Sex and the Immigration Laws

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INTRODUCTION

In the wake of the recent revelation of sexual escapades on Capitol Hill, it is interesting to observe the tolerance displayed by Congressmen, constituents, and columnists alike. The major question concerning the extracurricular activities of the female congressional aides involved has been, not "Does she or doesn't she?", but rather "Does she or doesn't she type?" The focal point of inquiry is whether the Government has in fact been harmed—that is, whether there has been official use of the taxpayers' money by Congressmen for their own personal, nongovernmental purposes. Apart from that, as one columnist noted: "Most Americans are dutiful liberals now, in the sense that they believe that what consenting adults, including public figures, do behind closed doors and drawn shades is not public business, if not done at public expense."1 Some commentators have argued that Congressmen are only human, after all, and should be judged by the same standards of moral conduct as

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* Editor, Interpreter Releases, American Council for Nationalities Service. J.D., Rutgers University Law School. Former Chairman, Board of Immigration Appeals, United States Department of Justice, 1968-74. The author wishes to acknowledge the contribution of Ms. Ann Burke, Editorial Assistant, Interpreter Releases, in researching some of the material included in this article.
are generally applied. However, this brings to the fore the issue of exactly what the general moral standards are and how they are ascertained.

A less tolerant attitude has been evinced by Congress toward aliens seeking to enter the United States, to remain here permanently, and to become naturalized. Congress has through the years exhibited in legislation a deep-rooted interest in the sex lives and sexual activities of aliens and has demanded increasingly high standards of conduct. As a result, Government officials engaged in the administration and enforcement of the immigration and nationality laws have frequently believed themselves duty bound to inquire into the most intimate details of the sexual practices of those hapless aliens who appear before them, although these are matters which most citizens would regard as purely personal and private.

Some of these inquiries are mandated by specific statutory references to proscribed sexual activities or conditions, such as the provision excluding from admission to the United States aliens “afflicted with . . . sexual deviation.” Other probing questions are based on statutory provisions directing the exclusion or deportation of aliens convicted of crimes “involving moral turpitude,” many of which are sexual. Various benefits under the immigration, as well as the naturalization laws, are predicated on a showing of “good moral character” for a prescribed period of time. This amorphous standard is further complicated by a provision precluding such a showing in the case of an alien who “during such period has committed adul-

2. See Newsweek, June 14, 1976, at 18: “The private life of the Ohio Democrat was nobody’s business but his own. The real issue was whether he had paid for it out of the taxpayer’s pocket.”

See Germond, Washington Star, June 23, 1976, pt. A, at 3, col. 1: “What this all means is that the politicians in the ‘great congressional sex scandals’ should be judged just as anyone else in our society.”

“Prior to the time when I was married and for an extended period of time, I did have a relationship with Elizabeth Ray. I was legally separated and single.” (emphasis added). 122 Cong. Rec. H 4895 (daily ed. May 25, 1976) (remarks of Representative Wayne Hayes).


4. Id. §§ 212(a)-(9) & 241(a) (4), 8 U.S.C. §§ 1182(a) (9) & 1251(a) (4). Section 212(a)(9) excludes not only aliens convicted of such crimes but also “aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime”...

5. E.g., id. § 244(a), 8 U.S.C. § 1254(a) (suspension of deportation); id. § 244(e), 8 U.S.C. § 1254(e) (voluntary departure in lieu of deportation); id. § 249, 8 U.S.C. § 1259 (registry); id. § 316(a), 8 U.S.C. § 1427(a) (judicial naturalization).
tery." An alien’s domestic activities may also come into focus if a question is raised about the bona fides of a marriage through which priority is sought in the issuance of an immigrant visa.

Justice Cardozo, though dedicated to stability in the law, noted

that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.

However, as will be seen, the hands of both judges and administrators can be effectively tied by legislative enactments which no longer reflect the mores of the day.

This article will examine the various statutory provisions which have provoked official interest in the sex lives of aliens and the standards by which official judgments have been made. The question of how realistic some of the standards are and the impact of certain statutory provisions upon the overall problem of immigration law enforcement will also be discussed. Although most of the items treated derive from provisions of the present Immigration and Nationality Act, enacted in 1952, the provisions of prior legislation are also germane, for the current law has no statute of limitations and thus reaches back to make deportable any alien who “at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.”

**Specific Statutory Sex Classifications**

**Prostitutes**

The present statute, like its predecessors, has specific provisions directed at prostitutes. Aliens are excluded from admission if they are “prostitutes or have engaged in prostitution, or aliens coming to the United States solely, principally, or incidentally to engage in prostitution.” Rendered deportable are aliens who “by reason

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7. E.g., id. § 201(b), 8 U.S.C. § 1151(b).
10. Id. § 212(a) (12), 8 U.S.C. § 1182(a) (12).
of any conduct, behavior or activity at any time after entry became a member of any of the classes specified" in the preceding sentence.\footnote{Id. § 241(a) (12), 8 U.S.C. § 1251(a) (12).} Because it is the alien's conduct, and not necessarily a conviction for prostitution, which triggers the immigration statute, inquiry into the private lives of aliens suspected of being or having been prostitutes has long been countenanced.

