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Article 10

Motion Picture Censorship; Expatriation Charitable Immunity; Deportation

RECENT DECISIONS AND DEVELOPMENTS

Motion Picture Censorship

"Civil liberties" is a sensitive phrase, for it suggests the sacred, and the sacred bears vehement defense. So it is that the familiar history of civil liberties in this country presents an immense and continuing journal embodying in every chapter man's most heartfelt argument. Judicially, civil rights controversies have inspired decisions most positive and lucid, yet to each is attached an opinion of clear dissent, sometimes angry, usually indignant, and always vigorous. In *Times Film Corp. v. City of Chicago,*[1] the United States Supreme Court upholds this tradition in full measure.

Petitioner, owner of exclusive rights in the motion picture "Don Juan," appealed from a refusal of the City of Chicago to issue a license authorizing the film's exhibition in that city. The refusal was based on a city ordinance[2] providing that all films be so licensed and that "such permit shall be granted only *after* the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship. . . ."[3] The petitioner applied for a permit but declined to submit the film for review. His application, consequently, was denied.

Upon certiorari, petitioner urged that since the ordinance required censorship *before* any motion picture may legally be displayed, it constitutes a previous restraint on freedom of speech and therefore is, on its face, violative of the first and fourteenth amendments. It is well that emphasis be placed on the fact that the ordinance is challenged on the ground, and on the sole ground, that it establishes a scheme of censorship involving prior restraint. Understood in this perspective, the issue becomes an extremely narrow one. In effect, the petitioner requested that the court hold *all* prior restraints on free speech to be void per se.[4] The Court declined so to do.

While recognizing that the motion picture industry is entitled to the constitutional protections against pre-censorship,[5] the Court refused to hold such protection to be entirely unlimited. Primary reliance is placed on the remarks of Chief Justice Hughes in *Near v. Minnesota,*[6] a case of signal importance in the area. There, the Supreme Court struck down a Minnesota statute authorizing injunctive relief against "malicious, scandalous and defamatory" newspapers.[7] While asserting every man's undoubted right to "lay what sentiments he pleases before the public,"[8] the Court

[1] 29 U.S.L. WEEK 4120 (U.S. Jan. 24, 1961).
[2] CHICAGO, ILL., MUNICIPAL CODE § 155-4, cited in Times Film Corp. v. City of Chicago, 29 U.S.L. WEEK 4120 (U.S. Jan. 24, 1961).
[3] *Ibid.* (Emphasis added.)
[4] Times Film Corp. v. City of Chicago, *supra* note 1, at 4121. The issue in the Court's words was "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." *Ibid.*
[5] This, *inter alia,* was the holding in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
[6] 283 U.S. 697 (1931).
[7] *Id.* at 702.
[8] *Id.* at 714.

in *Near* was careful, at the same time, to leave ample room for exceptions. Speaking of previous restraints, it said:

> [T]he protection . . . is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, *the primary requirements of decency may be enforced against obscene publications.* The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.[9]

This and similarly worded dicta in subsequent cases[10] precluded, in the Court's opinion, a holding that would render the freedom of speech and press immune from *all* previous censorship.

The Court was not asked to assess the validity of the tests by which the Chicago Police Commissioner was to judge the films reviewed, nor was any indication of the content of the motion picture in question presented on the record. Rather, the Court decided merely that previous restraint is not, *in itself,* a circumstance fatal to the city's ordinance.

Four justices dissented. Chief Justice Warren used more than eight thousand words to articulate an indignant minority view. The major point of departure between the minority and prevailing opinions seems to be a dispute as to the issue presented.

The majority answered, in the negative, the question "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[11] But to the dissent "this case clearly . . . [presents] the question of our approval of unlimited censorship of motion pictures before exhibition through a system of administrative licensing."[12] One faction asks "may any films be censored," and the other asks, "may all films be censored without limitation." A broad discrepancy is patent.

Because *Times Film* ought make its impression only upon the issue selected, delimited and decided by the majority, this discussion will be similarly narrowed. Despite the disparity between basic issues, at least two of the objections offered by the Chief Justice are in direct conflict with the majority view.

The first of these is that while prior restraint as a constitutional bar does have exceptions, these exceptions were never thought to include censorship of motion pictures.[13] Attention is directed to *Kingsley Books, Inc. v. Brown,*[14] wherein it was held that injunctive restraints against disseminators of pornographic literature are not in violation of the first and fourteenth amendments, provided it is demonstrated that such injunction will issue only *after* initial

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[9] *Id.* at 716 (emphasis added) (footnotes by the Court omitted).

[10] See, *e.g.,* Roth v. United States, 354 U.S. 476 (1957): "In the light of . . . history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . [T]here is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." *Id.* at 483. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952): "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." *Id.* at 502.

[11] Times Film Corp. v. City of Chicago, 29 U.S.L. WEEK 4120 (U.S. Jan. 24, 1961).

[12] *Id.* at 4124 (Warren, C.J., dissenting).

[13] *Id.* at 4125 (Warren, C.J., dissenting).

[14] 354 U.S. 436 (1957).

distribution. In such an event the injunction assumes a form similar in nature and effect to criminal proceedings.[15] Dicta in *Kingsley* characterized freedom from prior restraint as a right limited only by exceptional circumstances, but further indicated that such circumstances are "to be closely confined so as to preclude what may fairly be deemed licensing or censorship."[16]

Under the view thus expressed, it would seem clear that prior restraint for the purpose of censorship is constitutionally to be condemned. However, dictum by Chief Justice Hughes in *Near v. Minnesota* includes equally clear sentiments to the contrary.[17] The Court therefore merely chose its position from conflicting dicta. Its decision gives official recognition to censorship as a *possible* area of justifiable prior restraint. This is all that the question, as framed by the majority, required.

The second dissenting objection penetrates more deeply. It is addressed to the strictly administrative form of the censorship system created by Chicago's statute.

