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COMMITTEEMAN: Why did you rape her?
APPLICANT: Well, the opportunity presented itself to me and I took it. —*from an interview before a Character and Fitness Subcommittee in Detroit.*

OUGHT A SUBCOMMITTEE be divided on the problem presented by the case of the confessed rapist? Is it reasonable to say that "old-fashioned notions of sexual morality ought go by the board" and therefore the applicant should be approved? Or is it more sensible to conclude that what the applicant did to the girl he might well do with his client's money or reputation, and therefore the applicant ought be disapproved?

We have been searching for some basic information on the establishment of good moral character. We find precious little which is of any practical use to either student applicants or Character and Fitness Committees. All the writers are insistent that good moral character must be proved. They all presume two things: first, that since student applicants are aware of their own characters in fact, there is no problem of communication (i.e., the student ought without difficulty be able to convince the committee of the fact which appears to him so obvious, that he *is* of good moral character), a presumption which we find violent, and, second, that Character and Fitness Committees are possessed of tremendous intuition plus a large, unclouded crystal ball, a presumption which we likewise find violent.

Accordingly, we have gone into the authorities a little bit, have collated what we have found and added some comments. We trust that this attempt will indicate the necessity of further research on the problem,

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and that what follows will elicit comment from those who disagree.

Section 601.52, Michigan Compiled Laws 1948 (Stat. Ann. §27.72) provides, in part:

> Any person . . . who has the general education prescribed . . . and who is of good moral character, may be admitted to practice as an attorney and counselor in all the courts of record of this state . . . [provided that he is able to] . . . produce the certificate . . . of . . . the board of examiners, that he possesses sufficient learning in the law, good moral character and ability to enable him to practice properly . . . .

On November 27, 1953, the Supreme Court amended State Bar Rule 8 to provide that the Bar Commissioners should appoint a State Committee on Character and Fitness, and added a new Rule 16, providing for the duties of such Committee and for the appointment of subcommittees in each Congressional district, and specifying:

> It shall be the duty of the several subcommittees under the supervision and direction of the State Committee, to investigate the moral character and requisite qualifications (other than scholastic) of student applicants for admission to the bar, . . . in sufficient time so that . . . report may be made to the board of law examiners within the time limit set by such board.[1]

To conform to this new State Bar Rule, the Board of Law Examiners thereupon amended its own rule 3 to read, in part:

> (a) Applicants will be obliged to satisfy the Board that they possess good moral character and the requisite qualifications for the practice of the law.
>
> (b) Each applicant . . . shall present himself for personal interview [before the appropriate subcommittee on Character and Fitness of the State Bar of Michigan]. . . .
>
> The burden of complying with these requirements and of proving good moral character and fitness is on the applicant. . . .

It will be noted that while the applicants are given the duty of proving to the subcommittees that they possess good moral character and "requisite qualifications (other than scholastic)," and the subcommittees are charged with reporting, in effect, whether the applicants have sustained the burden of proof, no criteria are provided. It will not escape notice that "requisite qualifications (other than scholastic)" is language not found in the statute.

The statute and rules would seem to pose more problems than they answer. Who is a person of good moral character? What standards ought a subcommittee use in judging an applicant? Can the rule have a wider scope than the statute? What are "requisite qualifications (other than scholastic)"? Is due process involved? What ought an applicant be prepared to prove to a subcommittee?

Who Is a Person of Good Moral Character? What Standards Ought a Subcommittee Use in Judging an Applicant?

Alexander Pope wrote:

The good must merit God's peculiar care;
But who, but God, can tell us
who they are?[2]

[1] 337 Mich. xxxix.

[2] ESSAY ON MAN, epis. iv. The Michigan Legislature knew the answer, a generation ago. Act 163, P.A. 1913, set up standards for admission to the Bar. The usual provision for good moral character was included. Section 5 of the Act permitted "the production of a diploma authenticated by the proper officers and duly sealed by the said University of Michigan, Detroit College of Law or University of Detroit" to be used as irrefutable evidence not only of legal learning, but of the required good moral character.

Unfortunately, neither applicants nor subcommittees are gifted with the omniscience of the Almighty, and hence need some human standard. The standard cannot vary, else an applicant, learning that the subcommittee in his district took a dim view of certain extra-legal activities, could, by the expedient of changing his address to a Congressional district whose subcommittee had different ideas, defeat the very purpose of the statute and rules.

