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Aliens: Naturalization -- Good Moral Character as a Prerequisite

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NOTES

Aliens

NATURALIZATION — GOOD MORAL CHARACTER AS A PREREQUISITE

Introduction

Two recently decided cases are illustrative of the problems which arise when, in a naturalization proceeding, there is a question of whether or not the petitioner has established his good moral character as required by the Immigration and Nationality Act.[1] In *In re Kielblock's Petition*[2] petitioner, an unmarried female alien, admitted that over a period of several years she had engaged in a course of sexual relationship with a man although she was not married to him. The court declared: "The satisfaction of the sexual appetite is a peculiarly private matter, ordinarily concerning only the participants in the sexual act."[3] Unable to find aggravating circumstances such as adultery or cohabitation under the applicable California statutes, prostitution, the begetting of illegitimate children, or an open flaunting of the relationship, and finding that petitioner bore a good reputation in the community, the court cited with approval Judge Learned Hand's decision in *Schmidt v. United States*,[4] and held that, despite these acts of fornication, petitioner had established the required good moral character entitling her to citizenship. In our second case, *Petition for Naturalization of W——*,[5] the evidence against the petitioner, an alien widow, was, among other things, that she shared an apartment with an elderly married man and was known in the community as his wife. Although both the petitioner and the man denied having had marital relations of any kind, the court summarily denied her petition, holding that she had failed to establish the required good moral character.

It is the purpose of this Note to examine the present statutory provisions and the leading judicial decisions in order to develop a critical analysis of the present state of the law in regard to what constitutes the requisite good moral character for naturalization. Special emphasis will be placed upon cases involving questions of morality with respect to sexual activity.

I. STATUTORY BASIS

The Constitution of the United States grants to Congress the power to establish a uniform rule of naturalization.[6] In the exercise of this power, Congress has conferred exclusive jurisdiction upon the district courts of the United States and courts of record in the states and territories.[7]

The requirement that a petitioner for naturalization must establish his good moral character has been in force since the earliest law on the subject,[8] and is repeated in the Immigration and Nationality Act of 1952 (McCarran-Walter Act).[9] Most of the reported litigation on the subject of naturalization has arisen from this requirement.[10] Prior to 1952 no attempt had been made to define good moral character by statute.

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1 § 316(a), 66 Stat. 242 (1952), 8 U.S.C. § 1427(a) (1952).
2 163 F. Supp. 687 (S.D. Cal. 1958).
3 *Id.* at 688.
4 177 F.2d 450 (2d Cir. 1949).
5 164 F. Supp. 659 (E.D. Pa. 1958).
6 U.S. CONST. art. I, § 8, cl. 4.
7 Immigration and Nationality Act, § 310(a), 66 Stat. 329, 8 U.S.C. § 1421(a) (1952).
8 Act of March 26, 1790, ch. III. § 1, 1 Stat. 103.
9 § 316(a), 66 Stat. 242, 8 U.S.C. § 1427(a) (1952). "No person . . . shall be naturalized unless such petitioner . . . during all the period [of required residence] . . . has been and still is a person of good moral character. . . ."
10 *Developments in the Law of Immigration and Nationality*, 66 HARV. L. REV. 643, 710 (1953).

However, the 1952 Act expressly excludes, as not of good moral character,[11] those who during the five years prior to the filing of their petition (1) were habitual drunkards, (2) committed adultery, (3) practiced or advocated polygamy, (4) engaged in, or procured or solicited for, prostitution or other unlawful commercialized vice, (5) knowingly and for gain aided or abetted another alien to enter or try to enter the United States illegally, (6) admit having committed or were convicted of a crime involving moral turpitude, (7) were convicted of two or more offenses for which the aggregate sentences of imprisonment actually imposed were five years or more, (8) were convicted of dealing in narcotics, (9) derived their income principally from illegal gambling activities, (10) were convicted of two or more gambling offenses committed during such period, (11) gave false testimony to obtain any benefits under the act, (12) were confined to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense or offenses (purely political offenses are excepted) for which they were confined were committed within or without such period, (13) were convicted of murder at any time during their lifetime.