> The censor is beholden to those who sponsored the creation of his office. . . . His function is to restrict and restrain; his decisions are insulated from the pressures that might be brought to bear by public sentiment if the public were given an opportunity to see that which the censor has curbed. The censor performs free from all of the procedural safeguards afforded litigants in a court of law. . . . The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence. . . . How different from a judicial proceeding where a full case is presented by the litigants. The inexistence of a jury to determine contemporary community standards is a vital flaw.[18]

Lending support to this objection is the fact that under the challenged ordinance, film distributors are given no opportunity whatever to defend or justify the contents of a motion picture.[19] Statutes affecting civil liberties have been voided for constitutional transgressions far softer than this.[20]

In the strictest sense, however, this line of argument falls wide of the issue to which the majority limits itself. The objection necessarily involves investigation and consideration of the operation of the ordinance and its consequent abridgment of free speech. These ordinarily are highly relevant circumstances.[21] But the Court's decision in *Times Film* involved only a consideration of the alleged per se invalid-

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[15] *Id.* at 443.

[16] *Id.* at 441.

[17] Near v. Minnesota, 283 U.S. 697 (1931). Listing several possible exceptions to the right against freedom from prior restraint, the Court declared: "[T]he primary requirements of decency may be enforced against obscene publications." *Id.* at 716. Similar language is found in Schenck v. United States, 249 U.S. 47 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." *Id.* at 52.

[18] Times Film Corp. v. City of Chicago, *supra* note 11, at 4130 (Warren, C.J., dissenting).

[19] *Id.* at 4129 (Warren, C.J., dissenting).

[20] See, *e.g.*, Schneider v. State, 308 U.S. 147 (1939) (permit to distribute literature to issue only upon judgment of police officer that applicant is of good character and that the literature to be distributed is free from fraud); Grosjean v. American Press Co., 297 U.S. 233 (1936) (license tax on privilege of charging for newspaper advertising measured by gross receipts therefrom); Hague v. CIO, 307 U.S. 496 (1939) (director of safety given power to refuse to issue permits for public assembly upon his mere opinion that such refusal would prevent riots, disturbances or disorderly assemblage). See also Kunz v. New York, 340 U.S. 290 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[21] See Gitlow v. New York, 268 U.S. 652, 670-71 (1925).

ity of prior restraint in motion picture censorship. It does not purport to decide whether the particular statute before it is invalid on other grounds. It simply decides that the Chicago ordinance need not fall merely because it imposes a prior restraint.

The decision is described by the dissenting opinion as giving "official license to the censor, approving a grant of power to city officials to prevent the showing of any moving picture these officials deem unworthy of a license. It thus gives formal sanction to censorship in its purest and most far-reaching form. . . ."[22] This remark is not easily justified in light of the explicitly narrow issue adopted by the majority. Moreover, the majority opinion plainly states "we, of course, are not holding that city officials may be granted the power to prevent the showing of any motion picture they deem unworthy of a license."[23]

The Court, in addition, very clearly reserved for later determination questions involving the constitutional sufficiency of the tests suggested by the Chicago ordinance, and the constitutional consequences of its operation in specific instances.[24]

The severity and length of the dissenting opinion, and its sweeping interpretation of the majority view, might well engender considerable misunderstanding. But let it emphatically be pointed out that the decision, in fact, endorses the views expressed in the *Near* case; *viz.*, that free speech is not a right completely unfettered, and, more importantly, that prior restraint may be imposed only under clearly exceptional circumstances.[25] There is no indication that those circumstances need be any less "exceptional" as a result of this decision. That question was not considered.

Why the Court chose to confine its decision to an issue so narrow is a query well disposed to speculation. As phrased by the dissent, "surely, the Court is not bound by the petitioner's conception of the issue or by the more extreme positions that petitioner may have argued. . . ."[26] Indeed, it seems evident that the record, without difficulty, would have justified a contrary decision on other grounds.[27]

One possible answer might be that the Court wished definitively to preserve in the states at least theoretical *power* to exact a prior censorship before it undertook to describe more precisely the limits thereof. If this be the case, there is room to suggest that those limits are to be broadened and that the *Times Film* decision is but a starting point in the process. The Court seemingly went to considerable lengths in avoiding a clear opportunity to strike at the most effective form of censorship. This appears to be indicative of its sympathies in the area. Thus, while *Times Film* strictly construed imparts nothing critically new, it may well have sounded the key in which subsequent decisions will be tuned.

Expatriation

Citizenship is a right as precious and as fundamental as the traditional freedoms of speech, press and religion. It is, in a sense, no less than the "right to have rights,"[1] and

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[22] Times Film Corp. v. City of Chicago, 29 U.S.L. WEEK 4120, 4126 (U.S. Jan. 24, 1961) (Warren, C.J., dissenting).
[23] *Id.* at 4122.
[24] *Ibid.*
[25] *Id.* at 4121-22.
[26] *Id.* at 4126.
[27] See cases cited note 20 *supra.*
[1] Trop v. Dulles, 356 U.S. 86, 102 (1958). See Perez v. Brownell, 356 U.S. 44, 64-65 (1958) (dissenting opinion).

it can be attained by birth, or by compliance with the rules for naturalization as laid down by Congress. This latter proposition is crystallized in the fourteenth amendment, which provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[2] But unlike the more frequently acknowledged freedoms which are constitutionally guaranteed in the Bill of Rights, there is no express constitutional protection afforded to citizenship. Hence the basic question arises as to the ways, if any, in which this valuable right may be lost.

The recent case of *Cort v. Herter*[3] dealt with the constitutionality of Section 349 (a) (10) of the Immigration and Nationality Act, which provides that:

> (a) . . . a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by –
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> . . . .
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> (10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.[4]

The petitioner was an American citizen by birth, and he sought a judgment declaratory of his right to United States citizenship. The government based its claim of expatriation on the alleged violation of the statute, and met the burden of proof[5] imposed on it in such cases by presenting evidence which convinced the Court of petitioner's violation.[6]

In addition to challenging the factual basis of the alleged violation, the petitioner also contended that Congress was "without power to attach loss of citizenship as a consequence of avoiding service in the armed forces by remaining abroad,"[7] arguing "that such an exercise of power would violate the due process clause of the fifth amendment to the United States Constitution as well as the prohibition against cruel and unusual punishments in the eighth amendment."[8] At the threshold of the constitutional issue, the Court was confronted with the United States Supreme Court case of *Trop v. Dulles*,[9] where a similar statute[10]

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[2] U.S. CONST. amend. XIV, § 1. See also United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898), wherein the Supreme Court, in declaring a child born in the United States of permanently domiciled Chinese subjects to be a citizen, reached the following conclusion: "The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes."