There is little solace to be found in the reported decisions, although it is instructive to consider cases arising under our naturalization laws,[3] which require good moral character as a prerequisite to citizenship.

The problem has puzzled the federal judiciary. Judge Charles Edward Wyzanski, Jr., a U. S. District Judge in Massachusetts, considered it some ten years ago. He wrote:

> Ordinarily, if Congress leaves a case to a judge to decide, it expects him to appraise the facts by technical criteria. He has not the freedom which a jury so often exercises to disregard the letter of the law and apply the sentiment of the community. But there are exceptional cases in which the judge enjoys a broader scope. By using in the Nationality Act a phrase so popular as "good moral character," Congress seems to have invited the judges to concern themselves not only with the technicalities of the criminal law, but also with the norms of society and the way average men of good will act, in short with what Eugen Ehrlich in Fundamental Principles of the Sociology of Law (translated by W. L. Moll, Harvard University Press, 1936), p. 501, calls "the ascertainment of the living law." *Cf.* note, 43 Harv. L. Rev. 117.[4]

But if "the norms of society and the way average men of good will act" is to be our standard, where are we? What constitutes "society"? Who is an "average man of good will"? If a lynch mob, comprising all the adult population of a town, and acting unanimously, should kill its victim, would the "norm" of that "society" be properly applied to a member of the mob who later applied for admission to the Bar?[5] Or must

[3] 66 STAT. 166, 8 U.S.C.A. § 1101 (1952). The requirement of "good moral character" has been in the law for many years.

[4] Petition of R....., 56 Fed. Supp. 969, 971 (D.C., Mass., 1944). Ehrlich, *op. cit.*, p. 493, defines "the living law" as "the law which dominates life itself even though it has not been posited in legal propositions." He goes on, at p. 502, to suggest: "The knowledge of the living law has an independent value, and this consists in the fact that it constitutes the foundation of the legal order of human society." The author had previously noted, at p. 493, that the source of our knowledge of "the living law" was "first, the modern legal document; secondly, direct observation of life, of commerce, of custom and usages and of all associations not only of those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved." The writer of the cited note in the Harvard Law Review speaks, at p. 121, of the "apocalyptic criteria of individual judges."

[5] This is not so fantastic as it may sound. There was a disbarment case on similar facts. See *Ex parte* Wall, 107 U.S. 265 (1882), which had to do with a lawyer who joined a lynch mob in Tampa, Florida, during the noon recess of the U. S. District Court. The victim, not a negro, but a Scandinavian sailor alleged to have insulted Southern womanhood, was hanged from a tree outside the courtroom window. Mr. Justice Bradley, for the majority, affirmed the disbarment ordered by the court below, quoting Lord Mansfield: "The question is whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion." Mr. Justice Field dissented passionately, emphasizing that Wall was being disbarred for allegedly having committed an indictable offense which was not connected with his professional conduct, and for which he had not been tried and convicted. Wall was never disbarred in the state courts of Florida, and lived to become a state court judge, apparently well thought of.

"society" be Puritan? Or must "society" be state-wide or national?

Olin E. Watts, Chairman of the Florida Board of Law Examiners, suggests that "the applicant's moral fitness must be of a higher order than moral fitness as usually defined and used in common parlance."[6] But what does he mean? And even though we might emotionally agree with Mr. Watts, how can we apply his norm?

Judge Learned Hand, who pondered the problem for many years in naturalization cases, has observed:

> While we must not, indeed, substitute our personal notions as the standard, it is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel.[7]

A little later, he put it another way:

> We must try to appraise the moral repugnance of the ordinary man to the conduct in question; not what an ideal citizen would feel.[8]

Does this mean that good moral character is a mere matter of "feeling"? Does this mean that the emotions rather than reason must control? Is this what Holmes meant when he said that many an honest and

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[6] XXIII THE BAR EXAMINER 99, 100 (July, 1954).

[7] U.S. *ex rel.* Iorio v. Day, 34 F. 2d 920, 921 (2d Cir. 1929).