> The reason for setting such definite statutory standards was that Congress desired that in the matter of determining good moral character . . . more uniform regulations should be employed by the Service and adopted by the courts, to the end that a higher general standard of good morals and personal and political conduct are established.[12]

This provision has been criticised as being too harsh and inflexible,[13] but, nevertheless, it remains the law. And, although the law substitutes statutory mandates for judicial discretion in many areas, courts still retain broad discretionary powers since the act further provides: "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."[14] It is in regard to this latter provision that the tests and standards devised by the courts in the past continue to play an important role.

As to the period for which the petitioner's conduct might be examined in order to determine his good moral character the present act declares:

> In determining whether the petitioner has sustained the burden of establishing good moral character . . . the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period.[15]

Prior to this enactment the courts had been widely split on the time period to be considered. Some held that petitioner's conduct prior to the five-year residency period was relevant to the issue of his good moral character during the residency period.[16] A harsher view was that, although petitioner might have been of good moral character during the required residency period, the court could deny naturalization *solely* on the basis of misconduct prior to that period.[17] However, this view was subsequently repudiated by the Fourth Circuit[18] in favor of the doctrine that such prior misconduct was relevant to, but not decisive of, the issue of good moral character during the five years residency period. A third, and more liberal doctrine, limited the court to a consideration of the petitioner's conduct during the statutory residency period.[19] This liberal view has now been rejected by the statutory provision cited above, which seemingly adopts the position that misconduct prior to the five-year period is not a bar if the petitioner has in fact reformed, but evidence of such misconduct should be considered along with other evidence in determining whether petitioner has shown his good moral character during the statutory period.[20]

11 § 101(f), 66 Stat. 172, 8 U.S.C. § 1101(f) (1952).
12 S. REP. No. 1515, 81st Cong., 2d Sess. 770-71 (1950).
13 1953 REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 246.
14 Immigration and Nationality Act, § 101(f), 66 Stat. 172, 8 U.S.C. § 1101(f) (1952).
15 § 316(e), 66 Stat. 243 (1952), 8 U.S.C. § 1427(e) (1952).
16 Ralich v. United States, 185 F.2d 784 (8th Cir. 1950).
17 *In re* Lipsitz, 79 F. Supp. 954 (D. Md. 1948).
18 Marcantonio v. United States, 185 F.2d 934 (4th Cir. 1950).
19 Petition of Zele, 140 F.2d 773 (2d Cir. 1944).
20 See Petition of B., 154 F. Supp. 633, 634 (D. Md. 1957).

Finally, in order to gather evidence relating to the petitioner's qualifications for naturalization, the act provides for a personal investigation of his background unless waived by the Attorney General.[21] This investigation is to be conducted in the vicinity or vicinities in which the petitioner has maintained his actual abode and in the vicinity or vicinities in which he has been employed, or has engaged in business or work for at least five years prior to the filing of the petition.

II. JUDICIAL DECISION

A. *Preliminary Concepts*

The Supreme Court has held that naturalization is not the natural right of an alien but a "high privilege" to be given, withheld, or qualified as Congress may determine.[22] Since this is true, the only right to naturalization which an alien possesses is a statutory right which he may claim only upon the terms which Congress may impose.[23]

Congress is limited in the exercise of its power to set standards for naturalization by the constitutional requirement that the law be uniform.[24] However, this requirement of uniformity relates to geography alone, and thus it is not violated if the act does not apply uniformly to all races.[25] Furthermore, the provision that, if the petitioner has been convicted of two or more gambling offenses within the five years immediately preceeding the filing of the petition, he is therefore ineligible for citizenship for want of good moral character[26] is not unconstitutional even though aliens residing in an area where gambling is permitted might be entitled to naturalization while the same acts committed in an area where gambling is illegal would bar naturalization.[27] The reason why this is so is that, while the law must be general and uniform in its provisions in a geographic sense, its working and operation may be very different in different localities owing to diverse conditions and circumstances.[28]

Because citizenship is considered to be such a distinctly valuable privilege, and because of its attendant responsibilities, Congress has seen fit to place upon the petitioner the burden of proving compliance with all the statutory conditions.[29] Furthermore, if any doubts should arise as to whether or not the petitioner is qualified for citizenship, they should generally be resolved in favor of the government and against the petitioner.[30]

Applying these judicial pronouncements to the provisions of the present statute governing naturalization — a statute which has been referred to as requiring applicants

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21 § 335(a), 66 Stat. 255, 8 U.S.C. § 1446(a) (1952). A regulation of the Immigration and Nationality Service permits district directors to waive personal investigations. 8 C.F.R. 335(c) (1958). 320 U.S. 118, 122 (1943).

