ch. 113, § 127 (1954). Thus, if a witness has been convicted of any felony or larceny, the court need not reach moral turpitude questions.

273. 341 U.S. 223 (1951).

to be ample reason for ruling the term "moral turpitude" unconstitutionally vague,[274] the court refused to do so. Nor was it willing to employ the community standards approach which had been used by the circuit court[275] and supported by the Attorney General.[276] Instead, it stressed the fraud elements of the offense, found that previous decisions were unanimous in their treatment of fraud, and concluded that, at least in so far as the defendant was concerned, moral turpitude had a meaning well rooted in law.[277]

The dissenters[278] refused to confine themselves to the fraud issue. They examined the phrase "moral turpitude" and found in the cases dealing with turpitude the utmost confusion, conflict, and lack of definition. And they rejected the community standards test because of the multiplicity of geographic and socio-economic standards in this country and the difficulty of getting information about them.[279] In addition it was noted that the Court had recently found the phrase "contrary to public morals" unconstitutionally vague.[280] The dissenters could find no more certainty in "involving moral turpitude," and would have struck down that portion of the immigration and naturalization act under the void-for-vagueness rule:

274. See Bartos v. United States Dist. Court, 19 F.2d 722 (8th Cir. 1927); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947); United States *ex rel.* Ciarello v. Reimer, 32 F. Supp. 797, 798 (S.D.N.Y. 1940); United States *ex rel.* Shladzien v. Warden, 45 F.2d 204 (E.D. Pa. 1930); United States *ex rel.* Mylius v. Uhl, 203 Fed. 152, 154 (S.D.N.Y. 1913); Fort v. City of Brinkley, 87 Ark. 400, 112 S.W. 1084 (1908); Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920); Perren v. State, 69 Ga. App. 417, 25 S.E.2d 823 (1943); *In re* Dampier, 46 Idaho 195, 267 Pac. 452 (1928); Board of Dental Examiners v. Lazzell, 172 Md. 314, 191 Atl. 240 (1937); LOWENSTEIN, *op. cit. supra* note 39, at 213; Bradway, *supra* note 167, at 26–27; Developments In the Law, *supra* note 42, at 655. The Court had previously used the phrase "involving moral turpitude" in United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 423 (1933), but in doing so had "assumed without analysis or discussion a proposition not seriously relied on." Jordan v. De George, 341 U.S. 223, 239 (1951) (dissent). Compare majority opinion, 341 U.S. at 230. Although the deportation statutes are not (strictly speaking) criminal, the results are so severe that the courts have usually been willing to extend the vagueness rule to them.

275. United States *ex rel.* De George v. Jordan, 183 F.2d 768, 770–71 (7th Cir. 1950).

276. The Government offered "the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral." 341 U.S. at 237 (dissent).

277. See also United States *ex rel.* Berlandi v. Reimer, 113 F.2d 429 (2d Cir. 1940).

278. Justices Jackson, Black, and Frankfurter.

279. 341 U.S. 223, 241 (1951) (dissent).

280. *Id.* at 243 (dissent), referring to Musser v. Utah, 333 U.S. 95 (1948).

> Irrationality is inherent in the task of translating the religious and ethical connotations of the phrase into legal decisions. The lower court cases seem to rest, as we feel this Court's decision does, upon the moral reactions of particular judges to particular offenses. . . . The chief impression from the cases is the caprice of the judgments.[281]
>
> Apparently, Congress expected the courts to determine the various crimes includable in this vague phrase. We think that not a judicial function.[282]
>
> We should not forget that criminality is one thing—a matter of law—and that morality, ethics and religious teachings are another. Their relations have puzzled the best of men . . . . When we undertake to translate ethical concepts into legal ones, case by case . . . we usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it. In fact, what better reason is there?[283]

What is most significant for our purposes about the *De George* decision is the attempt by both sides to escape a moral task which they obviously view as impossible of fulfillment. The majority, by never sticking their noses beyond fraud, avoid *moral* judgment by employing the traditional *legal* technique of stare decisis. The minority, by proposing to rule "moral turpitude" void for vagueness, seek to get the courts out of the morals business altogether. Indeed, their dissatisfaction with the community standards doctrine seems to rest on the belief that it cannot really accomplish the shift of moral judgment back to the community.

The pattern that emerges from the moral turpitude cases is strikingly similar to that of the good moral character decisions. There is the same confusion and contradiction, even after years of litigation which might have been expected to bring order by the traditional process of case-by-case inclusion and exclusion.[284] There is the same avoidance of moral judgments through the community standards test. But here an additional technique for returning from morals to law is employed—the definition of turpitude in terms of categories of crime rather than individual acts.[285] In both areas, the avoidance devices are both logically and em-

281. 341 U.S. 223, 239 (1951) (dissent).
282. *Id.* at 242.
283. *Id.* at 241–42.
284. The moral turpitude standard is employed with different degrees of severity in some fields (*e.g.*, disbarment) than in others (*e.g.*, impeachment of witnesses). Note, 35 YALE L.J. 237 (1925); Comment, *supra* note 188, at 51. Some of the confusion undoubtedly results from this variation, but the very fact that the term "moral turpitude" can be used in so many fields in so many ways illustrates the ambiguity of this kind of moral terminology.
285. It might also be noted that by reference to conviction for an act, rather than examination of the circumstances, the courts avoid having to examine the state of mind of the individual, just as they do in the moral character cases.

pirically of dubious value. Yet they have been deliberately chosen by the courts as a lesser evil than the arbitrariness and confusion that might follow from individual moral judgments which the judges feel are beyond their authority and capabilities.

IV. THE MANN ACT

The courts have encountered another moral task in their application of the Mann Act, which created the felony of transporting women or girls in interstate commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose."[286] As early as 1914 a United States court of appeals refused to examine the legislative history of the act and, looking to the "ordinary and usual meaning" of the words, found a noncommercial sexual relationship sufficient for conviction. The court reasoned that the phrase "for any other immoral purpose" must be construed according to its plain meaning, and in accord with the *ejusdem generis* rule which requires that such a phrase be limited to the general category of acts aimed at by the statute. The general category of acts which formed the nexus between prostitution, debauchery and other immoral purposes "is sexual immorality, and . . . fornication and adultery are species of that genus."[287]

The Supreme Court in *Caminetti v. United States*[288] followed exactly the same line. It found, under the *ejusdem generis* principle, that "any other immoral purpose" plainly referred to illicit sexual relations and that transporting a mistress or concubine was clearly included in "the common understanding of what constitutes an immoral purpose."[289] Mr. Justice McKenna, in dissent, rejected the majority's argument that the plain-meaning approach should serve as an absolute bar to considerations of legislative intent, and further stated that the legislative history of the act[290] conclusively indicated Congress' intention of striking only at commercialized vice. He noted the great difference between the evils of white slavery and "the occasional immorality of men and women," and warned that the comprehensive nature of moral terminology required cautious interpretation if the judiciary were to stay within its assigned limits.

There seems to be little doubt that Mr. Justice McKenna was essentially correct in his interpretation of the legislative history of the Mann Act, and that the majority chose a mode of construction which was neither required by the Court's own rules nor justified

286. 36 Stat. 825 (1910), 18 U.S.C. § 2421 (1958).
287. Johnson v. United States, 215 Fed. 679 (7th Cir. 1914).
288. 242 U.S. 470 (1917).
289. *Id.* at 486.
290. The statute was entitled the White Slave Act.

by the intent of the legislature.[291] The majority's methodology has been subject to a constant and convincing attack by the commentators.[292] There has been some tendency in the courts to limit the scope of the statute in noncommercial cases.[293] Thus the courts have developed the "dominant motive" rule, which requires that the immoral sexual relations be a primary reason for (and not simply incidental to) the transportation,[294] and they have repeatedly insisted that only sexual intercourse is condemned.[295] The Court of Appeals for the District of Columbia refused to apply the Act in the District, largely because it was reluctant to employ the *Caminetti* rule.[296] The Department of Justice has expressly re-

291. Booth, *The White Slave Traffic Act*, 20 CAL. S.B.J. 102 (1945); Note, 15 GEO. WASH. L. REV., 214, 217–20 (1946); Note, 56 YALE L.J. 718, 719–20 (1947).

292. Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 961 (1940); Rogers, *The Mann Act and Noncommercial Vice*, 37 LAW NOTES 107 (1933); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 7–8 (1939). The majority in *Caminetti* relied heavily on United States v. Bitty, 208 U.S. 393 (1908), which had interpreted "prostitution, debauchery, or any other immoral purpose" in an immigration statute, 34 Stat. 899 (1907), to bar entry of a concubine. But, as the dissenters and several subsequent commentators have pointed out, the *ejusdem generis* principle is not strictly applicable to *Bitty*, and the case does not provide a convincing analogy to the *Caminetti* situation. *Bitty* concerned immigration statutes which had traditionally dealt with broad classifications and had been liberally interpreted, while *Caminetti* concerned a criminal statute to be narrowly construed. And the "immoral purposes" phrase involved in *Bitty* had been added by amendment, raising a presumption that it had some special meaning of its own, while in the Mann Act it had been part of the original wording, so that it might properly have been construed as simply amplifying or clarifying other language in the act. See Taylor, *Manhandling the Mann Act?*, 5 NAT'L B.J. 39, 46–48 (1947); Note, 35 GEO. L.J. 407, 408 (1947). The *Bitty* opinion itself lays particular stress on the fact that the "immoral purpose" provision had been added by amendment, so that the Court had either to assign it a special meaning or to imply that Congress had passed a meaningless, or redundant amendment. Furthermore, when the Supreme Court was later faced with a similar immigration provision which was not added by amendment, it stuck strictly to the *ejusdem generis* rule and found that the phrase simply amplified the prohibition on prostitution. See Hansen v. Haff, 291 U.S. 559 (1934).

293. Note, *supra* note 292, at 409–10.

294. See Long v. United States, 160 F.2d 706 (10th Cir. 1947); Simon v. United States, 145 F.2d 345 (4th Cir. 1944); Alpert v. United States, 12 F.2d 352 (2d Cir. 1926); Thorn v. United States, 278 Fed. 932 (8th Cir. 1922); Biggerstaff v. United States, 260 Fed. 926 (8th Cir. 1919); Comment, 19 So. CAL. L. REV. 250, 254–55 (1946); Note, 10 WYO. L.J. 198, 199 (1956).

295. United States v. Lewis, 110 F.2d 460 (7th Cir.), *cert. denied*, 310 U.S. 634 (1940). Bigamous marriage and the taking of nude photos of a 16 year-old girl are not immoral purposes under the act. United States v. Mathison, 239 F.2d 358 (7th Cir. 1956); Gerbino v. United States, 293 Fed. 754 (3rd Cir. 1923).

296. Beach v. United States, 144 F.2d 533 (D.C. Cir. 1944), *rev'd*, 324 U.S. 193 (1945).

fused application of the Act to the private trips of paramours, and uses its discretion in asking indictments against other noncommercial violators.[297] *Mortensen v. United States*,[298] which used the dominant motive rule to reverse a Mann Act conviction, contained a strong suggestion by Mr. Justice Murphy that *Caminetti* was on its way out. Another opinion by Mr. Justice Murphy expresses the basic discontent with *Caminetti*:

> The consequence of prolonging the Caminetti principle is to make the federal courts the arbiters of the morality of those who cross state lines in the company of women and girls . . . . I do not believe that this falls within the legitimate scope of the judicial function.[299]

But *Caminetti* has remained good law.[300] Noncommercial transporters have been repeatedly convicted.[301] And many of the cases involved the types of conduct—occasional fornication or long-term, stable, adulterous relationships—which have caused the courts so much trouble in the moral character and turpitude fields. The fornication decisions are particularly surprising, for the early precedents might easily have been limited to concubinage rather than read to include casual relationships.[302] While it seemed for a time after *Mortensen* that the Supreme Court might revise its

297. Booth, *supra* note 291, at 103. Indictments are apparently used in many instances so that the federal nationwide search system can be used to locate men who have deserted their families or seduced young girls. The F.B.I. estimates that about 2% of the Mann Act cases involve noncommercial violations. Note, 56 YALE L.J. 718, 725 (1947).

298. 322 U.S. 369 (1944).

299. Cleveland v. United States, 329 U.S. 14, 29 (1946) (dissent).

300. Taylor, *supra* note 292, at 46. Note, 15 GEO. WASH. L. REV. 214, 220 (1946).

301. Gebardi v. United States, 287 U.S. 112 (1932); Whitt v. United States, 261 F.2d 907 (6th Cir. 1959); Masse v. United States, 210 F.2d 418 (5th Cir. 1954); Daigle v. United States, 181 F.2d 311 (1st Cir. 1950); United States v. Krulewitch, 167 F.2d 943 (2d Cir. 1948), *rev'd on other grounds*, 336 U.S. 440 (1949); Long v. United States, 160 F.2d 706 (10th Cir. 1947); Jarabo v. United States, 158 F.2d 509 (1st Cir. 1946); Sipe v. United States, 150 F.2d 984 (D.C. Cir. 1945), *cert. denied*, 326 U.S. 788 (1946); Qualls v. United States, 149 F.2d 891 (5th Cir. 1945); Haskett v. United States, 145 F.2d 465 (9th Cir. 1944); Simon v. United States, 145 F.2d 345 (4th Cir. 1944); United States v. Reginelli, 133 F.2d 595 (3rd Cir.), *cert. denied*, 318 U.S. 783 (1943); Ghadiali v. United States, 17 F.2d 236 (9th Cir. 1927); Corbett v. United States, 299 Fed. 27 (9th Cir. 1924); Burgess v. United States, 294 Fed. 1002 (D.C. Cir. 1924); Blackstock v. United States, 261 Fed. 150 (8th Cir. 1919); Van Pelt v. United States, 240 Fed. 346 (4th Cir. 1917); United States v. Helwig, 7 F.R.D. 187 (W.D. Pa.), *rev'd on other grounds*, 162 F.2d 837 (6th Cir. 1947).

302. *Bitty* and *Caminetti* both involved concubinage. It might have been argued by later courts that under the *ejusdem generis* rule only concubinage was included in "other immoral purposes," because both prostitution and concubinage involved material reward, while free-will fornication did not. See Note, 56 YALE L.J. 718, 726–27 n.50 (1947).

views as expressed in *Caminetti,* the strong *Mortensen* dissents[303] indicated that several justices continued to support the older position. And in a per curiam reversal of the court of appeals in *Beach v. United States,*[304] the dissenters of *Mortensen* had become the majority although no special attempt was made to specifically reaffirm *Caminetti.*[305]

All this preliminary skirmishing culminated in *Cleveland v. United States,*[306] which specifically upheld *Caminetti* and again used the *ejusdem generis* rule to support the condemnation of noncommercial sexual vice. The Court held that "debauchery" did not imply commercialism and, therefore, if "other immoral purposes" was to be interpreted within the general category established by "prostitution" and "debauchery," it could not be limited to commercial activities.[307] Mr. Justice Rutledge reluctantly concurred because *Caminetti,* which had not been overruled, appeared to be governing. He took the opportunity to hint that *Caminetti's* lease on life might well be terminated. Justices Black and Jackson dissented briefly on the ground that *Caminetti* was so dubious that it should at least be restricted to its particular facts. Mr. Justice Murphy substantially repeated his *Beach* opinion, arguing that the legislature had intended only that white slavery be punishable. While Mr. Justice Murphy seems to go too far in limiting the legislative intent to white slavery rather than prostitution in general,[308] the issue between the majority and those writing separate opinions remained that of intent versus "plain meaning."