Under the prior statute, reformed prostitutes were not excluded,\footnote{Immigration Act of 1917, ch. 29, § 3, 39 Stat. 875, as amended 8 U.S.C. § 136 (1946) [The Immigration Act of 1917 is hereinafter cited as 1917 Act]. \textit{See In re S.}, 1 I. & N. Dec. 378 (BIA, 1943).} and a single act of prostitution did not constitute "practicing prostitution" within the meaning of that statute's provision for deportation after entry.\footnote{1917 Act § 19, 8 U.S.C. § 155. \textit{See In re B.}, 2 I. & N. Dec. 50 (BIA, 1944).} The present statute, however, excludes aliens who had abandoned the practice of prostitution before coming to the United States, and it is considered immaterial that prostitution was not a crime in the foreign country where the alien had plied the trade.\footnote{In re G., 5 I. & N. Dec. 559 (BIA, 1954).} However, if prostitution was practiced abroad under duress, it does not result in deportability.\footnote{In re T., 6 I. & N. Dec. 474 (BIA, 1955).} Similarly, a single act of prostitution after entry does not constitute "engaging in prostitution" within the meaning of the present Act.\footnote{In re Dolhaney, 11 I. & N. Dec. 375 (BIA, 1965).} The fact that oral sodomy was involved did not alter the nature of the conduct as prostitution within the meaning of the Act.\footnote{I. & N. Act §§ 212(a) (12) & 241(a) (12), 8 U.S.C. §§ 1182(a) (12) & 1251(a) (12) (1970).}

The statutory provisions are directed not only at the prostitutes themselves, but also at pimps, procurers, and others who derive gain from commercialized sex.\footnote{I. & N. Act § 212(a) (13), 8 U.S.C. § 1182(a) (13) (1970).} However, an alien convicted under the Mann Act\footnote{18 U.S.C. § 2421 (1948).} for transporting a female over interstate lines to induce her to engage in illicit sexual intercourse with him was held not to be deportable, for only fornication and not commercialized vice was actually involved.\footnote{In re R., 6 I. & N. Dec. 444 (BIA, 1954).}

\textbf{Immoral Sexual Acts}

The present statute specifically excludes from admission "[a]liens coming to the United States to engage in any immoral sexual act."\footnote{I. & N. Act § 212(a) (13), 8 U.S.C. § 1182(a) (13) (1970).}
Although questions might arise at first impression about what constitutes an "immoral" sexual act, the meaning of the provision has been crystallized by a long line of decisions. A similar provision of the prior statute was construed as contemplating immoral purposes of a character similar to prostitution and was held not to apply to extramarital relations short of concubinage. Thus, an alien returning to the United States to resume an extramarital relationship was found admissible under this provision of the prior statute. Taking into account the legislative history of the 1952 Act provision, the Board of Immigration Appeals (Board) held that the same construction should apply and that the provision in the 1952 Act does not bar aliens coming into the country to resume an extramarital relationship.

**Sexual Deviates**

Among the aliens excluded by the Immigration Act of 1917 were "persons of constitutional psychopathic inferiority." This phrase was held to encompass aliens who were homosexuals at the time of entry while that Act was in effect. When the immigration laws were codified in 1952, the excluding provision was changed to "[a]liens afflicted with psychopathic personality . . . ." The United States Court of Appeals for the Ninth Circuit held that the phrase was unconstitutionally vague when it was sought to be applied to homosexuality. The Supreme Court remanded the case

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22. Section 3 of the 1917 Act, 8 U.S.C. § 136(g) (1946), excluded "[p]rostitutes, or persons coming into the United States for the purpose of prostitution or for any other immoral purpose."
24. Id. See In re M., 3 I. & N. Dec. 213 (BIA, 1948); In re D., 1 I. & N. Dec. 373 (BIA, 1943); In re C.G., 1 I. & N. Dec. 70 (BIA, 1941).
25. In re B., 5 I. & N. Dec. 135 (BIA, 1953). The Board also held that, even if the statute was designed to reach people coming to resume merely an extramarital sexual relationship, their sex acts would not be considered immoral under Petitions of Rudder, 159 F.2d 695 (2d Cir. 1947). See also In re R., 6 I. & N. Dec. 444 (BIA, 1954), holding that simple acts of fornication unconnected with prostitution or commercialized vice did not bring an alien within the 1952 Act provision, despite his conviction under 18 U.S.C. § 2421 (1948) for having transported a female over interstate lines for purposes of illicit sexual intercourse with him.
29. Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962).
without deciding the constitutional issue. However, in a later case, the Supreme Court construed the provision to encompass homosexuals and held that the provision, so construed, was not constitutionally defective. The Court rejected the argument that the phrase “psychopathic personality” is a medically ambiguous term, stating that the test is what Congress intended, not what differing psychiatrists might think. Congress, said the Court, “was not laying down a clinical test, but an exclusionary standard which it declared to be inclusive of those having homosexual and perverted characteristics.” As amended in 1965, the statute now explicitly reaches aliens “afflicted with psychopathic personality or with sexual deviation.”