22 United States v. Manzi, 276 U.S. 463, 467 (1928). *Accord,* Schneiderman v. United States, 320 U.S. 118, 122 (1943).

23 United States v. Macintosh, 283 U.S. 605, 615 (1931), *overruled on other grounds,* Girouard v. United States, 328 U.S. 61 (1946); United States v. Schwimmer, 279 U.S. 644, 649 (1929), *overruled on other grounds,* Girouard v. United States, *supra;* Tutun v. United States, 270 U.S. 568, 578 (1926); Jubran v. United States, 255 F.2d 81, 84 (5th Cir. 1958); United States v. Menasche, 210 F.2d 809, 811 (1st Cir. 1954), *aff'd,* 348 U.S. 528 (1955).

24 U.S. CONST. art. I, § 8, cl. 4.

25 Kharaiti Ram Samras v. United States, 125 F.2d 879 (9th Cir. 1942). See Lee You Fee v. Dulles, 236 F.2d 885, 887 (7th Cir. 1956), *rev'd per curiam on other grounds,* 355 U.S. 61 (1957).

26 Immigration and Nationality Act, § 101(f)(5), 66 Stat. 172, 8 U.S.C. § 1101(f)(5) (1952).

27 *In re* Lee Wee's Petition, 143 F. Supp. 736 (S.D. Cal. 1956).

28 *Id.* at 738.

29 United States v. Schwimmer, 279 U.S. 644, 649 (1929), *overruled on other grounds,* Girourard v. United States, 328 U.S. 61 (1946); Tutun v. United States, 270 U.S. 568, 578 (1926). See Sodo v. United States, 406 Ill. 484, 94 N.E.2d 325, 327 (1950) specifically holding to the same effect in regard to the requirement of good moral character.

30 United States v. Macintosh, 283 U.S. 605, 626 (1931), *overruled on other grounds,* Girourard v. United States, 328 U.S. 61 (1946). "The Naturalization Act is to be construed with definite purpose to favor and support the Government,' and the United States is entitled to the benefit of any doubt which remains in the mind of the court as to any essential matter of fact." United States v. Schwimmer, *supra* note 29; United States v. Manzi, 276 U.S. 463, 467 (1928).

for citizenship to meet a greater number of conditions and to measure up to stricter standards of personal worthiness than have faced such applicants at any time in the country's history[31] — it becomes apparent that the privilege of citizenship is not a battle easily won by the alien seeking it.

B. *The Standards*

In applying the requirement of good moral character the courts are in general agreement that it, like the other requirements set for naturalization, is designed to insure that those who are granted citizenship will be worthy of this great privilege and capable of shouldering its concomitant responsibilities.[32] The courts also generally have conceded that there is a distinction between character and reputation, and that the naturalization law imposes upon them the duty of determining the petitioner's character.[33] However, it must be recognized that character, being a subjective reality, quite often is difficult to determine. For this reason the courts have been forced to rely upon the petitioner's behavior which they quite logically treat as the external manifestation of his character and the measure of his potential worth as a citizen.

In order to determine moral "goodness" the court must examine the petitioner's conduct by weighing it against *some* moral principles, and then reach a prudential judgment as to the merits of the petitioner's request. The great difficulty inherent in such an operation is the necessity for a judicial decision as to precisely what moral principles are to be the standards on which the court's judgment must rest. And this difficulty has been magnified by the absence of Supreme Court rulings on the point.