[8] U.S. *ex rel.* Berlandi v. Reimer, 113 F. 2d 429, 431 (2d Cir. 1940). Use of this ground once brought about an interesting conflict in the same court between Hand and Jerome Frank. Repouille v. U.S., 165 F. 2d 152 (2d Cir. 1947), was an appeal from a lower court finding that Repouille was of good moral character (and hence entitled to citizenship, having fulfilled the other prerequisites) despite the fact that, less than five years prior to the filing of his petition, he had killed his son, who was mentally and physically defective. The specific problem before the Court was whether euthanasia was a crime of sufficient moral turpitude to debar the person committing it from citizenship on the ground that such person was not of good moral character. Hand, for the majority (consisting of himself and Judge Augustus N. Hand) found that Repouille was *not* of good moral character, and reversed the trial judge, saying that only a minority of our people would agree that euthanasia was morally justifiable, and concluding:

> Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion. *Id.* at 153.

Frank retorted:

> But the courts are not utterly helpless; such judicial impotence has its limits. Especially when an issue importantly affecting a man's life is involved, it seems to me that we need not, and ought not, resort to our mere unchecked surmises, remaining wholly (to quote my colleagues' words) "without means of verifying our conclusions." Because court judgments are the most solemn kind of governmental acts—backed up as they are, if necessary, by the armed force of the government—they should, I think, have a more solid foundation. I see no good reason why a man's rights should be jeopardized by judges' needless lack of knowledge. *Id.* at 154.

The Hands had suggested that "the generally accepted moral conventions of the time" ought govern. Frank replied that "where we lack the means of determining present-day public reactions, we should remand [with instructions to afford] the opportunity to bring to the judge's attention reliable information on the subject, which he may supplement in any appropriate way." It would thus appear, as suggested by a Note in 16 UNIVERSITY OF CHICAGO LAW REVIEW 138, 139 (1948), that "[b]y either technique the judge is ineligible to make the final decision." The note-writer, after considering the problems raised by the conflict between Frank and the Hands, concludes:

> In the last analysis, any dependence by the judge on a standard outside himself in determining the question of good moral character in naturalization cases is likely to be unwise when not altogether futile.

Whether pantheism or subjectivism is suggested, *quaere*. "Modern men," says Walter Lippmann, "have a low capacity to believe in the invisible, the intangible, and the imponderable."

sensible judgment is not arbitrary but, rather, expresses

> an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions — impressions which may lie beneath consciousness without losing their worth?[9]

Holmes has also written that "words express whatever meaning convention has attached to them."[10] Learned Hand has said, "It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."[11] Edmond Cahn has suggested that ascertainment of good moral character calls for judgment without benefit of rules.[12] Are all of these people right? Can any of them be right? What is "right"? Are there any rules? Must we rely upon our "feelings"? If we have standards and consult them, is such consultation evidence of immaturity or lack of development? Must we follow the agnosticism of Hand, who has laid it down that:

> Nor is it possible to make use of general principles, for almost every moral situation is unique; and no one could be sure how far the distinguishing features of each case would be morally relevant to one person and not to another. 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.[13]

THE PUBLIC PHILOSOPHY 113 (1955). In the same volume he notes (pp. 104-5) that for more than two thousand years European thought has been acted upon by the idea that the rational faculties of man can produce a common conception of law and order which possesses a universal validity. He observes "[t]hat the idea is not mere moonshine and cobwebs is attested by history." The judges of the Second Circuit would seem to be living proof of the continuation of judicial abdication dating at least as far back as Roman times (*infra* note 12) and of the validity of the remarks of Solicitor-General James M. Beck, delivered at the 1921 American Bar Association Convention in Cincinnati. Mr. Beck's general subject was *The Spirit of Lawlessness*. He spoke of

> the general revolt against the authority of the past—a revolt that can be measured by the change in the fundamental presumption of men with respect to the value of human experience.

He went on to say:

> In all former ages, all that was in the past was presumptively true, and the burden was upon him who sought to change it. Today, the human mind apparently regards the lessons of the past as presumptively false—and the burden is upon him who seeks to invoke them. 46 AMER. BAR ASS'N REPORTS 167, 172 (1921).

George Santayana was certainly right when he remarked, in his THE LIFE OF REASON: "Those who cannot remember the past are condemned to repeat it."

[9] C. B. & Q. Railway Co. v. Babcock, 204 U.S. 585, 598 (1907).

[10] Trimble v. Seattle, 231 U.S. 683, 688 (1914).