Aliens with homosexual tendencies who engaged in homosexual acts prior to entry were held to be excludable (and hence deportable after entry) under the “psychopathic personality” provision even before it was amended specifically to cover sexual deviates. Sexual deviation has been held to encompass exhibitionism, sexual sadism, fetishism, transvestism, and pedophilia.

The determination of excludability has frequently involved a detailed examination of the alien’s sex life. The consequences of the examination vary, depending on the nature of the evidence and the weight it is given. The alien is excludable if the condition was found to exist at the time of the alien’s entry into the United States.

Polygamists

The Immigration Act of 1917 excluded “[p]olygamists or persons

30. Rosenberg v. Fleuti, 374 U.S. 449 (1963). The Court there held that on the facts remand was required to determine whether an “entry” had been made within the meaning of the immigration laws. It was later held administratively that the evidence of the alien’s homosexual tendencies and acts prior to his original entry in 1952 did not establish constitutional psychopathic inferiority under the then pertinent 1917 Act. In re Fleuti, 12 I. & N. Dec. 308 (BIA, 1965).
32. Id. at 124.
who practice polygamy or believe in or advocate the practice of polygamy.” 37 The terminology is altered slightly by the current Act, which applies to “[a]liens who are polygamists or who practice polygamy or advocate the practice of polygamy.” 38 It has been held that polygamy and bigamy are not synonymous. The mere fact that an alien had two wives did not prove polygamy because the alien had undertaken a second marriage without the benefit of a divorce from his first wife. The Immigration and Naturalization Service (Service) must demonstrate that the alien subscribes to the historical custom or religious practice of polygamy, “which the Mormons had typified in this country until the statutory abolition of polygamy in the latter part of the 19th century” 39 in order to sustain a charge.

**CRIMES INVOLVING MORAL TURPITUDE**

Both current and past immigration statutes provide for the exclusion and deportation of aliens convicted of crimes involving “moral turpitude.” If the Service is seeking to expel an alien already in the United States because of criminal conduct which occurred after entry, the alien must have been convicted of the crime. 40 When an alien seeks to enter the United States, exclusion may be based not only on conviction of a crime but also on the alien’s admission that he has committed the crime. 41 When deportability is charged, based upon a criminal conviction, moral turpitude is determined by the statutory or common-law elements of the crime as ascertained from the record in the criminal proceedings. Inquiry may not ordinarily be made outside this record during the deportation proceedings. 42 In exclusion proceedings involving a foreign conviction, the nature of the crime may be developed in certain circumstances by evidence adduced at the exclusion hearing. 43 If exclusion is founded on the alien’s admission of guilt, the alien’s statements, e-

ther during the prehearing investigation or at the exclusion hearing itself, are obviously evidentiary. Because many crimes indicating moral turpitude involve sexual conduct of various sorts, inquiry into an alien's sex life is sometimes necessary to determine his admissibility or deportability under these statutory provisions.

While much criticism has been directed at the phrase "crime involving moral turpitude" because of its lack of precision, a workable definition has long been used in immigration cases. The Supreme Court has upheld the use of the phrase against charges that it is constitutionally void for vagueness. The application of the phrase to various crimes in the context of the immigration laws will now be examined.

**Abortion**

An early decision held without discussion that a 1939 conviction of abortion under a New York statute involved moral turpitude. Recently the Board receded from this position in a case involving an alien who had been convicted in Mexico of having an abortion. The record reflected that the abortion took place during the first trimester of pregnancy. The Board concluded that moral turpitude was not involved because the abortion would not have been a crime in this country.

**Adultery**

Early cases held, without extended discussion, that adultery was a crime involving moral turpitude. In one case, an alien, separated from his wife who resided in Paris and who was contemplating divorce, had lived in New York with another woman and had gone

44. See, e.g., United States ex rel. Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947), where the court stated:

    The authorities are in agreement . . . that moral turpitude is evidenced by an act of baseness, vileness or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellowman or to society in general. It has been said that moral turpitude implies something immoral in itself regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.