Various attempts have been made to prescribe a standard of morality that would be fair to the petitioner while still recognizing the nation's concern as to the type of person admitted to citizenship. An early approach to the problem was to examine whether or not the petitioner's conduct violated a criminal statute.[34] Although the suggestion was made that the mere violation of a statute, regardless of its character, evidenced a lack of good moral character,[35] exceptions generally were recognized when this test was applied to various factual situations. Thus, some courts recognized that a man could be of good moral character, even though he had violated a criminal statute, if the act forbidden were *malum prohibitum* as distinguished from an act *malum in se*.[36] However, other courts refused to recognize such a distinction, at least as to habitual violaters.[37] Refinements of this exception, similarly based upon the nature of the offense involved, included one which made the ultimate determination depend upon whether the

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31 LOWENSTEIN, THE ALIEN AND THE IMMIGRATION LAW 286 (1958).

32 See *In re* Nybo, 42 F.2d 727, 728 (6th Cir. 1930).

33 United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031, 1033 (1909), discussed in Ohlson, *Moral Character and the Naturalization Act*, 13 B.U.L. REV. 636 (1933): "Character is subjective; reputation is objective. Character is fact; while reputation smacks of conjecture and speculation. Character includes both natural and acquired traits; while reputation consist of opinions which others hold of an individual. . . ." Despite this, it seems a petitioner's reputation may be considered in the determination of his moral character. *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).

34 *In re* Spenser, 22 Fed. Cas. 921 (No. 13,234) (C.C. Ore. 1878).

35 *Ibid.* "Upon general principles it would seem that whatever is forbidden by the law of the land ought to be considered, for the time being, immoral, within the purview of this statute."

36 *In re* Paoli, 49 F. Supp. 128, 131 (N.D. Cal. 1943). Petitioner had violated the state alcoholic beverage control act but the court found: "the violation was not a vicious one or one which necessarily involved moral turpitude; it was purely a statutory crime" and, therefore, did not preclude a finding of good moral character. *In re* Hopp, 179 Fed. 561 (E.D. Wis. 1910) (violation of a Sunday closing law by the owner of a saloon but the law was habitually violated and no attempt was made to enforce it in the community).

37 United States v. Gerstein, 284 Ill. 174, 119 N.E. 922 (1918). Petitioner was denied naturalization on the ground of immoral character because he had habitually violated the Sunday law. It made no difference that the law was not enforced in the community and that the violation was necessary for the petitioner to retain his trade.

petitioner had violated one of the "important laws" of the nation,[38] and another which recognized a distinction "between acts involving moral turpitude and economic policy, and between acts recognized as criminal at all times and in all countries and those which are simply violations of sumptuary, financial, or war regulations."[39] Another exception to the general principle that a violation of a criminal statute evidenced immoral character was recognized by some courts in the case of unintentional or "good faith" violations. Early cases had refused to recognize such an exception. Thus, a petitioner who had remarried in good faith reliance upon an invalid rabinnical divorce was found to be not of good moral character because of the bigamous nature of the resulting relationship.[40] Later courts, however, held that a petitioner who had so acted in similar circumstances could be found to be of good moral character.[41]

These exceptions, based upon the nature of the crime or upon such factors as good faith, illustrate the development of a more liberal approach by the courts, and a tendency to discard the old, rather mechanistic, attitude that, given the commission of a crime, the court should find that the petitioner was not of good moral character without regard to the particular circumstances of the case or to the petitioner's state of mind.

As these exceptions developed and the courts became less mechanical in their application of general principles to particular cases, the basic approach of the courts to the problem of what constituted good moral character became more apparent. The courts, in theory at least, refuse to consult and rely on their own conceptions of right and wrong when faced with the problem of determining the morality of a particular petitioner's conduct. Instead, the judiciary has developed two methods of morality judgments, both of which are designed to exclude any personal evaluation by the judge. Some courts have held that they are bound to look to the prevailing attitudes of the nation as a whole, *i.e.*, the rather nebulous "common conscience."[42] Others have steadfastly adhered to the doctrine that they must look to the standards and mores of the average citizen of the community in which the petitioner resides.[43] The "common conscience of the nation" test has been defended by some authors as being more consistent with the fact that national citizenship is being conferred, and less likely to result in the anomalous situation whereby an alien's choice of the community in which he will reside, rather than his choice as to a particular line of conduct, might ultimately determine the fate of his petition for citizenship.[44] The opposing "community standards and