[11] Cabell v. Markham, 148 F. 2d 737, 739 (2d Cir. 1945).

[12] 51 COL. L. REV. 838, 850 (1951). The notion that making a conclusion on the subject is unjudicial is hardly new. Cicero relates a tale (DE OFFICIIS, Book III, cap. xix) told him by his own father to the effect that one Pinthia, described as *equiti Romano sane honesto* (ought we translate "of good moral character"?) laid a wager that he could establish in court that he was a good man. Fimbria, the judge, declined to rule, saying that he would be forced either to rob a reputable man of his good name (should he find against Pinthia) or to make a judicial finding on a matter which ought be established by the performance of countless duties and the possession of praiseworthy qualities without number *(cum ea res innumerabilibus officiis et laudibus contineretur)*. Cicero's comment was that it was a shame that philosophers should remain in doubt on moral questions concerning which even peasants were certain. *(Haec non turpe est dubitare philosophos, quae ne rustici quidem dubitent?)*

[13] Johnson v. U.S., 186 F. 2d 588, 590 (2d

Isn't all of this but a diversion? Isn't all of this evidence of lack of real thought[14] rather than of scholarly thinking? When people become dazzled by their own cleverness, and sycophants build legends about them even during their lifetimes, has not the children's tale of The Emperor's New Clothes come alive? And isn't there real danger that the confusion and obscurity of thought promoted by the many years' vapid outpourings, of which the foregoing constitute but a tiny sample, can be taken advantage of by undesirables who find only too true the complaint of Bassanio that

> *In law, what plea so tainted and corrupt*
> *But, being season'd with a gracious voice,*
> *Obscures the show of evil?*[15]

Human experience, within the pedigree of our own law, has shown that the integrity of character of members of the bar is a matter of public concern.[16] The persistent use of the adjective "good" in describing the requisites for a lawyer's character evidences a continuity of thought on the prob-

Cir. 1951). What effect pre-poll propaganda might have on the result is not considered. Whether Judge Hand would, in theory, accept a mental hospital as a voting unit, and permit the inmates and the staff to ballot on the sanity of the staff, and abide by the result, is not clear. Two years prior to the Johnson case just cited, in Schmidt v. U.S., 177 F. 2d 450, 451 (2d Cir. 1949), he suggested that:

> Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate than our own. The situation is one in which to proceed by any available method would not be more likely to satisfy the impalpable standard, deliberately chosen, than that we adopted in the foregoing cases: that is, resort to our own conjecture, fallible as we recognize it to be.... We do not believe that discussion will make our conclusion more persuasive....

It should not be forgotten that the author of this opinion is the author of THE SPIRIT OF LIBERTY and is held in extraordinarily high esteem. In an article which was published in The New York Times Magazine for February 6, 1955, entitled "A Plea for the Freedom of Dissent," Judge Hand concludes that, since absolute truth is impossible to attain, it is irrational to speak of principles when, deep down, we all realize that our "principles" are nothing more than "the best postulates so far attainable" and not "eternal verities" at all. See, in this connection, also, the dissent of Mr. Justice Jackson, in Jordan v. DeGeorge, 341 U.S. 223, 237-8 (1951): "Can we accept 'the moral standards that prevail in contemporary society' as a sufficiently definite standard for the purposes of the [Immigration] Act?... How should we ascertain the moral sentiments of masses of persons on any better basis than a guess?" The Justice goes on to comment on "what treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case" and then observes: "We usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it. In fact, what better ground is there? Uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds." He concludes with a footnote: "The vice of leaving statutes that inflict penalties so vague in definition that they throw the judge in each case back upon his own notions is the unconscious tendency to

> *Compound for sins they are inclined to,*
> *By damning those they have no mind to.*
> —Butler, 1 HUDIBRAS (1772 ed.) 28."

[14] In Hand's New York Times Magazine article, *supra* note 13, he describes "the intolerable labor of thought" as being "that most distasteful of all our activities."

[15] MERCHANT OF VENICE, Act III, scene ii, lines 75-77.