(footnotes omitted).


abroad with her. In exclusion proceedings on their return, he admitted committing adultery and was excluded. On judicial review the exclusion order was sustained. The court found that his conduct was punishable as adultery under New York penal law and that adultery involves moral turpitude. However, the court held that he was not inadmissible as a person coming for an immoral purpose, for he had testified he would refrain from relations with his companion until after his wife divorced him.48 In another case, a Massachusetts adultery conviction prior to the alien’s reentry was held to be for a crime involving moral turpitude and deportability was sustained.49 A Connecticut conviction for adultery also was held to involve moral turpitude according to the Board, which stated, “The conviction for adultery presents no problem since it clearly involves moral turpitude.”50 Current administrative policy is not to sustain a charge of exclusion or deportation based upon an alien’s admission of adultery unless he has been convicted of that crime.51

A sexual relationship between unmarried people who are living together has sometimes resulted in conviction under various state statutes punishing “open lewdness”52 or “lewd and lascivious cohabitation.”53 The Board has held that such convictions involve moral turpitude. Lewd and lascivious cohabitation “is considered to be a more heinous offense than either adultery or bigamy, offenses which in Massachusetts do not require an evil intent.”54

Bastardy

The Board has held that a conviction of bastardy is not a crime involving moral turpitude, for bastardy is a civil proceeding to determine paternity and to fix the terms of a support order; it is not a crime. Despite the fact that fornication is involved, the Board has stated that bastardy does not indicate moral turpitude.55

54. Id. at 531.
Bigamy

Bigamy may or may not involve moral turpitude, depending upon whether mens rea is an essential ingredient of the crime. An early case upheld a deportation order based on a Canadian bigamy conviction. The alien had married his second wife in Canada while married to his first wife in England. Because he knew he was still married to his wife in England, the court held that the crime involved moral turpitude and that his first wife's unfaithfulness did not excuse his conduct.\(^5\) In a later case, another court held that the conviction of an alien who had remarried in Canada in the reasonable (though mistaken) belief that his first wife had divorced him was not a conviction involving moral turpitude, for in Canada mens rea was not an essential ingredient of the crime.\(^5\) Similarly, a conviction in Massachusetts for polygamy was held not to involve moral turpitude because under Massachusetts law mens rea was not an essential element of the crime.\(^5\) However, when the Board applied the same test to an admission of bigamy in Nevada, the decision was reversed by the Attorney General, who stated, “To hold that bigamy is not a crime involving moral turpitude is contrary to the accepted standards of morals.”\(^6\)

An alien who admitted committing bigamy in California prior to his reentry was held to be ineligible for suspension of deportation because bigamy was considered a crime involving moral turpitude.\(^5\) A married alien posing as single who entered into a sham marriage in Mexico with her brother, a United States citizen, for the purpose of obtaining a nonquota immigrant visa admitted to immigration officers after entry that she had committed incest and bigamy. Because the record showed that she had not in fact lived with or had sexual relations with her brother, the Board held that she had not committed incest. However, she was found inadmissible because she had in fact committed bigamy in Mexico and that was a crime involving moral turpitude.\(^6\)

Fornication

Despite early holdings that sexual conduct amounting to lewdness

\(^{56}\) Whitty v. Weedin, 68 F.2d 127 (9th Cir. 1933).
\(^{58}\) In re S., 1 I. & N. Dec. 314 (BIA, 1942).
\(^{59}\) In re E., 2 I. & N. Dec. 328, 338 (1945).
\(^{60}\) Gonzales-Martinez v. Landon, 203 F.2d 196 (9th Cir.), cert. denied, 345 U.S. 998 (1953).
\(^{61}\) In re C., 1 I. & N. Dec. 525 (1943).
involves moral turpitude,\textsuperscript{62} in recent years courts have generally held that fornication is not a crime involving moral turpitude.\textsuperscript{63} A conviction under the Mann Act\textsuperscript{64} was held not to involve moral turpitude when the record disclosed that what actually transpired was not prostitution or commercialized vice but simply fornication. The Board has concluded that "simple fornication does not involve moral turpitude."\textsuperscript{65} However, when the sexual relationship involves cohabitation or other elements that lead to a conviction of "open lewdness"\textsuperscript{66} or "lewd and lascivious cohabitation,"\textsuperscript{67} moral turpitude has been found.

\textit{Homosexual Offenses}

Crimes based on deviant sexual behavior, even when it is practiced by consenting adults, have generally been considered to involve moral turpitude. Although the crimes themselves have carried various labels, such as "disorderly conduct" or "open and gross lewdness," they have been regarded as turpitudinous if deviant sexual conduct is an essential element. In a case based on an alien's conviction of solicitation to commit sodomy, moral turpitude was assumed.\textsuperscript{68} A conviction of disorderly conduct has been found to involve moral turpitude when the elements of the offense involved loitering "about a public place soliciting men for the purpose of committing a crime against nature or other lewdness."\textsuperscript{69}

The Board held in \textit{In re Z.} that moral turpitude was not involved in a conviction under a Canadian statute punishing the "commission by any male person of any acts of gross indecency with another male person."\textsuperscript{70} The record of conviction did not describe the spe-