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38 United States v. Turlej, 18 F.2d 435, 438 (D. Wyo. 1927). A violation of the National Prohibition Act was held to preclude a finding of good moral character, but the court additionally concluded that the violation showed a lack of attachment to the Constitution and laws of the nation. Although the court refers to "important laws," the decision gives no adequate explanation as to what laws are important for purposes of naturalization. Thus future courts would have no precedent to guide them.

39 *In re* Bookschnis, 61 F. Supp. 751, 753 (D. Ore. 1945).

40 Petition of Horowitz, 48 F.2d 652 (E.D.N.Y. 1931); *In re* Spiegel, 24 F.2d 605 (S.D.N.Y. 1928).

41 Petition of Smith, 71 F. Supp. 968 (D.N.J. 1947). The petitioner having entered into a ceremonial marriage in good faith reliance upon an invalid Mexican divorce, the court held that an intent to violate the law or a moral precept would have to be found. Petition of R., 56 F. Supp. 969 (D. Mass. 1944); Petition of Schlau, 41 F. Supp. 161 (S.D.N.Y. 1941); Petition of Haverly, 180 Misc. 16, 42 N.Y.S.2d 217, 218 (Sup. Ct. 1943) (dictum). See Petition of Zele, 140 F.2d 773 (2d Cir. 1944) (exception extended to a misrepresentation made in a declaration of intent in reliance upon advice given by an employee of the naturalization service).

42 Johnson v. United States, 186 F.2d 588 (2d Cir. 1951); Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949); Repouille v. United States, 165 F.2d 152, 153 (2d Cir. 1947); United States v. Francisco, 164 F.2d 163 (2d Cir. 1947); United States *ex rel.* Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929); *In re* Spenser, 22 Fed. Cas. 921 (No. 13,234) (C.C. Ore. 1878).

43 Petition of B., 154 F. Supp. 633, 634 (D. Md. 1957); *In re* Liknes' Petition, 151 F. Supp. 862, 863 (S.D.N.Y. 1957); Petitions of F— G— and E— E— G—, 137 F. Supp. 782, 785 (S.D.N.Y. 1956); Petition of Gani, 86 F. Supp. 683, 687 (W.D. La. 1949); *In re* Mogus, 73 F. Supp. 150 (W.D. Pa. 1947); *In re* Paoli, 49 F. Supp. 128, 130 (N.D. Cal. 1943); *In re* Hopp, 179 Fed. 561, 563 (E.D. Wis. 1910).

44 *Developments in the Law of Immigration and Nationality*, 66 HARV. L. REV. 643, 710 (1953); Ohlson, *Moral Character and the Naturalization Act*, 13 B.U.L. REV. 636, 637 (1933).

mores" test has been defended upon the ground that an alien should not be required to live a more exemplary life than his neighbors in the community.[45]

Two recent cases have made use of a third test which appears to be somewhat of a consolidation of these two tests: Do the mores and standards of the average citizen of the community in which the petitioner resides coincide with such conduct? If not, does the common conscience of the nation brand it as illegal? In *In re Mayall's Petition*[46] the court, after having found that Congress had neither expressly nor by implication branded the petitioner's conduct as immoral, looked to the mores of the community and found that the statutory and decisional law indicated that the community regarded the conduct as immoral. The court then proceeded to consider the "common conscience" of the country as a whole, as embodied in the statutory and decisional law of the various states, which revealed that the nation as a whole did not consider the conduct to be immoral. The court concluded that the petitioner was of good moral character within the meaning of the act. A subsequent case arising in the same district was decided upon the same general basis.[47]

This general approach to the problem, emphasizing as it does societal attitudes, and rejecting the personal notions of the judge, has led to an enormous practical difficulty —how is the judge to determine what society thinks on moral issues? Judge Learned Hand, a leading exponent of this approach,[48] recognized the extent of the problem and declared:

> Our duty . . . 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. * * * * 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. So it seems to us that we are confined to the best *guess* we can make of how such a poll would result.[49] (Emphasis added.)