[16] "Every Bar in the world," says Herman Cohen in 30 LAW QUARTERLY REV. 464 (1914), "seems to derive its ultimate origin from Rome. In this country [i. e., England] the chain is Rome, Gaul, France, Normandy, England." That we are related, legally, to England, needs no authority for verification. Good moral char-

acter has been a requisite for all members of the bar in all countries, across the miles and across the centuries. Were Clyde Pharr's project of translating all Roman law into modern English complete [Princeton published his THEODOSIAN CODE in 1952], we would be able to indicate the Roman basis for the point more easily. At present, the texts available have not been properly collated, and secondary authority only is at hand. For post-Roman matters, MONUMENTA GERMANIAE HISTORICA, LEGES, is considered usually reliable, although certainly secondary and at times tertiary. In it we find mention of the profession of advocate as far back as the first years of the ninth century, under Charlemagne. And we read that "no one ought be admitted therein but men mild, pacific, fearing God and loving justice." Why should we care, especially since we are discussing a very practical and very modern problem? A recent commentator has put it:

> Medieval ideas of law have played an important part in the modern world. Much of modern law rests on medieval rules. Courts, always interested in the continuity and self-consistency of law—and sometimes hostile to the policies of legislative majorities—have constantly reinterpreted enacted law to conform with the law of the past, and at times have also called on natural law to strengthen their decisions.

See 1 LEWIS, MEDIEVAL POLITICAL IDEAS 31 (1954). There is another good reason for caring about this Carlovingian rule. Carlyle has pointed out (1 MEDIAEVAL POLITICAL THEORY IN THE WEST 238) that Charlemagne did not make laws by his own authority, this being one great difference between the Roman Empire and the Holy Roman Empire. Charlemagne required the consent and advice of his wise men, and, in some more or less vague sense, of the whole nation. This judgment, Carlyle tells us, appears to be "almost universally accepted." The available authority would seem to indicate that the normal method of promulgating new laws was to send a copy of the proposal to the local officials and have it read in the public assembly to the upper classes, who, if they agreed, would sign and seal the document (doubtless as a pledge of future obedience). Messengers would then be sent to inquire of the common people concerning the proposed changes, and, *after all had agreed,* their signatures or other authentication would be appended. This seems a little difficult to believe, from all that we know of "freedom" in ninth century France, but the text is plain: "Ut populus interrogetur de capitulis quae in lege noviter addita sunt; et postquam omnes consenserint, subscriptiones et manufirmationes in ipsis capitulis faciant." See MONUMENTA GERMANIAE HISTORICA, LEGES, sec. ii, vol. i, no. 40. *Cf.* also the remark of Professor Charles H. McIlwain, in 16 SPECULUM 275, that "sometimes the present-day exhibitions of this ignorance [of the middle ages] become almost grotesque." If, then, by common consent in the ninth century, a lawyer should be "mild, pacific, fearing God and loving justice" (the entire idea of which could just as well be translated "of good moral character"), might it not be reasonable to conclude that there was general recognition, 1150 years ago, that the public weal demanded a Bar composed of men of probity? Moving across the Channel, we find that in England after the Conquest, most of the lawyers were clerics. For all of the libels which have been perpetrated on the clergy, the fact doubtless is that, by and large, clergymen were of good moral character. It might normally be presumed that a churchman would have rather higher standards of personal morality than, say, a serf, or, say, a tavernkeeper. It was not until the appointment of the first permanent judges to sit in Westminster, in 1179, that there came to be any real need for lawyers as a class, for it was in that year that the Third Lateran Council, by its Canon 12, forbade clerics to "act as advocates in secular courts," with certain exceptions. The ultimate effect of this, of course, was to laicize the Bar. Three generations later, in 1280, the Bar had sunk so low that the City of London had to set up, for the protection of the public, certain intellectual standards. And while we cannot be certain as to the cause of this decline, and although we know that the argument *post hoc ergo propter hoc* is fallacious, the fact is that the decline coincided with the laity taking over bench and bar from the clergy. Pollock and Maitland are rather definite in their opinion, which is found in I HISTORY OF ENGLISH LAW 112:

> English law was administered by the self-same men who were "the judges ordinary" of the church's courts, men who were bound to be, at least in some measure, learned in the canon law... Blackstone's picture of a nation divided into two parties, "the bishops and clergy" on the one side

> contending for their foreign jurisprudence, "the nobility and the laity" on the other side adhering "with equal pertinacity to the old common law" is not a true one. [Bl. Comm., i, 19] It is by "popish clergymen" that our English common law is converted from a rude mass of customs into an articulate system, and when the "popish clergymen," yielding at length to the pope's commands, no longer sit as the principal justices of the King's Court, the golden age of the common law is over.