\textsuperscript{62} See, e.g., Lane ex rel. Cronin v. Tillinghast, 38 F.2d 231 (1st Cir. 1930).
\textsuperscript{63} \textit{In re D.}, 1 I. & N. Dec. 186 (BIA, 1941).
\textsuperscript{64} 18 U.S.C. § 2421 (1948).
\textsuperscript{66} \textit{In re C.}, 3 I. & N. Dec. 790 (BIA, 1949).
\textsuperscript{67} \textit{In re M.}, 2 I. & N. Dec. 530 (BIA, 1948).
\textsuperscript{68} \textit{In re K.}, 3 I. & N. Dec. 575 (BIA, 1949).
\textsuperscript{70} 2 I. & N. Dec. 316, 317 (BIA, 1945).
cific conduct, and the Board refused to conclude that the offense involved moral turpitude because of the absence of any definition of "gross indecency." The Board later retreated from its position in another case arising under the same statute in which the specific conduct was not revealed. The Board held that the gross indecency crime necessarily involves moral turpitude, for its examination of the reported cases failed to reveal any case in which a conviction occurred under this section on facts which would not have involved moral turpitude.\textsuperscript{71}

Moral turpitude was not found in a conviction under a Michigan statute which punished "gross indecency" because the statute did not define the term "gross indecency" and the specific acts involved were not charged in the indictment.\textsuperscript{72} However, in another case involving the same statute, moral turpitude was found, for the alien admitted that he had engaged in mutual masturbation, an act which the Board characterized as "vile, base, depraved and contrary to the tenets of society in and of [itself]."\textsuperscript{73} Admitted acts of sodomy were also held to be sufficient to sustain a finding of moral turpitude when the alien admitted the commission of the crime.\textsuperscript{74} More recently, a conviction under the Virginia sodomy statute of consensual, heterosexual sodomy by unmarried people was held to be a crime involving moral turpitude.\textsuperscript{75}

The trend in recent decisions has been to consider private, consensual, unorthodox heterosexual behavior as beyond the reach of the criminal laws when the people involved are married.\textsuperscript{76} The rationale behind these decisions has been that the marital relation is protected by the right of privacy enunciated by the Supreme Court in \textit{Griswold v. Connecticut}.\textsuperscript{77} However, the same right of privacy has been held unavailable if the parties are unmarried.\textsuperscript{78} Thus

\begin{itemize}
\item \textsuperscript{71} In re H., 7 I. & N. Dec. 359 (BIA, 1956).
\item \textsuperscript{72} In re S., 5 I. & N. Dec. 576 (BIA, 1953).
\item \textsuperscript{73} In re W., 5 I. & N. Dec. 578 (BIA, 1953).
\item \textsuperscript{74} In re S., 8 I. & N. Dec. 409 (BIA, 1959).
\item \textsuperscript{75} Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972).
\item \textsuperscript{77} 381 U.S. 478 (1965).
\end{itemize}
whenever the parties are not married to each other, an alien participating in unorthodox sex practices will probably confront not only the rigors of the criminal law but also the punishment of deportation.

Incest

Whether a conviction for incest demonstrates moral turpitude depends on the statute involved and the facts of each case. In one case, a conviction for incest under an Ohio statute was held to show moral turpitude when the people involved were stepfather and stepdaughter.\(^7\) However, an alien's conviction of incest under a Washington statute based on his marriage and sexual relations with his niece was found not to involve moral turpitude because in many other states such marriages are valid.\(^8\) A married alien who admitted committing incest and bigamy in order to obtain a nonquota visa was found not to have engaged in turpitudinous conduct because she had neither lived with nor had sexual relations with her brother.\(^9\)

Rape and Statutory Rape

A conviction of common-law—i.e., forcible and unconsented—rape clearly involves moral turpitude.\(^2\) Similarly, indecent assault has been held to be a crime involving moral turpitude when force was used with an intent to rape.\(^3\) Additionally assault with intent to commit rape and attempted rape are crimes involving moral turpitude.\(^4\)

Statutory rape is also considered a crime involving moral turpitude, for some statutes conclusively presume that consent cannot be given by a person whose judgment is impaired or by a minor under the age of consent. If the victims are minors under the age of consent, the crime has been held to involve moral turpitude regardless of the label attached to the crime, whether it is "carnal

\(^7\) In re Y., 3 I. & N. Dec. 544 (BIA, 1949).
\(^8\) In re B., 2 I. & N. Dec. 617 (BIA, 1946).
\(^9\) In re C., 1 I. & N. Dec. 525 (1943).
\(^2\) Ng Sui Wing v. United States, 46 F.2d 755 (7th Cir. 1931); In re D., 3 I. & N. Dec. 460 (BIA, 1949): "There is no question that the crime involves moral turpitude."
knowledge," "carnal abuse," "contributing to the delinquency of a minor," or another similar term.