[3] 187 F. Supp. 683 (D.D.C. 1960), *jurisdiction noted,* 21 U.S. SUP. CT. BULL. 566 (1961).

[4] 66 Stat. 163, 267-68 (1952), 8 U.S.C. § 1481 (a)(10) (1958).

[5] "[W]hen a citizenship claimant proves his birth in this country or acquisition of American citizenship in some other way, the burden is upon the Government to prove an act that shows expatriation by clear, convincing and unequivocal evidence." Nishikawa v. Dulles, 356 U.S. 129, 133 (1958).

[6] Cort v. Herter, 187 F. Supp. 683, 686 (D.D.C. 1960).

[7] *Id.* at 685.

[8] *Ibid.*

[9] 356 U.S. 86 (1958).

[10] In *Trop v. Dulles,* the prevailing opinion, in an obiter dictum remark, drew an analogy between the statutes decreeing loss of citizenship for desertion in time of war, which it ultimately declared unconstitutional, and the statute decreeing loss of citizenship for evading the draft by

attaching loss of citizenship as a consequence of conviction for desertion in time of war was declared unconstitutional as a cruel and unusual punishment in violation of the eighth amendment.[11] In striking down Section 349(a)(10) of the Immigration and Nationality Act, the Court stated: "We perceive no substantial difference between the constitutional issue in the *Trop* case and the one facing us. The Court's ruling there is controlling here."[12]

At common law, the doctrine of perpetual allegiance prohibited voluntary expatriation without the consent of the sovereign.[13] That such a doctrine was inconsistent with the policies of a young, growing America, which had thrown open its shores to the immigrants of other lands, scarcely needs demonstration.[14] But the early courts of the United States were none too explicit in their pronouncements regarding the right of expatriation.[15] Thus, it remained for Congress to permanently settle the doubt surrounding the concept, when in 1868 it passed legislation formally acknowledging the inherent right of voluntary expatriation.[16]

Although this right was firmly established by statute,[17] another and more serious question, namely, the power of Congress to deprive an individual of citizenship, received no such definitive answer. The existence of this power does not seem to have been challenged in the courts prior to the case of *Mackenzie v. Hare*,[18] in which an American citizen, who had married a British subject, sought registration as a qualified voter. Her application was denied on the ground that marriage to a foreign citizen had deprived

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remaining abroad, calling the two "essentially" alike. *Id.* at 93.

[11] U.S. CONST. amend. VIII provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[12] Cort v. Herter, *supra* note 6, at 687-88.

[13] Shanks v. Dupont, 28 U.S. (3 Pet.) 150, 153 (1830). See also Inglis v. Sailor's Snug Harbour, 28 U.S. (3 Pet.) 61, 75 (1830) (dictum); McCampbell v. McCampbell, 13 F. Supp. 847, 848 (W.D. Ky. 1936).

[14] Perhaps the most definitive statement of the American position on the right of voluntary expatriation appears in an opinion of Attorney General Black:

> "Here, in the United States, the thought of giving it (the right of expatriation) up cannot be entertained for a moment. Upon that principle this country was populated. We owe to it our existence as a nation. Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world." 9 OPS. ATT'Y GEN. 356, 359 (1859).

[15] See 3 MOORE, INTERNATIONAL LAW § 431 (1906).

[16] 15 Stat. 223-24 (1868). Specifically, the act read as follows:

> "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore, *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."

[17] *Ibid.*

[18] 239 U.S. 299 (1915).

her of American citizenship by statute.[19] The Supreme Court upheld the validity of the statute, stating that although a "change of citizenship cannot be arbitrarily imposed," the law in question dealt with "a condition voluntarily entered into, with notice of the consequences."[20] But the real issue in the *Mackenzie* case was the power of Congress to enact such legislation, and despite mention of the voluntary aspect of the conduct, the basis for the Court's decision was the government's sovereign power to control foreign affairs.[21] In *Savorgnan v. United States,*[22] a native-born American woman had acquired Italian citizenship while in the United States through naturalization in accordance with Italian law. Forced to leave the country with her Italian diplomat husband during the Second World War, she sought to establish her American citizenship upon her return. Although it was clear that she had not intended to jeopardize or surrender her American citizenship, the Supreme Court held that she had expatriated herself by foreign naturalization.[23] The results in the *Mackenzie* and *Savorgnan* cases indicate that the Court did not consider the power of Congress to decree expatriation as dependent upon the consent of the individual, but rather viewed it as incident to the power to control foreign affairs.[24]

In 1958, the Supreme Court decided the companion cases of *Perez v. Brownell*[25] and *Trop v. Dulles.*[26] They are significant not only because they form the foundation for an analysis of the *Cort*[27] case, but also because they evidence a serious divergence of views as to the nature of the citizenship right and the power of Congress to affect it. In *Perez v. Brownell,* the petitioner was a native-born American whose parents had left with him for Mexico in 1920 before he had attained majority. Aware of his birthplace, he nonetheless remained in Mexico during the Second World War for the admitted purpose of avoiding the draft, voting all the while in Mexican political elections. Several years after the war, he sought entrance to this country as a citizen. It was denied on the ground that he had expatriated himself.[28] Declining to pass on

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[19] The statute provided that "any American women who marries a foreigner shall take the nationality of her husband. *At the termination of the marital relation she may resume her American citizenship.* . . ." 34 Stat. 1228-29 (1907). (Emphasis added.) Note that the statute suspended citizenship rather than permanently expatriated.

[20] Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915).