As to the wisdom of using the results of a public opinion poll, Judge Hand remarked: ". . . 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 voters of accredited churchgoers."[50] Edmond Cahn concurred in Judge Hand's rejection of such polls in the following words:

> . . . no one would expect Judge Hand to believe that Jones, Smith, Robinson, and Brown possess ready and considered opinions on moral problems of the twilight zone, such as arise in naturalization proceedings. No one would expect him to entertain much respect for the offhand, unreflective answers his neighbors would probably offer. Feeling no personal responsibility in the matter, many of them would blurt their opinions without waiting long enough to make sure they had comprehended the question. Even an exceptionally serious and intelligent person is liable to give a thoughtless reply if the setting in which he is questioned conveys no sense of personal responsibility. At the end, statistics resulting from a poll may depend on whether the poll-taker has to be dismissed summarily because he happens to arrive when the family's dinner is ready for the table.[51]

And, when the suggestion was made that sociological studies (such as the Kinsey reports) be considered, Hand, realizing that is was societal attitudes and not conduct which was relevant, cogently noted that common practice often diverges from precept.[52] This same attitude was expressed in a more recent case which declared:

45 *In re* Hopp, 179 Fed. 561, 563 (E.D. Wis. 1910).

46 154 F. Supp. 556, 560 (E.D. Pa. 1957).

47 *In re* Naturalization of Spak, 164 F. Supp. 257, 260 (E.D. Pa. 1958).

48 See cases decided by the Second Circuit, note 42 *supra.*

49 Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951). See also Repouille v. United States, 165 F.2d 152 (2d Cir. 1947) where the court was faced with the problem of whether an alien who had committed euthanasia was of good moral character. Judge Frank in a vigorous dissent suggested that ethical leaders be consulted, or that the parties be allowed to present evidence on the point of what society thought of such conduct, and which evidence should be placed in the record which the judge might supplement in any appropriate manner.

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

51 CAHN, THE MORAL DECISION 307-08 (1955). See Note, 48 COLUM. L. REV. 622, 628-29 (1948); Note, 66 HARV. L. REV. 498, 510-12 (1953).

52 Schmidt v. United States, 177 F.2d 450, 452 (2d Cir. 1949).

> 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.[53]

However, it is not only on practical grounds that the prevailing judicial approach, which makes societal attitudes the test of morality, has been found wanting. The very principles upon which it is based have been roundly criticized as fallacious.[54] Cahn remarks: "Speaking through the naturalization statute, the community says to the judge, 'Ascertain whether this man has had good moral character for the past five years.' Judge Hand's approach attempts to return the task to the community, and the attempt proves vain."[55] Cahn suggests that the judge should indeed base his decision in such a case on his own notions of right and wrong.[56] This would not endow the judge with an arbitrary power since he would still be required to act in a responsible manner, and only after referring to external sources, conducting a painstaking investigation of all the circumstances, and carefully subjecting his own customary biases to a searching criticism.[57] There is obvious merit in these suggestions but, unfortunately, no court has expressly endorsed such an approach at the present time.

C. *Application of the Requirement to Particular Cases of Sexual Misconduct*[58]

As might be expected, some cases presented to the courts have been able to be decided without too much difficulty in view of the obvious immorality of the petitioner's conduct. Thus, in cases involving the keeping of a house of assignation,[59] incest by a father with his teen-age daughters,[60] and exhibitionism,[61] the courts have quite readily found that the petitioners had not sustained the burden of proving their good moral character.