For the text of the London Ordinance of 1280, see LIBER CUSTUMARUM, F.205 b., p. 280 in the Rolls Series edition (RERUM BRITANNICARUM MEDII AEVI SCRIPTORES), published in 1860 by Longmans in London. The basic complaint was ignorance, but it is to be noted that the mayor and the aldermen, who were to conduct the equivalent of a bar examination, were assisted by *autres prodeshommes de la cite* and that the ordinance defined the duties of the "counter" (read "pleader") so as to include the gist of canons 6, 10, and 44 of the current Canons of Professional Ethics. The ordinance not only provides that the Bar applicant must "reasonably understand" his profession, but also requires that he must know how "becomingly" (*avenauntment* is the word used) to manage the business of a client. It may reasonably be presumed that the mayor and the aldermen would have been familiar with the technical learning required as a minimum; would it be unreasonable to presume further that the *prodeshommes* were forerunners of our character and fitness committees? Is there no moral overtone in *avenauntment?* And, although what prompted the ordinance was the sad state of affairs attributable to the ignorance of the Bar, there was included a definite attempt to regulate conduct, with penalties of suspension from practice. And in the MIRROR OF JUSTICES, that thirteenth-century document of doubtful parentage, we read at p. 88 that a person who had been excommunicated could no longer serve as an attorney. Here, certainly, is evidence that the moral character of the Bar is seriously considered. But by the beginning of the fifteenth century, things had gone bad again, and the Bar was once more ignorant and unscrupulous. Hence, in 1402, by statute, 4 HENRY IV, cap. xviii, all licenses to practice law were cancelled, and provision made for the readmission of persons "that be good and virtuous, and of good fame." It is stipulated that "if any of the said attorneys do die, or do cease [one might think "retire," but the text reads: *'si aucun de ditz attourneez devie ou cesse'*], the justices for the time being by their discretion shall make another in his place, which is a virtuous man and learned." From this statute forward, even during that period in our own history when reaction to learning brought about the rule that anyone could be a lawyer, the requirement of good moral character as a condition precedent, has been standard. The need for good moral character in lawyers in today's society has seldom been better expressed than by Harold Lasswell. At p. 27 of his volume, ANALYSIS OF POLITICAL BEHAVIOR (1948) he lays it down that the modern lawyer is

> the one indispensable adviser of every responsible policy-maker of our society — whether we speak of the head of a government department or agency, of the executive of a corporation or labor union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser the lawyer, when informing his policy-maker of what he can or cannot legally do, is in an unassailably strategic position to influence, if not create, policy.

Lasswell continues: "for better or worse, our decision-makers and our lawyers are bound together in a relation of dependence or of identity." The books are full of cases concerning lawyers in high places who influenced, if they did not create, policy. The books also contain cases indicating the fall of unscrupulous or traitorous or unprincipled lawyers who had been in policy-affecting positions. That it was a character defect which made these lawyers unprincipled or traitorous or unscrupulous is a truism, but one which it is valuable to repeat in these days when Chief Justices pontificate that there is nothing more certain in modern society than the principle that there are no absolutes (Dennis v. U.S., 341 U.S. 494, 508 [1951]). The effect of a "learned" profession without integrity of character in its members would be chaos. Now if public concern has demanded that members of the Bar be persons with integrity of character, and such is the law, we have added verification of the wisdom of Dr. Samuel Johnson's remark (found in I HILL, JOHNSONIAN MISCELLANIES 223 [1897]) that "the law is the last result of human wisdom acting upon human experience for the benefit of the public."

lem. We make bold to say that it evidences a continuity of standard.