The *Cleveland* case is complicated by the fact that the particular kind of "other immoral purposes" in question was religiously inspired polygamy. The majority dismissed the whole problem with the observation that polygamy was worse than casual fornication

303. Justices Stone, Black, Reed and Douglas dissented. See also United States v. Oriolo, 324 U.S. 824 (1945), a per curiam reversal citing *Mortensen,* with dissents by Justices Stone, Douglas and Jackson.

304. 144 F.2d 533 (D.C. Cir. 1944), *rev'd,* 324 U.S. 193 (1945).

305. The majority used an examination of legislative history to justify application of the Mann Act and thus of the *Caminetti* rule within the District of Columbia. Mr. Justice Murphy, with whom Mr. Justice Black concurred, attempted to hoist the majority on its own petard by insisting that the use of legislative history did not stop at the District of Columbia issue. He found that the historical materials showed that Congress had not intended the statute to apply either to "immorality in general or . . . prostitution," but only to white slavery, and condemned all earlier decisions which ignored legislative intent. Beach v. United States, 324 U.S. 193, 197–98 (1945).

306. 329 U.S. 14 (1946).

307. The majority also approve the very dubious analogical argument from the *Bitty* case used in *Caminetti.* See note 292 *supra.*

308. Hoke v. United States, 227 U.S. 308 (1913), the case originally upholding the constitutionality of the act, did examine the legislative intent and nevertheless upheld a conviction involving a voluntary prostitute. See also United States v. Holte, 236 U.S. 140 (1915).

because it was "a notorious example of promiscuity." But Mr. Justice Murphy, after giving a brief lesson in cultural anthropology and moral relativism, rightly pointed out that whatever polygamy was, it could hardly be considered in the same class with prostitution and debauchery. Therefore it could not be included in "other immoral purposes" even under the plain meaning and *ejusdem generis* techniques of the majority.[309] The polygamists had also pleaded that the intent requirement of the statute was not satisfied, because the transportation was for religious not immoral purposes. The majority replied that "whether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard."[310] But this kind of reply simply avoids the issue. To be sure, if the defendant intended to violate the standard, he intended an immoral act no matter what his subjective state of mind. But the question is, did *Congress intend* the standard (*i.e.*, "other immoral purposes") to include sincere and religiously motivated plural marriage? The Court simply glosses over the whole moral dilemma by lumping the polygamy of religious zealots with the antics of traveling salesmen.

We might pause for a moment in our examination of the Mann Act cases to discuss the general problem of polygamy in the courts since *Cleveland* is the latest of the polygamy cases. Although the courts have indulged in a great deal of loose language about barbarousness, unchristianity, and paganism (most of which the Supreme Court had the bad taste to collect in *Cleveland*), the principal decisions all rest on legal, not moral, grounds. The opinions of the Supreme Court have revolved about the argument that marriage is a civil contract regulated traditionally and properly by the state, that polygamy is, therefore, a violation of law, and that religious beliefs may not be used as an excuse for breaking the law.[311] In short, the polygamy cases have tempted the justices to moral rhetoric, but the decisions are all squarely based on law, not morality. And it is in one of these cases, *Musser v. Utah*,[312] that the

309. Note, *supra* note 302, at 727, argues that polygamy cannot be included in "other immoral purposes" because the *Bitty* decision, which is the basic authority on the question, concerned the immigration law which contained separate provisions barring polygamists. Those provisions would be rendered meaningless if the immoral purpose clause was construed to include polygamy. *Cf.* Note, 20 ROCKY MT. L. REV. 221, 224 (1947).

310. 329 U.S. 14, 20 (1946).

311. See Mormon Church v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885); Reynolds v. United States, 98 U.S. 145 (1878). Cleveland v. United States, 329 U.S. 14 (1946), of course, also rests on law violation. Of particular interest is the concurrence of Justice Henriod in *In re* State in Interest of Black, 3 Utah 2d 315, 283 P.2d 887 (1955), which stresses the complexity of the moral issues and emphasizes that court findings must rely on the illegality not the immorality of acts.

312. Musser v. Utah, 333 U.S. 95 (1948).

Court held the phrase "contrary to public morals" unconstitutionally vague.

The last group of Mann Act cases involves the word "debauchery" as employed in the statute. Debauchery is generally defined in law as the subjection of a woman to repeated acts of unlawful sexual intercourse.[313] The condemnation of concubinage in *Caminetti* rested partially on this definition. But the principal cases on the subject develop a definition peculiar to the Mann Act indicating (as do so many of the decisions) that the "plain meaning" of the act is not so plain after all. The cases involve two teen-age girls transported to engage in a carnival strip show,[314] women sent to a night club of bad reputation,[315] girls employed as dancers but not prostitutes in a Mexicali house of prostitution,[316] and—shades of the melodrama—a seventeen-year-old girl who sought employment as a chorus girl and was sent to a theater where smoking, drinking and cursing occurred and her new employer urged her to be "his girl."[317] The no doubt mustachioed villains who led all these girls astray were convicted as debauchers because they introduced the girls into surroundings and circumstances "which eventually and naturally would lead to a course of immorality sexually."[318]

At first glance, the Mann Act cases seem directly to contradict the thesis that courts flee the role of moral censor, for here the Supreme Court seems to have gone out of its way to undertake a moral task which Congress never intended to impose. But in fact the courts have neatly avoided all questions of morality. "Other immoral purposes" was first narrowed by the *ejusdem generis* rule to include only sexual immorality and then "sexual immorality" was narrowed to one thing and one thing only, sexual intercourse without benefit of a valid marriage.[319] Thus the courts do not really grapple with the moral issues. This is why the decisions, while resting heavily on *United States v. Bitty* (which had used a community standards approach), almost never mentioned community standards. Such a test is, of course, unnecessary when the judges can rely on a black-and-white rule. Significantly enough,

313. Suslak v. United States, 213 Fed. 913 (9th Cir. 1914). Another common definition involves seduction from virtue. See King v. United States, 55 F.2d 1058 (10th Cir. 1932). Since the Mann Act has been repeatedly held not to be an anti-seduction statute, the definition is not useful.

314. United States v. Long, 16 F. Supp. 231 (E.D. Ill. 1936).

315. Pine v. United States, 135 F.2d 353 (5th Cir.), *cert. denied*, 320 U.S. 740 (1943).

316. Beyer v. United States, 251 Fed. 39 (9th Cir. 1918).

317. Athanasaw v. United States, 227 U.S. 326 (1913).

318. *Id.* at 332.

319. For a good example of this naive "marriage—moral, no marriage —immoral" approach, see Drossos v. United States, 16 F.2d 833 (8th Cir. 1927).

only the judicial dissenters[320] from the *Caminetti* rule have noted that morals are not as simple as that; the major criticism of *Cleveland v. United States* has centered on the failure of the Court to consider polygamy as any different than prostitution or concubinage.[321] But if the Court had abandoned its "legally married—yes, not legally married—no" view of sexual intercourse, it would have had to deal with real moral issues. In other words, those justices who are not willing to avoid a moral role by equating "other immoral purpose" with prostitution (and thus with a legally defined crime) escape by wrapping themselves in a rigorous and unrealistic rule which begs the moral question. Even the debauchery cases become clear in this light. Thus, judges confronted with situations which cannot be reached under their simplistic "sex without valid marriage" rule (because no sexual relations have occurred) seek some way of punishing the villain without giving up the comfort of their standard. They do so by switching from "immoral purpose" to "debauchery," and even then they are so cautious that they seek to deal with the situations involved, not as inherently immoral—that would require some real statement about morality —but as some kind of attempt, preparation, or conspiracy to unmarried sexual intercourse.

