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The question as to when an act is discretionary rather than ministerial, or an absolute duty,³⁴ can be answered only by examination of the applicable statutes and the particular facts of each case.³⁵ Although the exact limits of the "discretionary function or duty" exception are as yet uncharted by the courts, the cases indicate that the courts are aware of the manifest intent of Congress to pay for the negligent performance of routine duties by federal employees, but just as importantly not to inhibit the action of employees exercising genuine executive discretion and responsibility, and the courts are determined to carry out that intent.

MORALITY UNDER NATURALIZATION AND IMMIGRATION ACTS

Few topics have caused more consternation and discussion throughout the history of man than the problem of right and wrong. Legal scholars and commentators have been in the thick of this controversy. The question was highlighted by Chief Justice Vinson of the United States Supreme Court, when in a recent case he stated: "Nothing is more certain in modern society than the principle that there are no absolutes."¹ This theory might evoke surprise among lay people, but it should be no stranger to lawyers.²

Such a view, far from being an idle bit of philosophical by-play,³ has a direct and vital effect upon two of the most important pieces of federal legislation: the Naturalization Act and the Immigration Act.

The Naturalization Act makes one desiring to become a citizen prove that he has been "a person of good moral character" during the five years

³⁴ *Costley v. United States*, 181 F. 2d 723 (C.A. 5th, 1950); *State of Maryland v. Manor Real Estate and Trust Co.*, 176 F. 2d 414 (C.A. 4th, 1949) (F.H.A. had absolute, not discretionary, duty to safeguard health of tenants); *Oman v. United States*, 179 F. 2d 738 (C.A. 10th, 1949). (No government employee is granted the discretion to induce third parties to interfere with exclusive grazing privileges granted by the United States.)

³⁵ E.g., *Old King Coal Co. v. United States*, 88 F. Supp. 124 (S.D. Iowa, 1949) (Secretary of the Interior took over operation of a coal mine under an Executive Order empowering him to run it in such manner as he deemed necessary in the interest of the war effort. Held, that the power was discretionary).

¹ *Dennis et al. v. United States*, 341 U.S. 494, 508 (1951).

² "It is no longer news that law has lost its connection with philosophy. In place of its traditional foundations of morals and metaphysics it now rests either on some pragmatic expediency or on an historic evolution evidenced by custom, or it is deemed to consist of nothing but facts and therefore rests on no basis at all." McKinnon, *Law and Philosophy*, 26 *Can. Bar Rev.* 1045 (1948).

³ "We have arrived at the point historically where we can no longer proceed with any health or happiness on the blithe assumption that it doesn't matter what any of us believe—or whether there is really anything to believe." This quotation is from a speech delivered by Henry R. Luce, editor-in-chief of *Time*, *Life* and *Fortune* magazines, at the opening of Southern Methodist University's new legal center. A full text of the speech can be found in 43 *Fortune*, No. 6, at 85 (June, 1951).

preceding his application for citizenship.⁴ This requirement has been a part of our naturalization procedure since 1802.⁵ The phrase itself has varied in meaning over the past 150 years. Traditionally, the mere violation of a statute, regardless of its character, indicated bad moral character.⁶ As a result, cases have held that those who gave false statements to naturalization examiners,⁷ violated the National Prohibition Act,⁸ and violated local liquor laws⁹ could not be naturalized. A single act of adultery was once a fatal flaw in the petitioner's character.¹⁰ In another case, the court denied the petition of one who had admitted the commission of a murder and had served his sentence a long period of years prior to his application, even though good conduct was proved during the five years preceding his application.¹¹

The courts gradually came to realize that defining morality by reference to statutes was too contrived a solution. Exceptions began to appear, one case finding a distinction between acts criminal in all countries and at all times, and those made criminal by economic policies of a particular country.¹² A more common method of tempering the traditional view was to allow naturalization if the petitioner acted in good faith. Thus, one who remarried after obtaining a rabbinical divorce was granted citizenship where the evidence showed that the applicant was unaware that a civil divorce was required.¹³ In another case, the petitioner entered into a marriage ceremony which he believed to be valid but which in fact was not, and he thereafter lived in an adulterous relation with his supposed wife. The court granted citizenship because the applicant acted in good faith.¹⁴

One undoubted advantage of the old rule has been the compilation of a reasonably stable body of law. Thus, it may be said with some degree of certainty that the commission of such acts as perjury,¹⁵ giving false state-

⁴ 34 Stat. 598 (1906), 8 U.S.C.A. § 707(a) (3) (1942).

⁵ *Persichetti, Good Moral Character as a Requirement for Naturalization*, 22 *Temp. L.Q.* 182 (1948).