Who is a good man? Horace asked the question some years before the birth of Christ, and his answer may be of some help. He decided that a good man was a law-abiding traditionalist.[17] It would be difficult to find a law-abiding traditionalist who would not satisfy an average or ordinary person that he was "good." Does this mean that the definition is a proper one? Not necessarily. It probably would not satisfy Mr. Watts of Florida. Could one be a law-abiding traditionalist and be evil, *not* of good moral character? It is a little difficult to see how. Is being a traditionalist essential to being a good man? Hardly. It seems probable that all law-abiding traditionalists would be good men, but it by no means follows that all good men are law-abiding traditionalists. It may follow that all good men are law-abiding—at least to the point where the maxim *cessante ratione ipsa lex cessat* comes into operation, or the conditions described in the opening portions of the Declaration of Independence are in effect—but here we get into problems of semantics.[18]

But if we say that the good man must be a law-abiding traditionalist, do we mean that there must be a uniformity of mind? If so, how much? Is that uniformity which comes from adjustment of the individual to the group in which he lives a prerequisite to being good? Is it a prerequisite to being a lawyer? If complete adjustment should be reached, would we not be well on the road to the Orwellian state so terrifyingly described in *1984*? And if we cannot go so far as "group-think," will not uniformity of mind produce a single outlook, a one-party state and its concomitant, the brutality-ridden dictatorship the possibility of which seems to trouble so many of our thoughtful citizens? No, we can hardly push it that far. Our entire society, however, is based upon a set of generally-accepted norms, a group of common ideals, a certain amount of mutual trust. This does not mean that we are all conformists, except in a very limited

[17] In Horace's EPISTLES, Book I, epis. xvi, we read: "Vir bonus est quis? Qui consulta patrum, qui leges iuraque servat." We have used our own oversimplified translation in the text, thus avoiding the problem of distinguishing between *ius* and *lex* and of explaining *consulta patrum*, which is usually translated "the decrees" or "the customs of our forefathers." We disagree, because there is a standard Latin phrase for such thought *(mos maiorum)* and Horace didn't use it. It would seem sounder to translate *consulta patrum* as "decrees of the senate." This would make it correspond, in a fashion, to modern case law, and with *ius* the natural law and *lex* the statutory enactments, we seem to have covered the field. That the concept of legal good in Rome was not considered high, *cf.* Seneca's remark to Lucilius in 64 A.D. (epis. xxxiv, sec. iii): "Being good according to law isn't much of a problem." *(Exiguum est ad legem bonum esse.)*

[18] We are accustomed to think of the signers of the Declaration of Independence as patriots; the British Government under George III had other ideas, and unquestionably the signers were not law-abiding, so far as the British were concerned. Certainly, in a narrow sense, they were not traditionalists. Yet who today will say that they were not good men? And, for the matter of that, who today will say that the law-abiding royalists of the time were not good men also? And could we consult the majority, as Hand has suggested, where would we be? The British, it will be remembered, had a large fifth column, raised about 25,000 *volunteers* in the province of New York alone, and at the end of hostilities there were 60,000 persons in that province: 30,000 civilians and a like number of British troops, a great number of the civilians being Americans dedicated to the loyalist cause. Who says we can settle these things by majority vote?

sense.[19] Complete uniformity would produce stagnation, and progress, as Edgar Ansel Mowrer has noted, "is the work of the dissatisfied."[20]

To conclude, then, we disagree with Hand when he says that it is impossible to make use of general principles, but concur with him when he says that the standard should be something other than "our personal notions." For all of his agnosticism, Hand agrees that there must be a standard. If there were no standard, or if the standard were unknown or unknowable, the subcommittees could not act, for, with no standards, their decisions would necessarily be arbitrary.[21] Approval of any applicant would be just as arbitrary and capricious as rejection of any. The performance of the duty assigned to the subcommittees entails judgments, involves decisions. We recognize that, since "good" is one of the primary ideas which defy precise definition, any definition of any concept which itself involves use of the word "good" will not find everyone in accord therewith. We recognize also that the subcommittees on character and fitness are not engaged in a philosophical seminar, but must confound the theorists and make specific decisions in concrete cases based upon the facts presented to them. As a practical matter, decisions cannot be made without guiding principles any more than business can be transacted without money. Even as the money involved in a transaction need not change hands in the form of coin, so the principles involved in a decision need not be specifically expressed: to deny the existence of money because it happened that money in its primary form was not used in a transaction would be as sensible as to deny the existence of principles because, in a given decision, they happened to be unexpressed. The subcommittees making the decisions cannot, in Archibald MacLeish's phrase, be refugees from consequences, exiles from the responsibilities of moral

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[19] Our conformity to convention, for example, keeps us to the right of the road, but keeps our English friends to the left. No one on either side of the Atlantic claims that motorists are sheep because of this. We all agree that two and two make four, and no one cries that the schools' insistence upon this rather old-fashioned notion smothers free thought or has deprived our children of their precious birthright of freedom of speech or thought in the field of arithmetic. No one argued with Holmes when he said that freedom of speech did not include the right to scream "Fire!" in a crowded theatre. The "majority" which prevails in elections is usually an actual minority of the persons eligible to vote. Yet losing candidates do not contest election results on such a basis with a claim that it would be "unfair" to put them out of office under the circumstances. The motto attributed to everyone from St. Augustine to Luther is apropos:

In essentiis unitas;
In dubiis libertas;
In omnibus caritas.