The result of this acceptance (or rather creation) of a moral duty under a statute—combined with the typical judicial attempt to avoid moral responsibility—is, as usual, one problem after another. Thanks to the Court, every interstate trip of a man and woman is subject to the moral supervision of the government. And, again thanks to the Court, every act of unmarried sexual intercourse in connection with such a trip subjects the male to the risk of a long prison term, even though his activities are closer to the social norm than to criminal deviation. As a result the Court has created a fertile field for blackmailers.[322] And more important not the Court or Congress, but the Justice Department, becomes the actual censor of public morals. For the Department, faced with the prospect of flooding the prisons with interstate fornicators, has been forced to use its discretion in seeking indictments, and that discretion is naturally based largely on the threshold of moral shock of the government's lawyers. If it is doubtful

320. Mr. Justice McKenna, in Caminetti v. United States, 242 U.S. 470 (1917); Mr. Justice Murphy, in Cleveland v. United States, 329 U.S. 14 (1946).

321. See, *e.g.*, Taylor, *supra* note 292.

322. The danger of blackmail has constantly been stressed by the opponents of the *Caminetti* rule. See the dissents in *Caminetti* and *Cleveland*, and the court of appeals opinion in Beach v. United States, 144 F.2d 533 (D.C. Cir. 1944), *rev'd*, 324 U.S. 193 (1945). No third person need be involved. The courts have held that the female sinner cannot be prosecuted as an accomplice, so she herself can undertake the extortion.

that the courts should act as moral censors, it is virtually certain that the prosecutors should not do so, particularly with the total lack of statutory guidance which characterizes the field. The end product of judicial assumption of moral duties under the Mann Act is moral and legal confusion, compounded by arbitrary and sporadic criminal punishment.

V. OBSCENITY

Another group of morals cases deals with obscene publications. While a handful of early common law cases have been reported,[323] it was not until the passage of Lord Campbell's Libel Act that the British courts became regularly concerned with the problem. Lord Chief Justice Cockburn's summation in 1868 in *Regina v. Hicklin*,[324] a case arising under that act, began the modern English and American discussion of the law of obscenity, which has largely been an effort to refine and apply Cockburn's formula: "whether the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[325] The *Hicklin* rule can in fact be separated into three relatively independent problems: "the tendency . . . to deprave and corrupt," "minds open to . . . immoral influence," and "into whose hands publications . . . may fall." We shall consider each of these in turn.

Following the British rule that it is the tendency to deprave and corrupt which is the hallmark of obscenity, American courts emphasized the thoughts resulting from the material. Obscenity has a "tendency to suggest impure and libidinous thought"[326] and "stirs the sexual impulses."[327] But what is a libidinous thought, and at what point does corruption begin? One of the most striking characteristics of the rulings following *Hicklin* is the lack of any explicit philosophical, psychological, or moral basis for answering these questions. Obviously, all sexual thoughts do not deprave or corrupt. That sexual thoughts in general are personally degrading or destructive to the fabric of society is hardly self-evident in this post-Freudian age. And it would be difficult to demonstrate that writings or pictures significantly increase or decrease the quantity of sexual thought in the community.

Of course behind the notion that lustful thought is an evil to be

323. See Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938).
324. [1868] 3 Q.B. 360.
325. *Id.* at 371.
326. United States v. Bennett, 24 Fed. Cas. 1093, 1104 (No. 14571) (C.C.S.D.N.Y. 1879).
327. United States v. One Book Entitled "Married Love," 48 F.2d 821, 824 (S.D.N.Y. 1931).

controlled by the legislature is the assumption that such thought will lead to improper action. Underlying this assumption must surely lie an irrational fear of sexuality as an evil in itself,[328] for obviously the action which is most likely to flow from sexual thought is the kind of marital relations which it seems psychologically and sociologically desirable to encourage. There is little evidence to support the view that sexual offenses or other delinquencies are caused by exposure to "obscene" materials, and indeed much of what little is known on the subject points to the contrary conclusion.[329]

The obvious difficulty of rationalizing the evil thought criterion and the general rigors of the *Hicklin* rule led Judge Learned Hand in an early case, *United States v. Kennerley*,[330] to suggest that society has the right to establish codes of right conduct in literature as well as in other aspects of community life. He suggests that the British rule might be replaced by a test which rested on "the present critical point in the compromise between candor and shame at which the community may have arrived here and now."[331] But this offensiveness or shock principle is really derived from the field of obscene speech and indecent exposure. As Chafee points out, shock rarely results from books.[332] People likely to be shocked

328. KRONHAUSEN, PORNOGRAPHY AND THE LAW 268–69 (1959).

329. The available evidence against the harmful consequences of "obscene" materials is summed up in KRONHAUSEN, *op. cit. supra* note 328, at 269–80. See also Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954). The opposing data is presented in Schmidt, *A Justification of Statutes Barring Pornography from the Mail*, 26 FORDHAM L. REV. 70 (1957), and in the Kefauver hearings. See *Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. (1955). The Schmidt article provides an excellent example of the anti-sexuality noted above, for its principal argument is that if good reading materials have good effects on character, bad materials must have a bad effect, and bad is equated with sex. It should also be noted that to reason that "obscene" literature has an adverse effect on character and thus causes criminal action is to remove the written material a very long and indefinite causal step from the commission of crime. The "evidence" in the Kefauver hearings was largely the "expert" opinions of policemen, clergymen and the like. See also DOSHAY, THE BOY SEX OFFENDER AND HIS LATER CAREER 34–38 (1943); Paul & Schwartz, *Obscenity In the Mails: A Comment on Some Aspects of Federal Censorship*, 106 U. PA. L. REV. 214, 229–30 (1957). There is even some reason to believe that sexual fantasies which may result from exposure to sexually stimulating materials may act as a purgative or safety valve for the emotions of the mentally disturbed which might otherwise be directed to deviant behavior. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 360 (1954); KRONHAUSEN, *op. cit. supra* note 328, at 71–72, 141.

330. 209 Fed. 119 (S.D.N.Y. 1913). See also Parmelee v. United States, 113 F.2d 29 (D.C. Cir. 1940); State v. Lerner, 81 N.E.2d 282 (Ohio C.P. 1948).

331. United States v. Kennerley, 209 Fed. 119, 121 (S.D.N.Y. 1913).

332. 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 56 (1947).

are not likely to read the kinds of books that might shock them, and if by accident they do stumble on an objectionable passage, they can stop reading. In spite of Judge Hand's efforts, the lustful thought criterion remained the rule in American courts up to the time of the recent Supreme Court decisions.[333]

The community standards approach introduced in *Kennerley* was, of course, not only an attempt to avoid the lustful thought test of the *Hicklin* rule, but was also a means of eliminating the most constricting feature of the rule—the "minds open" criterion which makes the young and the perverted the measure of the mind of society. Subsequently, Judge Woolsey repudiated the "minds open" rule in the *Ulysses* case,[334] which held that the tendency of material to inspire lustful thought is to be determined on the basis of the *homme moyen sensual* rather than the young or abnormal. The "average man" doctrine has been widely adopted.[335]

In dealing with the "into whose hands" portion of the *Hicklin* rule, several courts have taken their cue from *Hicklin* itself, which said "into whose hands a publication *of this sort* may fall. . . ."[336] These courts have considered the type of book, price, and manner of advertising and sale.[337] There has been a tendency to consider the effects of a publication on its probable audience rather than on the general public or the chance adolescent reader.[338] "Into whose hands the publication *may* fall" thus frequently has become "into whose hands the publication *is likely* to fall."[339]

But probably the greatest liberalization of the British practice

333. See, *e.g.*, Roth v. Goldman, 172 F.2d 788 (2d Cir. 1949); Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); United States v. Rebhuhn, 109 F.2d 512 (2d Cir. 1940); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); People v. Dial Press, 182 Misc. 416, 48 N.Y.S.2d 480 (Magis. Ct. 1944).