In most of the cases, the alien involved was a male who had sexual relations or other forbidden sexual contacts with a female under the statutory age of consent. In one case\textsuperscript{85} mens rea was not an essential element of the crime as defined by the state statute, and even though the alien claimed he was ignorant of the female's age, the Board held that "mistaking the age of the girl in a statutory rape case is not an innocent mistake of fact. The mistake is not between an innocent act and a guilty one, but only in regard to the nature of the wrong."\textsuperscript{86}

Moral turpitude was also found in a case in which the alien was convicted of having sexual intercourse with a woman he knew to be feebleminded; the Board concluded that because the offense was the equivalent of rape, it necessarily demonstrated moral turpitude.\textsuperscript{87} When minors under the age of consent were involved, convictions for contributing to the delinquency of a minor were held to involve moral turpitude if the record disclosed acts of intercourse or other forbidden contacts.\textsuperscript{88} However, when the statutory language did not specify the elements of the offense and the record did not disclose the nature of the crime, moral turpitude was not found.\textsuperscript{89} Thus, in one case, in which the alien was convicted for keeping a delinquent child, aged sixteen, in a hotel room for several hours, no moral turpitude was found because the record did not disclose what happened in the hotel room.\textsuperscript{90} In another case, no moral turpitude was found when the alien had been convicted of encouraging a fourteen-year-old girl to stay out of school by taking her for an automobile ride.\textsuperscript{91}

**Convictions for carnal abuse,\textsuperscript{92} carnal knowledge,\textsuperscript{93} and indecent**

\textsuperscript{85} In re Dingena, 11 I. & N. Dec. 723 (BIA, 1966).
\textsuperscript{86} Id. at 728.
\textsuperscript{87} In re M., 2 I. & N. Dec. 17 (BIA, 1944).
\textsuperscript{88} Glaros v. INS, 416 F.2d 441 (5th Cir. 1969); Marinelli v. Ryan, 285 F.2d 474 (2d Cir. 1961) (involving touching a boy under sixteen); Orlando v. Robinson, 262 F.2d 850 (7th Cir. 1959); In re Wood, 12 I. & N. Dec. 170 (BIA, 1967); In re C., 5 I. & N. Dec. 65 (BIA, 1953); In re R.P., 4 I. & N. Dec. 607 (BIA, 1952); In re F., 2 I. & N. Dec. 610 (BIA, 1946).
\textsuperscript{89} In re P., 2 I. & N. Dec. 117 (BIA, 1944); In re V.T., 2 I. & N. Dec. 213 (BIA, 1944); In re C., 2 I. & N. Dec. 220 (BIA, 1944).
\textsuperscript{90} In re Y., 1 I. & N. Dec. 662 (BIA, 1943).
\textsuperscript{91} In re C., 2 I. & N. Dec. 220 (BIA, 1944).
\textsuperscript{93} Bendel v. Nagel, 17 F.2d 719 (9th Cir. 1927); In re M., 9 I. & N. Dec. 452 (BIA, 1961).
exposure94 have been judged by similar standards. In one early case, the Board found moral turpitude in a conviction for indecent exposure under a Michigan statute when the information charged design without specifying the acts committed, for the statute was construed as implying an evil intent.95 However, this conclusion was overruled in later decisions construing the same and similar statutes as not requiring any specific criminal intent.96 In one unusual case involving a female alien moral turpitude was found for conviction under a divisible Canadian statute when the basis of the conviction was her sexual intercourse with a juvenile male.97

The fact that the alien did not know that the woman involved was under the age of consent has been held to be no defense to the criminal charge and irrelevant to the question of turpitude.98 Some judges have found the question of moral turpitude a troublesome one when the statutory age of consent has been relatively high. Thus, the Board found moral turpitude in a conviction for contributing to the delinquency of a minor, based on the alien's intercourse with a nineteen-year-old woman, while the court in an unreported opinion set aside the deportation order because the record did not show that the alien had reason to know that the woman was under twenty-one or that she was not a prostitute.99 Recently, in a case involving a conviction of statutory rape under a Minnesota statute, which fixes the age of consent at eighteen, the dissenting judge contended that the actual facts should be litigated in the deportation proceedings so that the question of the alien's moral cul-

pability could be determined. In dissent Judge Eisele stated: "I seriously doubt that in today's society an instance of consensual intercourse necessarily involves moral turpitude just because the state in which the act took place has raised the age of consent to eighteen years."

Recent studies indicate that more female minors now engage in premarital sexual relations at an increasingly early age than had been previously thought. In a survey of more than 100,000 women subscribers to Redbook magazine, 93 percent of those responding who married after the end of 1973 had experienced premarital sexual intercourse. Women now twenty-five or older who had no education beyond high school reported that the average age at first intercourse was seventeen; for those currently under twenty-five intercourse first occurred at sixteen. For those who consider current mores an element in evaluating societal morality, the implications are revealing.