⁶ *In re Spenser*, 22 *Fed. Cas.* 921, No. 13, 234 (C.C. Ore., 1813).

⁷ *In re Talarico*, 197 *Fed.* 1019 (W.D. Pa., 1912); *In re Conway*, 9 *N.Y. Misc.* 652, 30 *N.Y. Supp.* 835 (S. Ct., 1894).

⁸ *In re Bonner*, 279 *Fed.* 789 (Mont., 1922).

⁹ *United States v. Gerstein*, 284 *Ill.* 174, 119 *N.E.* 922 (1918); *United States v. Hrasky*, 240 *Ill.* 560, 88 *N.E.* 1031 (1909).

¹⁰ *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).

¹¹ *In re Ross*, 188 *Fed.* 685 (C.C. Pa., 1911).

¹² *In re Bookschnis*, 61 *F. Supp.* 751 (Ore., 1945).

¹³ *Petition of Schlaue*, 41 *F. Supp.* 161 (S.D. N.Y., 1941), *rev'd on other grounds* 136 *F.* 2d 480 (C.A. 2d, 1943).

¹⁴ *Application of Barug*, 76 *F. Supp.* 407 (N.D. Cal., 1948). Note cases footnoted therein.

¹⁵ Case cited note 6 *supra*.

ments to naturalization examiners,¹⁶ cruel and barbarous treatment,¹⁷ and homicide¹⁸ indicate a lack of good moral character.

Recent cases evidence a break with the traditional view that statutes are the criterion of good moral character, although the break has not been complete.¹⁹ Today good moral character is such character as measures up to the standards of the community in which the alien resides.²⁰ As might be expected, this rule has had an unstabilizing effect on the cases, particularly those dealing with family and sexual relations. Where one act of adultery once barred citizenship, recent cases have allowed naturalization where the relationship was long-term, open and notorious.²¹ Fornication has given the courts considerable trouble. Decided cases indicate that fornication does not destroy good moral character.²² But the question is still unsettled, as is indicated by a recent federal case in which the court was equally divided on the problem.²³

A case in which Judge Learned Hand wrote the opinion is a most striking example of the cleavage between the traditional statutory standard and the current moral convention rule.²⁴ In that decision, the petitioner was tried and convicted for the mercy killing of his hopelessly crippled son. Sentence was suspended, however. This conviction was relied upon by the government as evidence that the petitioner lacked good moral character. Judge Hand agreed, not because the applicant had violated a statute declaring his act to be murder, but because euthanasia, in the court's opinion, would shock the conscience of the community, and so was not in accord with current moral conventions.

This latest formula for judging good moral character is not without its critics. Chief among them is Judge Learned Hand himself, who has said that judges have been given an impossible task in determining current moral conventions.²⁵ The best thing they can do, says the judge, is to take a guess.

¹⁶ *Del Guercio v. Pupko*, 160 F. 2d 799 (C.A. 9th, 1947); *Petition of Ledo*, 67 F. Supp. 917 (R.I., 1946); cases cited note 7 supra.

¹⁷ *Application of Polivka*, 30 F. Supp. 67 (W.D. Pa., 1939).

¹⁸ *In re Caroni*, 13 F. 2d 954 (N.D. Cal., 1926); *In re Ross*, 188 Fed. 685 (C.C. Pa., 1911).

¹⁹ *In re Paoli*, 49 F. Supp. 128 (N.D. Cal., 1943).

²⁰ *United States v. Cloutier*, 87 F. Supp. 848 (E.D. Mich., 1949); *Petition of Gani*, 86 F. Supp. 683 (W.D. La., 1949); *Petition of De Leo*, 75 F. Supp. 896 (W.D. Pa., 1948).

²¹ *Petition of Rudder*, 159 F. 2d 695 (C.A. 2d, 1947); *Petition of R—*, 56 F. Supp. 969 (Mass., 1944); *United States v. Rubia*, 110 F. 2d 92 (C.A. 5th, 1940).

²² *Application of Murra*, 178 F. 2d 670 (C.A. 7th, 1949); *Schmidt v. United States*, 177 F. 2d 450 (C.A. 2d, 1949).

²³ *United States v. Manfredi*, 168 F. 2d 752 (C.A. 3d, 1948), in which an unmarried man admitted that he had had occasional meretricious relationships with a single woman for pay.

²⁴ *Repouille v. United States*, 165 F. 2d 152 (C.A. 2d, 1947).

²⁵ *Johnson v. United States*, 186 F. 2d 588 (C.A. 2d, 1951).