334. United States v. One Book Entitled "Ulysses," 5 F. Supp. 182 (S.D. N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

335. See Volanski v. United States, 246 F.2d 842 (6th Cir. 1957); One, Inc. v. Olsen, 241 F.2d 772 (9th Cir. 1957), *rev'd on other grounds*, 355 U.S. 371 (1958); Parmelee v. United States, 113 F.2d 729, 730 (D.C. Cir. 1940); Sunshine Book Company v. Summerfield, 128 F. Supp. 564, 567 (D.D.C. 1955); American Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954).

336. Regina v. Hicklin, [1868] 3 Q.B. 360, 371. (Emphasis added.)

337. Roth v. Goldman, 172 F.2d 788 (2d Cir. 1949); United States v. Rebhuhn, 109 F.2d 512 (2d Cir. 1940); People v. Fellerman, 243 App. Div. 64, 276 N.Y. Supp. 198 (1934); People v. Pesky, 230 App. Div. 200, 243 N.Y. Supp. 193 (1930); *In re* Worthington Co., 30 N.Y. Supp. 361 (Sup. Ct. 1894).

338. United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936).

339. *Id.* at 157. See United States v. 31 Photographs, 156 F. Supp. 350, 354 (S.D.N.Y. 1957); People v. Creative Age Press, Inc., 192 Misc. 188, 79 N.Y.S.2d 198 (Magis. Ct. 1948).

undertaken by American courts has not been directly concerned with Justice Cockburn's formula. Concurrent with the *Hicklin* rule, the practice of citing marked passages of a book in the crown complaint had grown up in England[340] and, although there was little uniformity in the United States, it was a common American practice to admit isolated passages as evidence.[341] But in 1930 a New York court specifically required that the book be considered as a whole,[342] and the *Ulysses* decisions of 1933 firmly established this rule.[343] The "whole book" rule requires that if sexual passages are not "dirt for dirt's sake," but are integrated into the work so that the "dominant note" is not the promotion of lust, the work cannot be found to be obscene. Thus the rule allows the courts to maintain the lustful thought definition of obscenity without condemning works of obvious integrity and literary merit.

But is the "whole book" rule really compatible with the lustful thought definition of obscenity? People do not read a whole book at one sitting. Nor do they enter a trance, forbearing all thoughts as they read. If some passages of the work are obscene, then by definition some readers have lustful thoughts when they read those particular passages. The lustful thoughts—the evil that the legislature presumably desires to prevent—have occurred. Whatever impression the reader may get from the book as a whole will come too late to prevent their occurrence.

The notions of "dirt for dirt's sake" and literary merit, which are associated with the "whole book" rule, suggest a close connection between the rule and the attempt to distinguish pornography from works which only incidentally arouse sexual feelings but have, nevertheless, generally been considered obscene. The "whole book" technique, of course, allows judge or jury to consider whether the sexual passages are integral parts of a serious work or are so prominent and extensive as to indicate the kind of direct exploitation of erotic stimuli which is generally associated with the word

340. ST. JOHN-STEVAS, OBSCENITY AND THE LAW 134 (1956).

341. United States v. Bennett, 24 Fed. Cas. 1093 (No. 14571) (S.D.N.Y. 1879), had been the principal federal decision sanctioning the use of isolated passages to prove obscenity. The subsequent decision of United States v. Dennett, 39 F.2d 564 (2d Cir. 1930), had weakened but not overthrown this precedent by holding that it was not the intent of Congress in banning obscene books from the mails to exclude decent sex instruction, although the books in question obviously contained passages which, taken out of context, might incite lustful thoughts.

342. Halsey v. New York Soc'y for Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 (1922).

343. United States v. One Book Entitled "Ulysses," 5 F. Supp. 182 (S.D. N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934). See Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); American Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).

pornography. *Commonwealth v. Gordon*,[344] for instance, stated that only hard-core pornography evidences a sufficiently clear and present danger of causing some criminal action to be subject to control.[345] This line of reasoning demonstrates the value of the pornography approach, which allows a change in emphasis from controlling sexual thought in general to defining and condemning such writings as constitute at least a plausible risk of undesirable action.

Thus when the Supreme Court first began to issue opinions in obscenity cases, the most restrictive features of the *Hicklin* rule had been eliminated, but the heart of the rule—the definition of obscenity in terms of lustful thought—remained. This definition was basically in conflict with the "whole book" rule, another relatively fixed doctrine. It also created serious difficulties for the logical defense of the "average man" standard, for if lewd thought was the danger to be controlled, why should the law concern itself exclusively with the average man? The focus on "lustful thought" also put obscenity law squarely at odds with the "clear and present danger" rule and with the traditional concern with incitement to action, not thought, in the speech cases.[346] The "community standards" test had been tentatively employed, but it also seemed to conflict with the "lustful thought" criterion, since it was based on shock to propriety rather than on lust. Finally, efforts had been made to differentiate pornography from obscenity, but a clear distinction had not yet emerged.

The first Supreme Court review of an obscenity law was *Butler v. Michigan*,[347] holding that censorship which reduced the reading matter available in the community to that suitable for a fourteen-year-old violates due process. While this opinion by Mr. Justice Frankfurter did seem to affirm the "average man" or "community standards" antidote to the "whose minds are open" portion

344. 66 Pa. D. & C. 101, *aff'd sub nom.*, Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1950).

345. *But see* Schindler v. United States, 221 F.2d 743 (9th Cir. 1955), *cert. denied*, 350 U.S. 938 (1956) (clear and present danger not applicable to interstate commerce regulation); Besig v. United States, 208 F.2d 142 (9th Cir. 1953) (artistic merit may increase the danger of obscenity by making it more attractive).

346. The Supreme Court had dealt abortively with this problem in Doubleday & Co., Inc. v. New York, 335 U.S. 848 (1948). The result was a four-four split, without opinion. Defendant's brief was based largely on an appeal to the applicability of the clear and present danger rule, and Mr. Justice Rutledge mentioned this point favorably in oral argument. 17 U.S.L. WEEK 3118 (U.S. Oct. 16, 1948). Justices Black and Douglas have since supported the contention in obscenity cases; thus it may be assumed that the split was over the application of the rule.

347. 352 U.S. 380 (1957).

of the *Hicklin* rule,[348] its sweeping condemnation of a statute on due process grounds gave few clues as to the Court's attitude toward the more complex issues outlined above.[349]

Roth v. United States (and *Alberts v. California*),[350] decided a few months after the *Butler* case, dealt directly with first and fourteenth amendment protection for allegedly obscene materials. The *Roth-Alberts* case held that ideas having even the slightest redeeming social importance are normally protected, but that obscenity is without such importance. Obscenity is, therefore, not within the area of constitutionally protected speech or press. Consequently, use of the "clear and present danger" standard was specifically rejected.[351] But *Roth-Alberts* made it clear that sex and obscenity are not synonymous. A standard must be provided which protects discussion of the former, since it is one of the vital problems of society. The standard is, "whether to the average person, applying community standards, the dominant theme of the material taken as a whole appeals to prurient interest . . . ."[352]

Unfortunately, the standard of obscenity which the Court formulated in *Roth-Alberts* does not present solutions. It simply gathers up all the previously existing confusions and contradictions, and lumps them into one statement. For instance, Mr. Justice Brennan borrowed "appeals to prurient interest" from the *Model Penal Code*[353] and proceeded to define it as "exciting lustful thoughts," the heart of the *Hicklin* rule. But the drafts of the *Code* had specifically disapproved the lustful thought approach.[354] It was obviously their intention to move toward a pornography test—that is,

348. In this respect it echoes a similar British attempt, Regina v. Martin Seeker Warburg, Ltd., [1954] 2 All E.R. 683 (Crim Ct.).