Prostitution

Prostitutes and their associates have been convicted under various statutes which have been held to involve moral turpitude because of the nature of the sexual activity. Thus, turpitude was found under a Massachusetts statute pursuant to which an alien was charged with being "a lewd, wanton and lascivious person in speech and behaviour," and under a New Jersey statute punishing open lewdness when the indictment charged that the alien and the woman had been living together in open fornication and adultery without being married to each other. However, a Connecticut statute punishing "lascivious carriage" was held not to involve moral turpitude, for the phrase was undefined, and court decisions were not clear about the nature of the acts prosecutable. Similarly, a conviction of "vagrancy, lewd [sic]" under a California stat-

101. Id. at 1031 (dissenting opinion).
104. Lane ex rel. Cronin v. Tillinghast, 38 F.2d 231 (1st Cir. 1930); In re A., 3 I. & N. Dec. 168 (BIA, 1943) (same); In re M., 2 I. & N. Dec. 530 (BIA, 1946) (lewd and lascivious cohabitation).
ute was considered not to manifest moral turpitude when the statute did not define the offense and punished conditions which did not inherently involve moral turpitude.\textsuperscript{107} Again, a Mann Act conviction was also held not to involve turpitudinous conduct when the record revealed that the transportation was for purposes of simple fornication and did not involve prostitution or commercialized vice.\textsuperscript{108}

**Good Moral Character**

**General Considerations**

The large number of decisions both reported and unreported\textsuperscript{109} indicate that the interest of the INS in the sex lives of the aliens who come before it is generated most frequently by the statutory requirement of "good moral character" found in various parts of the immigration and nationality laws. A tremendous amount of time and effort is consumed by the Government in investigating, assembling evidence, and adjudicating such issues. This effort includes the work of Service investigators, adjudicators, naturalization examiners, trial attorneys, immigration judges, appellate trial attorneys, the Board, reviewing and naturalization courts, and their supporting staffs.

Good moral character is not required of an alien seeking to enter the United States. Regardless of the status under which he is seeking admission for permanent entry, bad moral character is not, as such, a statutory bar. It is only if the alien's conduct or condition places him within one of the excludable classes defined in the statute that his character is relevant to his right to enter.

Once the alien has entered the United States, good moral character for a specified period (the statutory period) is a prerequisite for the receipt of important benefits under the immigration and nationality laws. If the alien is a permanent resident and desires to become a citizen, he must establish good moral character for the

\textsuperscript{107} In re G.R., 5 I. & N. Dec. 19 (BIA, 1953).

\textsuperscript{108} In re R., 6 I. & N. Dec. 444 (BIA, 1944).

\textsuperscript{109} It is interesting to note the large number of unreported decisions referred to in the Service's *Interpretations* dealing with the subject of good moral character. INS, *Interpretations* § 316.1(e)(f)(g), at 5245 et seq. (1974).
statutory period. If he is here illegally or otherwise lacks permanent resident status, the statute requires the alien to prove good moral character for the statutory period if he seeks voluntary departure in lieu of deportation or if he seeks suspension of deportation or creation of a record of lawful admission for permanent residence. If an immigrant visa is readily available and if he seeks adjustment of status without leaving the country, good moral character is not a statutory prerequisite although it is considered an important element in the exercise of administrative discretion on the issue of whether to grant this form of relief.

Because the requirement of good moral character is the same in all the statutory provisions referred to, logically the same standards for judgment should apply regardless of which section is invoked. Therefore, in the discussion which follows cases will be cited without necessarily differentiating among the various immigration and naturalization provisions involved.

Standards

Not until the 1952 Act did Congress establish criteria for judging whether the good moral character requirement has been met. The statutory standard is purely negative—i.e., it sets forth certain acts or conditions which preclude a finding of good moral character, re-

110. I. & N. Act § 316(a), 8 U.S.C. § 1427(a) (1970). The good-moral-character requirement has been imbedded in our naturalization laws since the first statute on the subject, Act of March 26, 1790, ch. 3, § 1, 1 Stat. 414.

111. I. & N. Act § 244(e), 8 U.S.C. § 1254(e) (1970). For further discussion on voluntary departure, see Wasserman, Practical Aspects of Representing an Alien at a Deportation Hearing, 14 SAN DIEGO L. RSV. 111, (1976); Comment, Suspension of Deportation: Illusory Relief, id. at 229.


regardless of what the facts might otherwise indicate. Thus, courts and other tribunals have been required throughout the years to develop their own standards for judgment. The task has not been easy, for the phrase “good moral character” has been acknowledged as vague.

In an early case which is still frequently cited, the court stated that the phrase does not require moral excellence, but rather that “[a] good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen.” Subsequent cases have also used community standards as the test. However, some tribunals have sought to apply a national standard, while others

116. Section 101(f) of the 1952 I. & N. Act, 8 U.S.C. § 1101(f) provides as follows:

(f) For the purpose of this Act—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—

(1) a habitual drunkard;
(2) one who during such period has committed adultery;
(3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212(a) of this Act; or paragraphs (9), (10), and (23) of section 212(a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
(4) one whose income is derived principally from illegal gambling activities;
(5) one who has been convicted of two or more gambling offenses during such period;
(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;
(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;
(8) who at any time has been convicted of the crime of murder.