Another problem plaguing the courts in these cases is to decide whether petitioner's conduct prior to the five year span preceding his application is open to inspection. Cases have gone both ways.²⁶ It seems clear that the applicant must not be guilty of bad moral conduct from the time his application is filed until the hearing.²⁷

The problem of judicially determining morality is further complicated by another statute dealing with aliens. That is the Immigration Act which allows the Attorney General to deport an alien who is convicted of or admits commission of a "crime involving moral turpitude."²⁸ A widely accepted definition of moral turpitude is: "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general."²⁹ This statement has not been too helpful, however, and the courts have been forced to find a more stable rule. One test used was the familiar *malum in se-malum prohibitum* classification.³⁰ Some have proposed that seriousness of the crime be the criterion;³¹ others would limit the words moral turpitude to crimes of violence.³² These tests have largely been abandoned, until now the most popular standard seems to be the same as that for judging good moral character, i.e., current moral conventions.³³

Despite the different tests used to decide moral turpitude cases, a certain amount of uniformity is noticeable. This may be due to the fact that in applying the moral turpitude phrase of the Immigration Act, the court can only consider if the crime committed, of its nature, involves moral turpitude.³⁴ The petitioner's guilt or innocence cannot be considered, nor are extrinsic facts, such as good faith, pertinent. This has a very substantial stabilizing effect, and one which the courts do not meet in applying the good moral character provision of the Naturalization Act. Generally speak-

²⁶ *Petition of Gabin*, 60 F. Supp. 750 (N.D. Cal., 1945), in which the court said it was not restricted in its inquiry to the five year period. *Application of Murra*, 178 F. 2d 670, (C.A. 7th, 1950), in which the court refused to consider evidence of petitioner's conduct prior to the five year period.

²⁷ *In re Markiewicz*, 90 F. Supp. 191 (W.D. Pa., 1950).

²⁸ 39 Stat. 889 (1917), 8 U.S.C.A. § 155(a) (1942).

²⁹ *Ng Sui Wing v. United States*, 46 F. 2d 755 (C.A. 7th, 1931).

³⁰ *United States ex rel. Chartrand v. Karnuth*, 31 F. Supp. 799 (W.D. N.Y., 1940); *Jordan v. De George*, 341 U.S. 223, 236 (1951), dissenting opinion.

³¹ *Jordan v. De George*, 341 U.S. 223, 236 (1951), dissenting opinion.

³² *Ibid.*

³³ *United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534 (E.D. Pa., 1947); *United States v. Carrollo*, 30 F. Supp. 3 (W.D. Mo., 1939); *United States ex rel. Iorio v. Day*, 34 F. 2d 920 (C.A. 2d, 1929); *Jordan v. De George*, 341 U.S. 223, 236 (1951), dissenting opinion.

³⁴ *United States ex rel. Robinson v. Day*, 51 F. 2d 1022 (C.A. 2d, 1931).

ing, the following crimes involve moral turpitude: rape,³⁵ bigamy,³⁶ adultery,³⁷ assault with a dangerous weapon,³⁸ grand and petit larceny,³⁹ manslaughter in advanced degrees,⁴⁰ forgery,⁴¹ embezzlement,⁴² and counterfeiting.⁴³

A great deal of trouble is encountered when tax laws are under scrutiny. A leading case on the subject is *Jordan v. De George*.⁴⁴ There the petitioner conspired to defraud the United States of taxes on distilled spirits. The majority of the court, speaking through Chief Justice Vinson, thought that any crime wherein fraud was an ingredient involved moral turpitude. A strong dissent was lodged by Justices Jackson, Black and Frankfurter, who said that the phrase "moral turpitude" was too vague a standard to be constitutional. In a significant statement, the dissenters said: "Can we accept 'the moral standards that prevail in contemporary society' as a sufficiently definite standard for the purposes of the Act? . . . How should we ascertain the moral sentiments of masses of persons on any better basis than a guess?"⁴⁵

It seems proper to ask whether the courts are correct in their basic assumption that morality is a variable, unstable concept, one which receives its validity from the majority view of those in a particular locality. There was a time when morality meant something vastly different than it does to most courts today. The belief that there exists an unchanging, ascertainable standard of conduct to which all human actions should be in accord has been voiced by some of the greatest philosophers in history, men like Plato, Aristotle, St. Thomas, Locke, Rousseau and Kant.⁴⁶

Blackstone, one of the eminent scholars of Anglo-American law, was a firm believer in absolutes.⁴⁷ In 1776, the framers of the Declaration of Independence gave eloquent voice to their deep-rooted conviction that

³⁵ Case cited note 29 supra.

³⁶ *Whitty v. Weedon*, 68 F. 2d 127 (C.A. 9th, 1933).