349. The potentialities of this approach are indicated by Paramount Film Distrib. Corp. v. Chicago, 172 F. Supp. 69 (N.D. Ill. 1959), ruling that a city ordinance which allowed exhibitions limited to persons over 21 was invalid as not a reasonable exercise of the police power because it could have prevented a 20-year old serviceman from seeing something unshowable to a girl of twelve.

350. 354 U.S. 476 (1957).

351. *Id.* at 486.

352. *Id.* at 489.

353. MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).

354.

> We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscenity as that which "tends to corrupt or debase." If this means anything different from the tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking. . . .

MODEL PENAL CODE § 207.10(2), comment at 10 (Tent. Draft No. 6, 1957).

to differentiate between works which might arouse sexual thoughts to some degree, as part of a serious literary or scientific purpose, and those designed specifically to create sexual fantasies. Of course such an attempt is at odds with the lustful thoughts standard, not only because both pornographic and nonpornographic works may create such thoughts, but because one standard designates the evil to be prevented as the creation of sexual thought while the other is aimed at preventing the exploitation and aggravation of existing sexual interests. The prurient interest test appears in the text of the *Roth-Alberts* opinion; the lustful thought standard in a footnote. But the Court specifically approved trial court instructions using the lustful thought test. Which tack the court will take in the future is more a matter of hope than real prediction.[355]

The *Roth-Alberts* standard also incorporates the "whole book" rule.[356] We have already described the difficulty of combining the "whole book" and "lustful thought" approaches. Furthermore, the use of "dominant theme" suggests a movement toward the pornography standard, as does the Court's approval of the "dirt for dirt's sake" formula, but it is only the concurring opinions that champion the "hard-core" pornography criterion.[357] Thus the ma-

355. See Schwartz, *Criminal Obscenity Law*, 20 PA. B. ASS'N Q. 8 (1958). In a separate opinion, Mr. Justice Harlan noted this conflict but attempted to save the "lustful thought" rationale, at least in so far as state obscenity laws are concerned. He contended that although the evidence remains mixed as to whether lustful thought causes criminal acts, the state legislatures are entitled to make the judgment that there is a causal relationship and to regulate thought which they consider incitement accordingly. Roth v. United States, 354 U.S. 476, 501–02 (1957).

Two points should be noted here. First, where freedom of speech is involved, a higher standard of constitutionality than reasonableness has generally been required. Obscenity legislation is not a "time, place, and manner" regulation but thrusts directly at the substance of the utterance. See Mackay, *The Hicklin Rule and Judicial Censorship*, 36 CAN. B. REV. 1, 15 (1958). Second, obscenity statutes are criminal laws, and the burden of proof as to causation normally lies with the prosecution in such instances. The basic question is, of course, whether it is the province of government to prevent a mature individual from seeking out erotic stimulation. Mr. Justice Harlan at least makes a stab at the problem, unlike the majority which passes it over without explanation. See Mackay, *supra*, at 16.

356. *I.e.*, "the dominant theme of the material taken as a whole . . . ." 354 U.S. at 489.

357. Mr. Justice Harlan's opinion attempts to develop the "hard-core pornography" approach which was beginning to emerge before *Roth-Alberts*. Since the majority has excluded obscenity from first amendment protection because it is "utterly without redeeming social importance," it is impossible to use the "lustful thought" test. Many works which might "tend to stir sexual impulses" are of marked social value. As to the "appeal to prurient interest" test, the federal government has no general police power and is therefore not concerned with the regulation of prurient interest. Since the federal interest in obscenity is only incidental to the mail and commerce powers, and is limited by the first amendment, it extends only to the regulation of hard-core pornography.

jority opinion in *Roth-Alberts* left the pornography-obscenity issue just about where it had previously been.[358]

But in many ways the most puzzling part of the Court's standard is its inclusion of the "average man" and "community standards" criteria. In the "good moral character" and "moral turpitude" cases, we have seen that "community standards" can refer either to the actions of the community or to its notions of right and wrong. There has been a tendency to define "community standards" in the obscenity field in terms of the community's sexual practices.[359] But this approach not only fails to take account of Judge Hand's caution that it is what the community says not what it does that counts, but ignores the basic motives of obscenity legislation. We do not need Kinsey to prove that every citizen of the community performs certain basic bodily functions, or that there is a general consensus that such functions are necessary and proper. Witness the television commercials. Yet, excessively clinical description of these functions will generally result in a charge of obscenity. In short, just as Judge Hand originally stated the point, it is the standard of candor or frankness which is really affirmed in obscenity law. This "community standard of candor" is subject, of course, to the above-mentioned criticisms of all community standards doctrines as to definiteness, uniformity, and ascertainability,[360] as well as being open to the objections against using shock or shame as a test which were noted in connection with Judge Hand's original formulation. In addition, such an approach is in direct conflict with the "lustful thought" criterion, since those who have lustful thoughts are not going to be repelled and those who are shocked are not going to have lustful thoughts. To be sure, we could use both criteria—as the *Model Code* seems to do—and condemn any work which causes thought

Mr. Chief Justice Warren concurred in an interesting opinion which argued that it was the nature of defendant's activities, not the nature of the utterance, that was determinative. Thus the real question was whether the defendant was engaged in the exploitation of the community's prurient interests. This seems to suggest a movement toward the pornography standard.

358. The argument that only pornography could be considered to represent a clear and present danger has of course been neutralized by the Court's denial of the applicability of that test.

359. See, *e.g.*, KRONHAUSEN, *op. cit. supra* note 328, at 156.

360. The argument of the dissenters in *Jordan v. De George* that they could not find a national community standard to apply is illustrated by a recently reported case involving an Iowa community. In that case, a federal district judge from Nebraska refused to pass on the community standards of Iowa, and indeed recommended that the various localities of Iowa should make their own determinations. N.Y. Times, Feb. 28, 1960, § E, p. 7. If a judge from Nebraska cannot pass on obscenity in Iowa, this would seem to limit the Supreme Court to passing on the community standards of the District of Columbia.

or shock.[361] But we can't discover whether a work creates lustful thought by applying community standards of shock, as the Supreme Court seems to do.

Finally, all the various community standards keep getting mixed up. Thus, Mr. Justice Brennan in *Roth-Alberts* approved a trial court instruction which contained, as a test of obscenity, the question: "Does it offend the common conscience of the community?"[362] Now this would seem to refer to a community standard conceived as professions as to what is right or wrong. But Mr. Justice Frankfurter, in a later case,[363] has concluded that the definition of obscenity is governed by "community feelings regarding what is to be deemed prurient or not prurient by reason of the effects attributable to this or that particular writing."[364] In his view, then, "community standards" consists in what the community believes the effects of a certain piece of writing will be. That cause-and-effect relationships are to be verified by majority vote is certainly a novel suggestion. In fact, the author of that suggestion has evidenced an unwillingness to pursue his own logic, for Mr. Justice Frankfurter has himself urged the admission of expert testimony on the "psychological or physiological consequences of questioned literature." Why, if the test is what the community at large believes the consequences will be?

If the courts mean that you can write about actions immoral by the community's standards of behavior (or by its formal standards of right and wrong) so long as you do not use language which offends the community's standards of candor—because works which reflect both kinds of writing offend the community's standards of sociological prediction—they had better say so. For the moment we are left simply with "community standards" and in any given case the courts will apparently pay their money and take their choice. Why they pay their money for this sideshow at all is nicely indicated by Mr. Justice Frankfurter's caution in *Smith v. California*[365] that community standards must be used to avoid decisions which rest on "a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges."[366] In short, the courts have been so anxious to avoid arbitrary personal judg-

361.
> A thing is obscene, if, considered as a whole, the predominant appeal is to prurient interest, for example, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such materials.