[21] *Id.* at 311. The Court made the following remark: "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers." *Ibid.* See also 14 MICH. L. REV. 233-34 (1916).

[22] 338 U.S. 491 (1950).

[23] The controlling statutes in the *Savorgnan* case were § 2 of the Citizenship Act, 34 Stat. 1228 (1907), and §§ 401, 403 of the Nationality Act, 54 Stat. 1168-70 (1940). In general the statutes provided for expatriation as a consequence of foreign naturalization, or taking an oath of allegiance to a foreign country.

[24] Note the following remark in Savorgnan v. United States, 338 U.S. 491, 500 (1950): "The United States has long recognized the general undesirability of dual allegiances."

[25] 356 U.S. 44 (1958).

[26] 356 U.S. 86 (1958).

[27] 187 F. Supp. 683 (D.D.C. 1960), *jurisdiction noted,* 21 U.S. SUP. CT. BULL. 566 (1961).

[28] The government denied entrance on the ground that he had violated § 401 of the Nationality Act, 54 Stat. 1137 (1940), 8 U.S.C. § 1481 (a) (5) (1958), which provided that: "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

the statute dealing with the avoidance of military service, the Supreme Court held that the power of Congress to regulate foreign affairs included the power to prevent participation by citizens in foreign political elections so as to avoid serious international complications, and that the withdrawal of citizenship was a means reasonably calculated to achieve that end.[29] The dissent,[30] on the other hand, took the position that the government was "without power to take citizenship away from a native-born or lawfully naturalized American,"[31] and that only conduct unequivocally indicating a voluntary abandonment of citizenship could be the basis of statutory expatriation.[32] The dissent concluded that "the mere act of voting in a foreign election . . . without regard to the circumstances attending the participation, is not sufficient to show a voluntary abandonment of citizenship."[33]

Trop v. Dulles[34] dealt with a statute that decreed expatriation as a consequence of desertion, provided that the individual was convicted by court-martial and dishonorably discharged.[35] The Supreme Court held that the sanction imposed was penal in nature,[36] and, as such, violated the prohibition in the eighth amendment against cruel and unusual punishment.[37] Mr. Justice Brennan concurred in the result, but on the ground that "the requisite rational relation between this statute and the war power does not appear. . . ."[38] The dissent[39] reasoned that "Congress was calling upon its war powers when it made such desertion an act of expatriation,"[40] and that attaching denationalization to conduct already unlawful did not make denationalization a punishment.[41]

The constitutionality of the statute in-

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. . . ."

A second ground was a later amendment which decreed loss of nationality for:

> "Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States." 58 Stat. 746 (1944), 8 U.S.C. § 1481 (a) (10) (1958).

[29] Perez v. Brownell, 356 U.S. 44, 59-62 (1958).

[30] Chief Justice Warren, Justices Black and Douglas.

[31] Perez v. Brownell, 356 U.S. 44,77 (1958) (dissenting opinion).

[32] *Id.* at 75-76. The opinion stated that: "The fatal defect in the statute before us is that its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship. . . . Congress has employed a classification so broad that it encompasses conduct that fails to show a voluntary abandonment of American citizenship." *Id.* at 76.

[33] *Id.* at 78.

[34] 356 U.S. 86 (1958).

[35] Nationality Act, 54 Stat. 1168-69 (1940), as amended, 58 Stat. 4 (1944), 8 U.S.C. § 1481 (a) (8) (1958).

[36] Trop v. Dulles, 356 U.S. 86 (1958). Note the following remark: "Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute." *Id.* at 97.

[37] "It [expatriation] is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself." *Id.* at 101.

[38] *Id.* at 114 (concurring opinion). Mr. Justice Brennan apparently adopted the *Perez* rule.

[39] Justices Frankfurter, Burton, Clark and Harlan.

[40] Trop v. Dulles, 356 U.S. 86, 121 (1958) (dissenting opinion).

[41] *Id.* at 124.

volved in the *Cort* case[42] was questioned in three cases prior to the *Trop* decision. In *Gonzalez v. Landon*,[43] the Court declared that "citizenship is a matter of voluntary choice," but that "a voluntary act of a party which clearly indicates a desire for and is declared by law to result in expatriation is conclusive."[44] Apparently ignoring its own statement, the Court held Section 401(j), now Section 349(a)(10), of the Nationality Act constitutional without discussing whether evading military service in time of war "clearly" indicated a desire for expatriation. This decision was followed without question by *Vidales v. Brownell*.[45] The only other case in which the issue arose was *Mendoza-Martinez v. Mackey*,[46] but because of the complicated extraneous issues there involved, the government did not urge the constitutional point so as to enable an adjudication of this latter point that would be free from doubt.[47]

The *Cort* case, then, is the first post-*Trop* decision to pass on the constitutionality of Section 349(a)(10), the former Section 401(j), of the Nationality Act. As already mentioned, the Court concluded that the *Trop* case was controlling on the issue, and declared the statute unconstitutional. The statute in the *Cort* case was enacted by Congress as part of the Nationality Act of 1940,[48] though it was only added in 1944. Unlike the provisions involved in the *Mackenzie, Savorgnan* and *Perez* cases, many sections of the Nationality Act were designed to punish internal criminal conduct rather than to regulate external foreign affairs.[49] Thus, although it was effectively argued in *Perez* that the attachment of expatriation to certain conduct was reasonably calculated to effect congressional control of foreign relations, the same argument is inapplicable to these "criminal" statutes.

It seems reasonably clear that these "criminal" statutes are punishment in the constitutional sense,[50] especially in view of the fact that they generally require conviction as a condition precedent to expatriation. But the statute in the *Cort* case is significantly different from these other statutes at least in this important aspect, since it does not require prior conviction in order to expatriate. The reason for this apparent omission is that Congress was attempting to deal with those individuals who were evading the draft, and yet also remained outside the jurisdiction of our courts, thus avoiding punishment.[51]

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[42] Cort v. Herter, *supra* note 27.

[43] 215 F.2d 955 (9th Cir. 1954), *rev'd on other grounds*, 350 U.S. 920 (1955).

[44] *Id.* at 956-57.