Other cases of sexual misconduct have given rise to greater difficulty. Early cases dealing with bigamy or adultery committed unintentionally and/or in good faith reliance upon an invalid divorce decree refused to find that the petitioner was of good moral character.[62] Later cases, however, adopted the more lenient view that such a person might be found to be morally acceptable.[63] And still later there was recognition accorded to the fact that certain extenuating circumstances might make a relevant difference. Thus, in *Petitions of Rudder*,[64] where the paramour of one petitioner had failed to secure the requisite consent of the court to remarry after an earlier divorce, and where the paramours of two other petitioners were separated from their husbands and were married to the petitioners as soon as they were freed by the death or divorce of their former husbands, the court found that the petitioners had sustained the burden of proving their good moral character. The fourth petitioner in *Rudder* did not begin the illicit cohabitation until about seven years after he was separated from his wife

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53 Petitions of F— G— and E— E— G—, 137 F. Supp. 782, 785 (S.D.N.Y. 1956).

54 See generally CAHN, THE MORAL DECISION 300-12 (1955); Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838 (1951); 33 MARQ. L. REV. 202 (1949-50).

55 CAHN, THE MORAL DECISION 309-10 (1955).

56 *Id.* at 300-12. See GRAY, THE NATURE AND SOURCES OF THE LAW 287-88 (2d ed. 1921). *But see* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 108 (1921): "My own notion is that he would be under a duty to conform to the accepted standards of the community, the mores of the times."

57 See generally CAHN, *op. cit. supra* note 55, at 300-12.

58 For an application of the requirement to other types of misconduct see Annot., 22 A.L.R.2d 244 (1952).

59 Ralich v. United States, 185 F.2d 784 (8th Cir. 1950); *In re* Kornstein, 268 Fed. 172 (E.D. Mo. 1920).

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

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

62 See cases cited in note 40 *supra*.

63 See cases cited in note 41 *supra*.

64 159 F.2d 695 (2d Cir. 1947). See *In re* Mayall's Petition, 154 F. Supp. 556 (E.D. Pa. 1957) (petitioner, in violation of state law, married a man named as correspondent in a divorce suit brought against her by her former husband ten years previously, and she continued to live with him in a familial relationship).

who refused to give him a divorce. The court found that he also had sustained the required burden. In this case the court emphasized the "permanence, stability, and apparent respectability of the relationships involved. . . ."[65] However, where the petitioner had committed even a single act of adultery and failed to show the presence of extenuating circumstances,[66] or where he deserted his wife and child, whom he then failed to support, and entered into the meretricious relationship, the court branded the conduct as immoral.[67] The same regard for such factors as good faith and extenuating circumstances is evident in cases of incestuous marriages[68] and in cases where marriages are invalid because of a state law forbidding miscegenation.[69]

The provision of the 1952 Act declaring that one who has committed adultery during the statutory period cannot, as a matter of law, be found to be of good moral character[70] has given rise to questions as to its application in cases of unintentional adultery, or adultery under extenuating circumstances. The district courts which have ruled on the point have reached contradictory results. Several cases have held that Congress did not intend to change the naturalization case-law definition of adultery and have found the petitioner to be of good moral character under these circumstances.[71] Other cases have insisted upon the application of a stricter interpretation of the statutory provision.[72] The courts of appeals have not yet ruled on the point.

Finally, there have been the fornication cases. Where the petitioner's conduct was also found to be in violation of the Mann Act, although it was a non-commercial violation, the petitioner was found not to be of good moral character.[73] However, where the petitioner admitted to having engaged in occasional sexual intercourse with unmarried women (the last occasion having been about six months prior), the court refused to hold that such casual, non-adulterous lapses precluded a finding of good moral character.[74] *In re Kielblock's Petition*[75] seems to extend that doctrine by finding

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65 Petitions of Rudder, *supra* note 64, at 698.

66 Estrin v. United States, 80 F.2d 105 (2d Cir. 1935). See Petition of B., 154 F. Supp. 633 (D. Md. 1957) (adultery and desertion of husband prior to the statutory period; unchaste reputation during the period).

67 Johnson v. United States, 186 F.2d 588 (2d Cir. 1951); *In re* Matura's Petition, 87 F. Supp. 429 (S.D.N.Y. 1949).

68 United State v. Francioso, 164 F.2d 163 (2d Cir. 1947) (none of the factors which make such a marriage abhorrent, such as close and continuous family contacts prior to the marriage, were present; the Catholic Church had sanctioned the marriage).