[20] XXXVIII THE SATURDAY REVIEW, No. 6, p. 40 (February 5, 1955).

[21] This introduces a related problem: Is it proper for a subcommittee to act without there being any antecedent adoption by the Supreme Court or the State Board of Law Examiners of specific regulations or standards for governing what shall constitute "good moral character"? There are constitutional connotations in such a question. An exhaustive search by the editors of A.L.R. uncovered but one case in point, Bell v. Regents, 295 N.Y. 101, 65 N.E. 2d 184, 163 A.L.R. 900 (1946). The case held that antecedent regulation was unnecessary. Counsel for Bell included Lloyd Paul Stryker. No petition for certiorari was ever filed. It seems reasonable to presume, therefore, that Stryker determined that even the dissenting opinion (which was sprinkled with such phrases as "doubtful constitutionality," "assignment or delegation of quasi-judicial power," "unfettered discretion," and the like) was insufficient, in view of the lack of other authority, to warrant attempting to take the case up.

choice.[22] If the decisions of the subcommittees are made arbitrarily and capriciously, they are rightly subject to criticism, whether due process be involved or not. If the decisions of the subcommittees are based on principle, they are not subject to valid criticism.

We submit that the general principles of what has come to be known as Judaeo-Christian morality, which embodies the natural law as recognized by all men,[23] must be the general principles by which an applicant must live if he is to be considered of good moral character.[24] This is not a foggy notion, except for those who would want to make it a foggy notion. We understand more than we can express. Intuitive cognition has not had the psychological attention which it deserves.

Horace's "law-abiding traditionalist," although not completely satisfactory, is probably as close as we are going to be able to come, in a notoriously imprecise tongue abroad in a semantically-imperfect world, to reducing the concept of the man of good moral character to a few words. Whatever version of the Decalogue he chooses, the man of good moral character will follow the Ten Commandments and that law which, in the words of St. Paul, is "graven upon the heart of man."[25]

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22 That the subcommittees must indeed have been intended to have been considered responsible for the consequences of their decisions would appear from the inclusion, in the affidavit of history, of a general release by the applicant of the Committee "from all liabilities whatsoever." The MacLeish phrase comes from his slender volume THE IRRESPONSIBLES.

23 That this is a truism and not mere wishful thinking, see the volumes published by the University of Notre Dame Press, annually from 1949 through 1953, entitled NATURAL LAW INSTITUTE PROCEEDINGS.

24 "It would indeed be a travesty," said the Appellate Division of the Supreme Court of New York, in suspending an attorney from practice for a year because he had a monetary interest in a social club in which card games for money stakes were played, "if the Court were powerless to restrain rogues from parading as its officers simply because they were clever enough to divorce their professional lives from their private lives." *In re* Fischer, 231 App. Div. 193, 247 N.Y. Supp. 168 (1930).

25 Romans ii, 15. For those who would insist that we have concluded with practically useless generalities, we can offer two comments, 2200 years apart, and neither by a Christian. The first is by Aristotle. In his NICOMACHEAN ETHICS, Book I, iii, 4, he wrote:

> It is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject permits; it is equally unreasonable to accept probable conclusions from a mathematician and to demand from a rhetorician scientific proofs.

The second is by Holmes. (That he did not consider himself a Christian, see his own remarks, I HOLMES-LASKI LETTERS 654, II *id.* 824.) On January 17, 1899, he delivered an address to the New York State Bar Association. It was reprinted in 12 HARV. L. REV. 443 (1899) under the title *Law in Science and Science in Law.* At page 457 he says:

> When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discrimination. In some regions of conduct of a special sort we have to be informed of facts which we do not know before we can draw our lines intelligently, and so, as we get near the dividing point, we call in the jury.