[45] 217 F.2d 136 (9th Cir. 1954).

[46] 238 F.2d 239 (9th Cir. 1956) (per curiam).

[47] Mackey v. Mendoza-Martinez, 362 U.S. 384, 387 (1960) (memorandum of Mr. Justice Frankfurter).

[48] 54 Stat. 1168 (1940). This act also made treason, desertion in time of war, and forceful overthrow of the government acts of "voluntary" expatriation. The Expatriation Act, 68 Stat. 1146 (1954), 8 U.S.C. § 1481 (a) (9) (1958), added rebellion, insurrection, seditious conspiracy, and violation of the Smith Act to this list of acts of "voluntary" expatriation. See *The Expatriation Act of 1954*, 64 YALE L. J. 1164 (1955).

[49] See *The Expatriation Act of 1954*, 64 YALE L. J. 1164, 1178 (1955).

[50] *Id.* at 1180.

[51] "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be *penalized* in some measure. This bill (Section 401 (j)) would deprive such persons as are citizens of the United States of their citizenship, and, in the case of aliens, would forever bar them from admission into the United States. Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely *impose a similar penalty* on those who are *not subject to the jurisdiction*

A reading of the Congressional Record leaves little doubt that section 401(j), now section 349(a)(10), was enacted to punish such persons.[52] However, this conclusion raises a question apparently not considered by the Court in the *Cort* case, and one which casts doubt as to the ground on which the statute was declared unconstitutional. For if it be conceded that Congress is attempting to punish by expatriation those who remain outside the United States to avoid military service, then it must follow that the attempt to punish without a prior conviction is a denial of due process and violative of the fifth amendment.[53] Hence, the question of cruel and unusual punishment is not reached, since the mere "attempt" to punish without a determination of guilt is itself unconstitutional.

It can hardly be said that the question of congressional power to decree loss of citizenship is settled. The *Perez* and *Trop* decisions indicate two competing views as to the nature of the right, and congressional power to affect it. The precarious balance of power existing between these two factions is highlighted by the fact that the *Trop* decision required the concurring vote of Mr. Justice Brennan to go the way it did, and his opinion in restating the rule of *Perez* provided no key to the ultimate disposition of this question by the Court. Perhaps a good deal of the confusion precipitated by this problem could be avoided by keeping in mind the distinction between the two types of statutes that have been involved in these citizenship cases. In *Mackenzie, Savorgnan,* and *Perez* the conduct was non-criminal, while in *Trop* and *Cort* the statutes sought to punish wrongful conduct. Failure to make this classification might well account for the contention of the dissent in *Trop, i.e.,* that there was no essential difference in the nature of the sanctions imposed. The dissent apparently was unwilling to recognize a difference based on purpose and intent. But such a classification cannot dispose of the more fundamental question of congressional power to decree expatriation. As a general proposition, the better view would seem to be that Congress lacks such power and that only conduct unequivocally indicating voluntary abandonment of citizenship should be the basis of statutory expatriation. Such a conclusion is almost required for equivocal, non-criminal conduct abroad, for in such a case one can hardly reconcile the arbitrary imposition of expatriation with a Constitution dedicated to the preservation of fundamental rights and liberties. And, as to criminal conduct, it would seem that alternative penalties in the nature of imprisonment, fine, or even death, can be invoked by Congress, and made severe enough to deter the potential offender without at the same time running afoul of the eighth amendment. Finally, in this connection, it might be noted that certain criminal conduct such as treason could, upon conviction, be made the basis of statutory expatriation, not as additional punishment, but simply as conduct unequivocally indicating an abandonment of citizenship.

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of our courts, the *penalty* being the same as would result in the case of those who are subject to the jurisdiction of our courts." See 90 CONG. REC. 7629 (1944) (remarks of Senator Russell) (emphasis added).

[52] *Ibid.*

[53] In the *Trop* case, the Supreme Court hinted that § 401 (j) was a denial of due process, when in an obiter dictum remark it stated that the section did not provide "any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed. . . ." Trop v. Dulles, 356 U.S. 86, 94 (1958).

Charitable Immunity

Recent years have witnessed the incessant but erratic erosion of the charitable immunity doctrine.[1] This is of particular importance to church organizations in view of the fact that they may now be required to divert a percentage of the charitable fund toward the possibility of increased litigation and insurance costs. But since that which is so diverted will redress a tort the diversion is morally justified.

Presently there are states in which immunity no longer exists;[2] where it exists in favor of churches and other charitable organizations but not in favor of hospitals;[3] and where the immunity has remained impervious to attack.[4]

In those states wherein the doctrine has been rejected, the rejection has been bottomed on various factors. These range from the observation that the "reason"[5] for the immunity never did exist[6] to statements that its elimination would not lead to any undue hardship upon charitable institutions, especially when insurance is readily available.[7] Where the doctrine has been retained, its retention has been defended upon grounds of stare decisis.[8]

In the midst of these diametrically opposed views lies the nebulous middle area of partial immunity which assumes a certain significance by reason of the fact that it represents a transitional stage in the trend toward non-immunity. This area is exemplified by two recent decisions of the Ohio Supreme Court, *Gibbon v. YWCA*[9] and *Blankenship v. Alter.*[10] In *Gibbon* the following question was certified: "What is the present rule . . . of Ohio with reference to *respondeat superior* tort liability or non-liability of a religious and charitable institution (not a hospital) in an action by a patron of such institution's facilities."[11] The answer to this question was a hesitant reaffirmance of the position that a charitable institution is not liable for injury

[1] *E.g.,* Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956); Parker v. Port Huron Hosp., ___ Mich. ___, 105 N.W.2d 1 (1960); Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958); Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230 (1950).

[2] Malloy v. Fong, 37 Cal.2d 356, 232 P.2d 241 (1951); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

[3] Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960) (dictum).

[4] Barrett v. Brooks Hosp., Inc., 338 Mass. 754, 157 N.E.2d 638 (1959). For recent surveys indicating the position of the various states on the question of charitable immunity, see 4 CATHOLIC LAWYER 180 (Spring 1958); Simeone, *The Doctrine of Charitable Immunity,* 5 ST. LOUIS U.L.J. 357, 369 (1959).