69 *In re* Application of Barug, 76 F. Supp. 407 (N.D. Cal. 1948).

70 § 101(f)(2), 66 Stat. 172, 8 U.S.C. § 1101(f)(2) (1952).

71 Dickhoff v. Shaughnessy, 142 F. Supp. 535 (S.D.N.Y. 1956). An examination of the act indicates that of the eight grounds (excepting adultery) for exclusion from being found of good moral character which do not require convictions, two require a specific finding of willful intent and the other six are of such character that the alien who commits them must know that he is doing so and that they are condemned by the general moral feelings of the community. Under these circumstances it would be difficult to assume that Congress meant to change the case-law definition of adultery. While this case is partially distinguishable upon the ground that the petitioner was seeking the suspension of a deportation order, the issue in the case involved the meaning of the term "adultery" as used in the section of the statute "defining" good moral character. The court, at 538, cites two unreported naturalization cases to the same effect—Petition of Greenidge (S.D.N.Y. May 2, 1955), and Petition of Racine (S.D.N.Y. May 9, 1955). *Accord, In re* Gruelich's Petition, 37 N.J. Super. 371, 117 A.2d 316, 318 (Hudson County Ct. 1955) (naturalization case). The act applies only to flagrant and clear cases of adulterous conduct and not to innocent situations. To hold otherwise would interject into the act an undue harshness.

72 See *In re* Matura's Petition, 142 F. Supp. 749 (S.D.N.Y. 1956) (distinguishable in that petitioner had also deserted his wife and child prior to the statutory period, had failed to contribute to their support, and had obtained an annulment only after the statutory period had begun to run); Petition of Da Silva, 140 F. Supp. 596 (D.N.J. 1956) (no discussion of good faith or possible extenuating circumstances); Petitions of F— G— and E— E— G, 137 F. Supp. 782 (S.D.N.Y. 1956) (although petitioner was entitled to have her status determined by a prior act, the 1952 Act was found to embody the "conmmon conscience").

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

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

that the petitioner was of good moral character although she had engaged in a course of sexual relationship over a period of years, and despite her apparent failure to show the presence of any extenuating circumstances. This extension would especially appear to be unwarranted, not only because of the absence of extenuating circumstances, but also because of the duration and the continuous nature of the illicit relationship, as opposed to the mere casual lapses of the petitioner in *Schmidt v. United States.*[76]

Conclusion

While the inclusion of the requirement of good moral character in the naturalization statutes has occasioned a considerable amount of litigation, citizenship is such a grave privilege, carrying with it reciprocal responsibilities, that it justifies, in fact demands, that it be conferred only upon those aliens who are able to prove themselves morally worthy of it. The earlier cases applied the requirement too mechanically and without taking into consideration such relevant factors as intent, the presence of extenuating circumstances, and the possibility of reformation. Recent cases have quite fortunately discarded this mechanistic approach, and in this respect they would appear to be in accord with sound principles of morality. However, it is unfortunate that these modern decisions continue to search vainly for the content of the "common conscience" in order to reach results which are in accord therewith. It would appear that a great deal of needless practical and prudential difficulties could be avoided if the judges would only hearken to Cahn's suggestion that they forthrightly shoulder the responsibility of decision on the basis of their own informed notions of morality. There is no reason to fear that judges who take such a responsible view as that which Cahn urges upon them would act in an idiosyncratic or irrational manner. On the contrary, we may have cause to fear for the moral future of the nation if judges, who have both the position and the qualifications for exerting a moral influence on the community, should continue to regard themselves as mere mouthpieces of the unascertainable "common conscience." This would be especially true if they should mistakenly confuse common conduct with the "common conscience."

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75 163 F. Supp. 687 (S.D. Cal. 1958). *But see* Petition of Pacora, 96 F. Supp. 594 (S.D.N.Y. 1951), wherein a petitioner, who for four of the five years immediately preceeding the filing of his petition had cohabited with a woman who was unwilling to marry him, was found not to be of good moral character. There were no extenuating circumstances since he knew that she would not marry him, although she was free to do so.

76 177 F.2d 450 (2d Cir. 1949).