KRONHAUSEN, *op. cit. supra* note 328, at 147.

362. Quoted in Paul & Schwartz, *supra* note 329, at 233.

363. Smith v. California, 361 U.S. 147, 160 (1959) (concurring opinion).

364. *Id.* at 166.

365. 361 U.S. 147 (1959).

366. *Id.* at 165.

ments that they have turned almost instinctively to community standards, even before knowing what community standards they are talking about.

Mounce v. United States,[367] in which the Court (per curiam, upon confession of error by the Solicitor General) remanded the case to the district court in light of *Roth-Alberts*, offers a little more clarity. The district court had originally seized upon "community standards" in *Roth-Alberts* and, taking its choice from the wide range of standards available, had chosen "the sense of propriety, morality, and decency" of the average man.[368] The court of appeals had also adopted this test.[369] Upon review by the Supreme Court, the Solicitor General argued that this test violated the "lustful thought" criterion of *Roth-Alberts* because it did not require the positive creation of new thoughts but simply a negative offense to existing ones. The Supreme Court evidently agreed, but was not willing to say what "community standard" was to be used.[370]

If the Supreme Court approves the Solicitor General's reasoning that the "lustful thought" criterion requires a positive creation of new thought, not simply an effect on existing thought patterns, the conflict is not simply between lustful thought and community standards. What if someone subtitles *Goldilocks and the Three Bears, The Virgin in the Bears' Den*, and advertises it as a dark tale of bestiality? The appeal to prurient interest is there, but not the lustful thought.[371] Lower courts, seeking to apply the *Roth-Alberts* standard, have for the most part used both the "lustful thought" and "prurient interest" tests, without any indication that they are aware of a conflict between them.[372]

367. 355 U.S. 180 (1957).

368. United States v. 4200 Copies of the Int'l Journal, 134 F. Supp. 490, 493 (E.D. Wash. 1955). Another court has done the same. See People v. Richmond County News, Inc., 13 Misc. 2d 1068, 179 N.Y.S.2d 76 (Ct. Spec. Sess. 1958). Two other courts, however, had guessed that the decency standard was not the right community standard. See People v. Silerglitt, 15 Misc. 2d 847, 182 N.Y.S.2d 536 (Sup. Ct. 1958); Commonwealth v. Moniz, 338 Mass. 442, 155 N.E.2d 762 (1959).

369. Mounce v. United States, 247 F.2d 148, 149 (9th Cir. 1957).

370. Nor have all courts conveniently forgotten the objections to "community standards" on grounds of vagueness raised by the minority in *Jordan v. De George*. The Nebraska Supreme Court has recently ruled that the use of a "community standards" test rendered an obscenity ordinance unconstitutionally vague. The court used the analogy of the "current rate of wages in the community" formula held unconstitutional in Connally v. General Constr. Co., 269 U.S. 385 (1926).

371. For such a situation, see Cincinnati v. Walton, 167 Ohio St. 14, 145 N.E.2d 407 (1957).

372. See Eastman Kodak Co. v. Henricks, 262 F.2d 392 (9th Cir. 1958); State v. Sul, 146 Conn. 78, 147 A.2d 686 (1958); Cincinnati v. Walton, 167 Ohio St. 14, 145 N.E.2d 407 (1957); People v. Brooklyn News Co., 12 Misc. 2d 768, 174 N.Y.S.2d 813 (1958); Burke v. Kingsley Books, 8

The first case following *Roth-Alberts* in which the Supreme Court ventured a full opinion was *Kingsley International Picture Corporation v. Regents of the University of New York*.[373] But there the Court found that the film in question had been refused a license not because it was obscene but because "that picture advocates an idea—that adultery under certain circumstances may be proper behavior."[374] Therefore no extended discussion of the obscenity question was presented. The regulation was simply struck down as an unconstitutional interference with the communication of ideas.

Smith v. California,[375] the most recent Supreme Court decision, sheds little more light on the problem. The majority held a Los Angeles obscenity ordinance which lacked a scienter requirement void on its face. But Mr. Justice Frankfurter's concurrence is of particular interest. He was reluctant to strike down a statute for lack of scienter, without offering some guidance as to what *mens rea* standard the Court would find acceptable. Then, under the guise of discussing this requirement, he launched into the peculiar discussion of the community standards doctrine which we have discussed previously in relation to the *Roth-Alberts* decision. Aside from the inherent difficulties of his argument, it is obvious that the community standards test goes to the question of the obscenity of the work, not the guilty knowledge of the book seller. Certainly one need not prove that a work was not obscene by community standards to demonstrate that the seller did not know that it was obscene. But Mr. Justice Frankfurter was extremely anxious to make certain points, and he took his opportunities as they arose. Perhaps he had been frightened by Mr. Justice Harlan's confession in *Kingsley Pictures* that obscenity decisions are based on "individual subjective impressions." In any event, he argued that the ascertainment of obscenity is not "a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges,"

Misc. 2d 306, 167 N.Y.S.2d 615 (Sup. Ct. 1957); *In re* Tahiti Bar Inc., 186 Pa. Super. 214, 142 A.2d 491 (1958), *aff'd*, 395 Pa. 355, 150 A.2d 112 (1959). The most remarkable of these is the *Eastman Kodak* case. After a long discussion which seems quite deliberately to avoid or explain away the "lustful thought" test and emphasize appeal to pruriency (the *Roth-Alberts* standard is omitted in favor of the *Model Penal Code* approach, for instance), Judge Chambers concludes by remanding the case with a new instruction asking the jury whether the work tends "to corrupt . . . *by inciting lascivious thoughts or arousing lustful thoughts*." Eastman Kodak Co. v. Henricks, 262 F.2d 392, 397–98 (9th Cir. 1958).

373. 360 U.S. 684 (1959).

374. *Id.* at 688.

375. 361 U.S. 147 (1959). Times Films Corp. v. Chicago, 365 U.S. 43 (1961), dealt with an allegedly obscene film but was settled entirely on the question of previous restraint with no examination of the quality of the film itself. See also Marcus v. Search Warrants, 367 U.S. 717 (1961).

because courts must apply the community's standards, not their own. But Mr. Justice Frankfurter decided to go Judge Hand one better. He was not willing to admit that the judicial determination of what the community standards are is itself subjective and haphazard, although he had been among the dissenters in *Jordan v. De George*. Instead he found that the fatal defect in the court below was its refusal to admit expert testimony, for such testimony was necessary to establish the community standards. Here we come to the explanation of Mr. Justice Frankfurter's peculiar definition of community standards, not in terms of candor but "of the effects attributable to this or that particular writing." The California courts had refused to hear expert psychiatric witnesses on the grounds that expert testimony was not admissible as to the psychological effects of the work at issue on the "average man."[376] In other words, the testimony issue went to the "lustful thought" requirement, not to the "community standards" test. But Mr. Justice Frankfurter was determined to place the critical function of determining community standards on some other basis than the obviously arbitrary guesswork of judges. The psychiatrist seemed a handy and comforting figure, so he had somehow to be linked to this doctrine. Thus he was to tell the court not what effects the literary work actually had—that would not bail out the standards test—but what effect the community thought it would have. In fairness to Mr. Justice Frankfurter, the *Roth-Alberts* test of determining lustful thought by applying community standards is such a mixture of apples and oranges that he may be forgiven for juggling the fruit in any way he sees fit, but he is straining so hard in this opinion that he is bound to drop something.