[5] The theories upon which the charitable immunity doctrine has been based are: (a) the *Trust Fund* theory, *i.e.,* the use of funds for other than charitable purposes would violate the intended use of the contributions; (b) the *Implied Waiver* theory, *i.e.,* those who accept charity waive any claim against their benefactors; (c) the theory that *Respondeat Superior* does not apply where the activity is not conducted for profit; and (d) that *Public Policy* dictates that charitable institutions must be protected and tort recoveries would discourage future contributors. See generally 2 HARPER & JAMES, TORTS § 29.16 (1956).

[6] Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash.2d 162, 167, 260 P.2d 765, 768 (1953).

[7] Bing v. Thunig, *supra* note 2, at 664, 143 N.E. 2d at 7, 163 N.Y.S.2d at 9.

[8] See Smith v. Congregation of St. Rose, 265 Wisc. 393, 398, 61 N.W.2d 896, 898 (1953). "[W]e feel that it is for the legislature and not this court to change the rule of immunity. . . ." *Ibid.* See also Sister Ann Joachim, O.P., *The Policymakers: Courts or Legislatures?,* 39 B.U.L. REV. 349 (1959).

[9] 170 Ohio St. 280, 164 N.E.2d 563 (1960).

[10] 171 Ohio St. 65, 167 N.E.2d 922 (1960).

[11] Gibbon v. YWCA, 170 Ohio St. 280, 284, 164 N.E.2d 563, 566 (1960).

to a *beneficiary* of the institution, unless such injury is caused through the failure of the institution to exercise reasonable care in the hiring or retaining of a negligent servant. This ruling was followed by the *Blankenship* decision, wherein a participant at a bingo game operated on church premises recovered for injuries sustained when a chair supplied by the church collapsed. The Court reasoned that by engaging in an activity for profit the church lost whatever immunity it might have claimed – this, despite the fact that the proceeds went to charity.[12]

The combined effect of these decisions in Ohio is to allow recovery against a charitable institution only when the injury is sustained by a stranger (a nonbeneficiary) or when the tort is committed in a business activity.

In endeavoring to define the terms beneficiary and stranger, courts have produced myriad results. Thus, a person who was purchasing religious articles was held to be a beneficiary,[13] while attendance at a church social was held to present a factual question as to plaintiff's status as a beneficiary.[14] Further, spectators at a football game were considered strangers,[15] while patrons at a hillbilly show were declared beneficiaries.[16] In some areas, charities have been held liable to paying beneficiaries;[17] in others no distinction is made between paying and nonpaying beneficiaries.[18]

The attempt to define charitable as opposed to business activities has also led to contrary results. Hence the practice of letting rooms has been defined as a business activity,[19] though providing shelter for animals under a contract agreement is considered a charitable function.[20] Some courts have held that the conduct of a store is a commercial activity,[21] while others have indicated that the nature of the activity may not matter so long as the proceeds go to charity.[22]

The distinctions thus drawn by courts in their attempt to identify beneficiaries and charitable activities seem analogous to decisions which had imposed liability for the negligent administrative acts of charitable hospitals, but not for negligent medical acts. As a result, courts indulged in petty distinctions which required the imposition of liability where blood was administered to the wrong patient,[23] but not where the wrong blood was administered to the right patient.[24] These distinctions were finally rejected in New York because they provided for "neither guiding principles nor clear delineation of

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[12] Blankenship v. Alter, 171 Ohio St. 65, 167 N.E.2d 922 (1960).

[13] Cullen v. Schmit, 139 Ohio St. 194, 39 N.E.2d 146 (1942).

[14] Jewell v. St. Peter's Parish, 10 N.J. Super. 229, 76 A.2d 917 (1950).

[15] Clayton v. Southern Methodist Univ., 172 S.W.2d 197 (Tex. Civ. App. 1943), *rev'd on other grounds,* 142 Tex. 179, 176 S.W.2d 749 (1944).

[16] Esposito v. Henry H. Stambaugh Auditorium Ass'n, 77 N.E.2d 111 (Ohio Ct. App. 1946).

[17] Executive Comm. v. Ferguson, 95 Ga. App. 393, 400, 98 S.E.2d 50, 56 (1957).

[18] Williams v. Randolph Hosp., Inc., 237 N.C. 387, 75 S.E.2d 303 (1953).

[19] Roland v. Catholic Archdiocese, 301 S.W.2d 574 (Ky. 1953).

[20] Siidekum v. Animal Rescue League, 353 Pa. 408, 412, 45 A.2d 59,63 (1946).

[21] Berube v. Salvation Army, Inc., 21 Conn. Supp. 487, 157 A.2d 493 (Super. Ct. 1960).

[22] Esposito v. Henry H. Stambaugh Auditorium Ass'n, *supra* note 16, at 112 (dictum).

[23] Necolayff v. Genesee Hosp., 296 N.Y. 936, 73 N.E.2d 117 (1947) (per curiam).

[24] Berg v. New York Soc'y for the Relief of the Ruptured & Crippled, 1 N.Y.2d 499, 136 N.E.2d 523, 154 N.Y.S.2d 455 (1956).

policy. . . ."[25] The same criticism may properly be leveled at the *Gibbon* and *Blankenship* decisions.

The Ohio court, after having rejected the doctrine of charitable immunity with regard to hospitals,[26] has chosen to retain it in the case of charitable institutions where the injury is to a beneficiary or does not occur in a business activity. The reason for this does not hinge on a reactionary tendency on the part of the court but may rather lie in the statement that the "revision of an established policy should be made only when compelling reasons are set forth. . . ."[27] Such compelling reasons were not set before the court in either case.[28] It is also probable that the course of legislative action in Ohio may have affected its decision.[29]

The Ohio position with regard to charitable immunity, however, is not unique. Courts do not, as a rule, make the transition from nonliability to total liability in one leap. The normal process which follows the adoption of the immunity doctrine entails a constant imposition of exceptions until the immunity ceases to exist.[30] In this light, the *Gibbon* and *Blankenship* decisions would seem to be but a pause in the decisional process inclined toward non-immunity.

"Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing."[31] To deny an individual compensation because he suffered injury at the hands of a charitable organization is "to require him to make an unreasonable contribution to the charity. . . ."[32]

Deportation

Since the Garden of Eden, banishment or exclusion has long been a social lever imposed as punishment for wrongs committed against the justice, modesty, and peace of the social compact. In Rome, banishment came to be punishment for adultery, murder, poisoning, forgery, embezzlement, sacrileges and various other crimes which today are termed crimes of moral turpitude.[1]

The United States provided for banishment in 1798 when it enacted the Alien and Sedition Laws, which gave to the President the power to rid the nation of those dangerous to its peace and safety. The present exclusion law applying to

[25] Bing v. Thunig, 2 N.Y.2d 656, 661, 143 N.E.2d 3, 5, 163 N.Y.S.2d 3, 6 (1957).

[26] Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956).

[27] Gibbon v. YWCA, 170 Ohio St. 280, 288, 164 N.E.2d 563, 569 (1960).

[28] In *Gibbon,* the petition alleged that plaintiff had drowned through the negligence of the defendant but the facts were insufficient and did not support the allegations of negligence. In *Blankenship,* the plaintiffs asked for relief which came within the partial immunity rule set out in *Gibbon.*

[29] The Governor of Ohio has recently vetoed a bill which would have codified the rule set forth in *Gibbon* and the court may have decided to await the outcome of the legislative process. See Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960).

[30] A state which recently followed this process was New Jersey. The doctrine was adopted in D'Amato v. Orange Memorial Hosp., 101 N.J.L. 61, 127 Atl. 340 (1925), was qualified in Simmons v. Wiley Methodist Episcopal Church, 112 N.J.L. 129, 170 Atl. 237 (1934), and totally rejected in Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958). *But see* N.J. STAT. ANN. tit. 2A, §§ 53A-7, 8 (Supp. 1960).

[31] President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 813 (D.C. Cir. 1942).

[32] HARPER, TORTS § 294, at 657 (1933).

[1] Navasky, *Deportation as Punishment,* 27 U.KAN. CITY L. REV. 213, 219 (1959).

aliens was created in the Immigration and Nationality Act of 1952. This section provides, *inter alia:*

> (a) An alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who
> . . .
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective *institution,* for a year or more or who at any time after entry is convicted of two crimes *involving moral turpitude,* not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial. . . .[2]

One of the most evasive and difficult elements to establish in such a proceeding is whether the crime committed is one involving "moral turpitude." Two schools of thought exist in the area: one believes that the term "moral turpitude" is vague and indefinite,[3] and the other maintains that it is well defined and easily understood.[4] In the recent case of *United States ex rel. Sollazzo v. Esperdy,*[5] the United States District Court for the Southern District of New York has expanded the specific list of crimes involving turpitude to include the crime of bribing a participant in an amateur game, stating: "The corrupt intent together with the element of fraud necessarily present in crimes under the genus 'bribery' leaves no room for doubt and compels the conclusion that the crime of bribery of a participant in an amateur game involves moral turpitude."[6]

The concept of "moral turpitude" is several centuries old and does have a positive meaning, although it has never been clearly or certainly defined.[7] All crimes embraced within the Roman conception of the *"crimen falsi"* involve moral turpitude, some elements of which are baseness, vileness, or depravity.[8] It is generally agreed that infamous offenses, crimes *mala in se,* and felonies are three types of offenses involving moral turpitude.[9] However, difficulty arises where a court faced with a specific crime and a "real" defendant must determine whether the particular crime fits within the nebulous bounds of "moral turpitude." It has been said that one reason for the difficulty is that turpitude itself is measured by moral standards which society has set up for itself through the centuries.[10] Standards change; hence turpitude varies according to the contemporaneous community mores. If the crime is not one patently contrary to all moral standards, who shall determine what standards are applicable? With what degree of certainty can they be ascertained?

In addition to the difficulty in applying the concept "moral turpitude" itself, there is also a conflict in the courts as to the proper scope of inquiry into the question of whether a prior conviction was for a crime involving moral turpitude. One view is to

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[2] 8 U.S.C. §1251(a) (4) (1958) (emphasis added).
[3] United States *ex rel.* Berlandi v. Reimer, 30 F. Supp. 767, 768 (S.D.N.Y. 1939), *aff'd,* 113 F.2d 429 (2d Cir. 1940).
[4] Bartos v. United States Dist. Court for Dist. of Neb., 19 F.2d 722, 727 (8th Cir. 1927) (concurring opinion).
[5] 187 F. Supp. 753 (S.D.N.Y. 1960).
[6] *Id.* at 756.
[7] See United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947).
[8] Holloway v. Holloway, 126 Ga. 459, 55 S.E. 191 (1906).
[9] See Bartos v. United States Dist. Court for Dist. of Neb., *supra* note 4, at 725.
[10] United States *ex rel.* Manzella v. Zimmerman, *supra* note 7, at 537.

consider only the inherent nature of the transgression itself rather than the surrounding circumstances.[11] The other would examine circumstances extraneous to the crime itself in making a determination concerning deportation. For example, larceny, no matter how small or insignificant, has been considered a crime involving moral turpitude.[12] But in *Tutrone v. Shaughnessy,*[13] the defendant who, in 1914, at the age of seventeen, had been convicted of petty larceny, was held by a 1958 court not to have committed a crime involving moral turpitude. The court, applying the modern attitude toward juvenile crime, stated that "to hold [petty larceny as moral turpitude in this case] would flout the decent and modern standards for dealing with youthful offenders. . . ."[14] As this case indicates, the confines to which "moral turpitude" will be limited must be left to a judicial process that will expand and contract to meet the changing standards of society.