³⁷ *United States ex rel. Tourny v. Reimer*, 8 F. Supp. 91 (S.D. N.Y., 1934).

³⁸ *United States ex rel. Pellegrino v. Karnuth*, 23 F. Supp. 688 (W.D. N.Y., 1938); *United States v. Smith*, 8 F. 2d 663 (W.D. N.Y., 1925).

³⁹ *United States ex rel. Chartrand v. Karnuth*, 31 F. Supp. 799 (W.D. N.Y., 1940); *United States ex rel. Meyer v. Day*, 54 F. 2d 336 (C.A. 2d, 1931).

⁴⁰ *United States ex rel. Sollano v. Doak*, 68 F. 2d 1019 (C.A. 2d, 1933); *Pillisz v. Smith*, 46 F. 2d 769 (C.A. 7th, 1931).

⁴¹ *Ponzi v. Ward*, 7 F. Supp. 736 (Mass., 1934).

⁴² *United States ex rel. Schreiber v. Reimer*, 19 F. Supp. 719 (S.D. N.Y., 1937).

⁴³ *United States ex rel. Schlimmgen v. Jordan*, 164 F. 2d 633 (C.A. 7th, 1947).

⁴⁴ 341 U.S. 223 (1951).

⁴⁵ *Ibid.*, at 237.

⁴⁶ Adler, *The Doctrine of Natural Law in Philosophy*, 1 *Natural Law Institute Proceedings* 66 (1947).

⁴⁷ 1 *Bl. Comm.* *39, 40.

there were unchangeable ideals which had a more stable foundation than the shifting sands of public opinion.⁴⁸

Contemporary legal scholars such as Mortimer Adler,⁴⁹ Harold McKinnon,⁵⁰ Ben Palmer⁵¹ and Clarence Manion⁵² have expressed belief in ultimate truth. They are the foremost advocates of the only contemporary school of jurisprudence which is founded upon a belief in absolutes. This philosophy is generally referred to as Natural Law.⁵³

It will be seen that competent authority exists for maintaining that morality is an unchanging, absolute, ascertainable standard of conduct. If such a rule were to be applied to concrete cases, would the maze of contradictory decisions in this field disappear? No one can say for sure. If a constitutional phrase like "freedom of speech" is subject to so much doubt and dispute, it cannot be hoped that a God-given directive to do good and avoid evil⁵⁴ will cause any less consternation. Nevertheless, such broad standards are at least a foothold⁵⁵ upon which men of intelligence and goodwill can build a reasonably stable body of law.

EXTENSION OF LIABILITY OF STOREKEEPERS TO THOSE RIGHTFULLY UPON THE PREMISES

Sometimes when examining a rule of law which has remained stable for a number of years one finds that, although the rule has remained the same in its expression, a change has occurred in its application. Such a change seems to have taken place in the cases dealing with the liability of storekeepers and proprietors of shops to those rightfully upon their premises.

⁴⁸ Declaration of Independence, Preamble.

⁴⁹ Authority cited note 46 supra, at 65.

⁵⁰ Authority cited note 2 supra.

⁵¹ Palmer, Reply to Mr. Charles W. Briggs, 32 A.B.A.J. 635 (1946).

⁵² Manion, *The Founding Fathers and the Natural Law: A Study of the Source of Our Legal Institutions*, 35 A.B.A.J. 461 (1949).

⁵³ "In the beginning God, acting with Supreme Intelligence, created all things according to a Divine Plan. That Plan is the Eternal Law. Man, endowed by his Creator with an immortal soul, an intellect and a free will, can ascertain the primary dictates of the Eternal Law by his own reason, apart from direct Revelation. Such dictates thus made known, together with the inferences flowing rationally from them, constitute the Natural Law." 3 *Natural Law Institute* 1 (1949).

⁵⁴ Authority cited note 46 supra, at 71.

⁵⁵ The problem of deciding just what the moral law prohibits is not too great an obstacle. Authority cited note 51 supra, at 636; Wilkin, *Natural Law in American Jurisprudence*, 24 *Notre Dame Lawyer* 343, 361 (1949). Already tax statutes have been examined in the light of Natural Law. Peters, *Tax Law and Natural Law*, 26 *Notre Dame Lawyer* 29 (1950). Other perplexing problems have been treated also. Rommen, *The Natural Law*, c. XIII (1948); Cobban, *The Crisis of Civilization*, c. X (1941); Maritain, *The Rights of Man and Natural Law* (1947); Sterilization, 33 *Marq. L. Rev.* 78 (1949); Euthanasia, 33 *Marq. L. Rev.* 133 (1949); Divorce, 32 *Marq. L. Rev.* 295 (1949).