Two recent lower court decisions help round out the picture. In *United States v. 31 Photographs*,[377] the Kinsey group of sex researchers were allowed to import admittedly pornographic items. Since the interests of the persons whom this material would reach were not prurient, the material was not obscene within the meaning of the statute, although it would have been if offered to the "average man." In other words, the "average man" test is not compatible with the prurient interest approach. By exposing this conflict the court set itself the difficult task of choosing in each case (on the basis of its peculiar facts) one standard or the other, or a combination of the two.

376. People v. Smith, 161 Cal. App. 2d 860, 327 P.2d 636 (App. Dep't 1958). The court used the "reasonable man" of tort law, by way of analogy. This use of expert witnesses both as to psychological impact and literary merit has been allowed by some courts but not by others. See Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326, 349–50 (1957).

377. 156 F. Supp. 350 (S.D.N.Y. 1957).

The other case, which need not detain us long because its final disposition is still in the hands of the gods of appeal, is *Grove Press, Inc. v. Christenberry.*[378] Judge Bryan, in attempting to determine the mailability of the unexpurgated edition of *Lady Chatterley's Lover,* offered both the *Roth-Alberts* and *Model Penal Code* tests, noting that the Supreme Court saw no practical difference between them. But Judge Bryan's approach is in fact a rejection of the *Roth-Alberts* test in favor of the approach of the *Model Penal Code,* for he would first determine whether the work appeals to prurient interest (not lustful thought) and then—but only as an addendum—whether it exceeds the community's limit of candor. Since he rejects the "shock" basis of the standards test and employs the "whole book" rule, he actually comes very close to rejecting both *Roth-Alberts* and the *Code* for a finding that only pornography is obscene.

These two lower court cases illustrate most of the problems in the obscenity field. Following *Roth-Alberts,* an apparently definitive statement, the lower courts are still grappling with all the same questions which troubled them before the *Roth-Alberts* decision. Is lustful thought the evil to be controlled, or is it prurient interest? What kind of community standard should be employed? What audience are the courts to consider? Should the standard shift from obscenity to pornography? Several forces have led the Supreme Court into these dilemmas. *Roth-Alberts* is, in some ways, reminiscent of the noncommercial Mann Act cases. There, the courts allowed themselves to get into the morals field because sexual immorality seemed to them so easy to define. In *Roth-Alberts,* the Court takes the same simplistic view toward obscenity[379] —and as a result plunges into an area replete with moral problems. And we may use the term "moral problems" advisedly, for—no matter what the after-the-fact rationale—behind most obscenity statutes is that equation of sin and sex which is one of the less desirable heritages of western civilization.[380] The moral pressure represented by the widespread use of obscenity statutes was directed at the Court at the same time that sentiment favoring the restriction of the scope of first amendment guarantees was reaching its highest point. The conjunction of these two pressures result-

378. 175 F. Supp. 488 (S.D.N.Y. 1959). This case has been affirmed, 276 F.2d 433 (2d Cir. 1960), in an opinion which compliments the lower court's reasoning, seems purposely to ignore the *Roth-Alberts* test in favor of that of the *Model Penal Code,* and also seems to favor a pornography standard. The court was obviously reluctant to follow the Supreme Court's lead, but provided neither an alternative nor clarification.

379. See Roth v. United States, 354 U.S. 476, 497 (1957) (Harlan, J., dissenting in *Roth,* concurring in *Alberts*).

380. See, *e.g.,* BROUN & LEECH, ANTHONY COMSTOCK, ROUNDSMAN OF THE LORD (1927).

ed in the Court's willingness to discard the "acts, not thoughts" *emphasis* which is at the foundation of the speech cases, and to take up the role of moral agent whose duty it is to help the good and punish the bad. Here, then, is a combination of the factors which we have seen in the other morals cases. On the one hand, the Court feels forced into its moral role by statutory provisions. On the other, it moves voluntarily—partly because it does not realize the difficulties involved, and partly out of reluctance to employ the techniques which would have allowed it to hold its ground. The result is an obviously confused body of doctrine and litigation, a heavy and judicially unwelcome emphasis on personal judgment, and the usual attempts by the courts to escape responsibility for that judgment—attempts which only result in further confusion and inconsistency.

CONCLUSION

Those who wish to place emphasis on the moral role of the courts do so for various and differing reasons. One suspects that at least one basic reason is the very moral uncertainty of the times. Faced with seemingly insoluble problems, it is quite tempting to find a good guy, one who is "responsible," and just tell him to go out and get the bad guys. We have seen in the obscenity cases the result of asking the courts to act "morally" because society is too confused to express its moral judgments in legal terms. And the liquor cases show that even when moral judgments are expressed in statutes, the courts founder when society is not really united on the moral issue. Indeed, the fantastically complicated case law on sexual relations and marriage indicates that the courts cannot even find a consistent view in the basic areas of human relations where one might expect a relatively high level of agreement. The courts will not, and cannot, manufacture a moral consensus which society has failed to find for itself.

The areas of law which we have considered indicate that where the courts are assigned or take upon themselves the task of moral judgment, largely unconfined by positive law, the result is extreme confusion. The judges are not able to identify wrong, as required by Cahn, nor an ideal relation among men, as required by Berns. Indeed they cannot even identify the men of good moral character who could be trusted with freedom and the election of other good men to censorial office. Nor can they successfully differentiate good words or thoughts from bad, or good acts from bad, or bad from worse. Nor can they apply "moral" distinctions hallowed by long usage, or even discover what moral rules are supported by present community acceptance. Of course some of these

difficulties arise precisely because the courts seek to avoid unbridled moral decisions. But the crucial point is that the potential for arbitrary personal decision inherent in judicial determination of moral questions and the confusion which accompanies such determinations, illustrated by the wanderings and contradictions of the case examined here, drove the judges to contrive escape mechanisms like the "community standards" test even while they recognized that those devices themselves created further confusion. In any event, using their own morals, or the community's, or any combination or variation of the two you like, the courts have proved entirely incompetent to make sound and consistent moral judgments in these especially "moral" areas of law.

Perhaps the principal difficulty with discussions of law and morals is that they generally proceed by way of generality or through the citation of one or two illustrative cases. A more detailed study of the most "moral" areas of American law, I think, sheds more light on the subject. To those who believe that the law works itself clear through case-by-case determination, I submit that what the law is trying to work itself clear of is unconfined moral judgments. To those who posit objective, readily ascertainable rules of right and wrong, the case law replies that the courts have been unable to find such rules and feel themselves incompetent to do so. To those who wish the courts to act as moral leaders, the judges reply that they themselves are seeking that leadership elsewhere.

Earlier it was said that the dispute between the positivists and those who refuse to separate morals from law resolves itself into a question of emphasis. It is not being argued here that moral considerations can be completely eliminated from judicial decisions, or that absolutely comprehensive systems of statutory or common-law rules can be established in every area of legal concern. There is not an absolutely precise and certain thing called "law" which must be rigorously separated from a totally vague and ephemeral thing called "morals." But, on the other hand, we cannot solve all our problems by simply giving the judge a roving commission to satisfy his moral sensitivity. The case law which we have surveyed indicates that the courts are not able to function satisfactorily when great emphasis is placed on morality. If "ought" is to be mixed with the "is" in law, it must be added in very small batches or the result will be judicial chaos. Perhaps it is not so much a problem of how hard judges should work for the good in law, as what good they should work for. Experience indicates that judges do better working for that good in law called stability or predictability (or, put negatively, absence of arbitrariness) than for the good in law expressed as general morality or social virtue. In short, the

courts can do better in applying and clarifying the mandates of the Constitution which provide at least some continuity for the judicial process than in setting off on the uncharted paths of a moral crusade. Therefore, the reply to those who wish to substitute a moral censorship formula for the more traditional approaches to constitutional problems is that such a formula not only involves grave dangers, but simply will not work.