Such an approach is open to the criticism that it is too elastic, and leaves too much to the discretion of the courts. In *Tillinghast v. Edmead,*[15] a petty larceny by an "ignorant colored domestic" was considered an act of moral turpitude. Yet a minor's possession of burglar tools with an intent to commit the crime of larceny was held not to be such an act.[16] In *United States ex rel. Mazzillo v. Day,*[17] an assault by an intoxicated person was held to constitute moral turpitude, but in *Manzella v. Zimmerman,*[18] jail breaking without the element of violence was not. The intentional taking of human life without justification is a crime involving turpitude.[19] This classification includes manslaughter in the first degree.[20] Second degree manslaughter[21] and homicide resulting from negligent operation of a motor vehicle,[22] however, no matter how negligent, are not considered crimes of moral turpitude. Assault with intent to kill[23] or rob,[24] or assault with a dangerous weapon[25] all involve moral turpitude, but aggravated assault[26] does not indicate it conclusively. As to the latter, the court must weigh all the circumstances disclosed by the record, and determine whether a particular aggravated assault involves moral turpitude.[27] Assault and battery in and of itself will not constitute moral turpitude.[28] This is an exception to the common-law rule that *mala in se* crimes always involved turpitude. Fraud has been held both in federal and state courts to involve moral turpitude, even

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11 United States *ex rel.* Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929).
12 Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).
13 160 F. Supp. 433 (S.D.N.Y. 1958).
14 *Id.* at 436.
15 Tillinghast v. Edmead, *supra* note 12.
16 United States *ex rel.* Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939).
17 15 F.2d 391 (S.D.N.Y. 1926).
18 United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947).
19 Pillisz v. Smith, 46 F.2d 769 (7th Cir. 1931).
20 United States *ex rel.* Allesio v. Day, 42 F.2d 217 (2d Cir. 1930).
21 United States *ex rel.* Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929).
22 *In re* Schiano Di Cola, 7 F. Supp. 194 (D.R.I. 1934).
23 United States *ex rel.* Shladzien v. Warden of E. State Penitentiary, 45 F.2d 204 (E.D. Pa. 1930).
24 See United States *ex rel.* Rizzio v. Kenney, 50 F.2d 418 (D. Conn. 1931).
25 United States *ex rel.* Morlacci v. Smith, 8 F.2d 663 (W.D.N.Y. 1925).
26 United States *ex rel.* Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928).
27 *Ibid.*
28 Ciambelli *ex rel.* Maranci v. Johnson, 12 F.2d 465 (D. Mass. 1926).

without the ingredient of loss;[29] so also, perjury[30] having fraud as its foundation, and bigamy.[31] Conviction of crime which by definition does not necessarily involve moral turpitude is not ground for deportation merely because the alien acted immorally as well.[32] Conversely, when the crime involves moral turpitude, no evidence other than the record can be introduced to show that the defendent was in fact, blameless.[33] In *Forbes v. Brownell,*[34] the plaintiff was excluded from the United States on the grounds that he had committed and been convicted of bigamy. The question of intent was raised by the alien. He contended that in the absence of *mens rea*, moral turpitude was not involved under the Canadian statute. The court agreed, since his conviction under the Canadian law was based upon an honest mistake in remarrying; in effect, no intent, no turpitude.

In 1924, the District Court of Maine[35] classified extortion, bribery, and conspiracy to extort from a public official as crimes involving moral turpitude. Although the concept of bribery has been legislatively expanded to include other than public officials, the gist of the crime has remained the same, *viz.*, the corruption of one having a legal, moral, or public duty. In view of this, the decision in *United States ex rel. Sollazzo v. Esperdy,*[36] holding that the crime of bribery of a participant in an amateur game involves moral turpitude, is not surprising.

The concept of "crime involving moral turpitude," although lacking in legal precision, has been held sufficiently definite to be a constitutional standard for deportation.[37] Aliens are punished under this elastic and indefinite phrase, with a life sentence of banishment, in addition to the punishment which a citizen would suffer for the same act. There is no doubt that the provisions of section 1251 (a)(4) are of a harsh penal character, designed to exclude the hardened, confirmed criminal rather than the occasional ignorant or bewildered alien offender. Under the present wording of the statute, the enforcement of a severe penal sanction is made to depend upon the construction of a notoriously vague and shifting concept. Although the phrase is indeed a venerable one, the outer limits of which have been broadly delineated by much judicial construction, there has been much disagreement, and, in view of the sanctions involved, it would seem that a far more definitive standard is both necessary and equitable.

Such a standard could be established by more definitive legislation. Such legislation might take the form of a precise definition of the phrase "moral turpitude." The difficulty here, aside from the problems inherent in legally defining a moral concept, is in adopting a definition reasonably related to objectivity and yet flexible enough to allow for changing conditions and shifting moral temperaments of the legislature, the judiciary, and the people.

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[29] *E.g.*, Jordan v. De George, 341 U.S. 223 (1951); Bisaillon v. Hogan, 257 F.2d 435 (9th Cir. 1958).
[30] United States *ex rel.* Boraca v. Schlotfeld, 109 F.2d 106 (7th Cir. 1940).
[31] Gonzalez-Martinez v. Landon, 203 F.2d 196 (9th Cir.), *cert. denied,* 345 U.S. 998 (1953).
[32] United States *ex rel.* Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931).
[33] United States *ex rel.* Teper v. Miller, 87 F. Supp. 285 (S.D.N.Y. 1949).
[34] 149 F.Supp. 848 (D.D.C. 1957).
[35] *Ex parte* Tozier, 2 F.2d 268 (1924), *aff'd sub nom.*, Howes v. Tozer, 3 F.2d 849 (1st Cir. 1925).
[36] 187 F. Supp. 753 (S.D.N.Y. 1960).
[37] Jordan v. De George, 341 U.S. 223 (1951).

A more practical approach might be the abandonment of the phrase in question altogether and the substitution of a detailed list of the actual crimes necessary to effect banishment. The requisite flexibility of such an approach would, of course, be provided by subsequent legislative amendments including or excluding crimes. This identical method has proved both feasible and practical in other similar areas, notably that of international extradition treaties.[38]

[38] See United States v. Raucher, 119 U.S. 407 (1886).