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.


118. In re Hopp, 179 F. 561, 563 (E.D. Wis. 1910).


120. Moon Ho Kim v. INS, 514 F.2d 179 (D.C. Cir. 1975); United States
have suggested a standard that combines both.\textsuperscript{121}

The courts have generally agreed that moral concepts are not static and that the issue of good moral character must be determined by standards prevalent at the time.\textsuperscript{122} Some cases have concluded that moral standards are determined by the way citizens act.\textsuperscript{123} Others have recognized that a difference often exists between moral precepts and actual conduct\textsuperscript{124} and thus have relied on the former as setting the applicable standard.\textsuperscript{125} Although there is general agreement that the personal moral views of the judge are not controlling,\textsuperscript{126} no consensus has developed about how a tribunal is to ascertain what the community or national standards are.

Taking a poll to determine what the common conscience is has been rejected as impractical:

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, to resort to our own conjecture, fallible as we recognize it to be.\textsuperscript{127}

And in a later case this same court stated:

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.\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
\item 121. E.g., Petition of Mayall, 154 F. Supp. 556 (E.D. Pa. 1957).
\item 122. Johnson v. United States, 186 F.2d 583 (2d Cir. 1951); Petitions of Rudder, 159 F.2d 695 (2d Cir. 1947); Application of Barug, 76 F. Supp. 407 (N.D. Cal. 1948).
\item 124. E.g., Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949).
\item 125. Petition of F.G. & E.E.G., 137 F. Supp. 782, 785 (S.D.N.Y. 1956) ("It is not a question of what the community does, but what the community feels.").
\item 127. Schmidt v. United States, 177 F.2d 450, 451-52 (2d Cir. 1949).
\item 128. Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951).
\end{enumerate}
\end{footnotesize}
In a subsequent case, the court rejected the notion that the test is the personal moral principles of the individual judge or court and stated that “the decision is to be based upon what he or it believes to be the ethical standards current at the time.”

The problem is further complicated by the fact that the conduct in issue may violate the criminal laws of the state where the alien resides, but is not considered criminal in other jurisdictions. This fact raises the additional questions of whether criminal or civil criteria should be applied and of whether using a national standard requires disregarding the vagaries of individual state laws. In the light of these considerations, the specific types of sexual conduct which are relevant to the good moral character requirement will be examined.

Specific Applications

Adultery

The question of whether an alien's commission of adultery during the statutory period precludes a showing of good moral character has vexed both courts and administrative tribunals for many years. Apart from the problem of ascertaining just what the “common conscience” is in this regard during times of steadily shifting sexual mores, numerous factual variables have required reexamination of previously settled standards.

Early decisions held that adultery was incompatible with accepted moral standards. Thus, a single act of adultery within the statutory period precluded a showing of good moral character. When aliens remarried in the United States after getting rabbinical divorces in New York which were invalid under the law of that state, courts held that the remarriages were bigamous and adulterous and therefore precluded a finding of good moral character. Later cases applied a more liberal approach and recognized extenuating circumstances. Whenever parties married in good faith, un-

130. Estrin v. United States, 80 F.2d 105 (2d Cir. 1935); United States v. Unger, 26 F.2d 114 (S.D.N.Y. 1926); United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925).
aware of an existing impediment occasioned by an invalid divorce, courts held that the adultery was only technical and did not impugn good moral character.\textsuperscript{132}

In many cases, in which marital impediments were found, the aliens were given administrative stays of deportation to allow them to adjust their lifestyles in order to meet the good moral character requirements for discretionary relief from deportation.\textsuperscript{133} The Board held that a later marriage of the parties cured any adultery committed during the statutory period, concluding that “[b]y reason of such marriage, all the antenuptial incontinence and lapses from virtue were covered with oblivion.”\textsuperscript{134} In one case in which an alien had lived in an adulterous relationship during the statutory period, but the relationship had broken up, the Board granted voluntary departure, stating, “[b]ut where, as in this case, no one was injured, no family was broken up, and the public was not offended, the Board believes that the alien, without another blemish on his record, can be found to be a person of good moral character.”\textsuperscript{135} However, good moral character was not found when the aliens made no attempt to adjust their marital status and terminate their illicit relationships.\textsuperscript{136}

The courts take a more sympathetic view than does the Service if extenuating circumstances exist even though the parties have not adjusted their marital status by divorce and remarriage. In the leading case of \textit{Petitions of Rudder},\textsuperscript{137} the district court had granted naturalization in a series of cases involving aliens who had married and lived with their spouses over a long period of time, even though the marriages were invalid because of known existing impediments. On the Service’s appeal, the judgments were affirmed. The Second Circuit noted that the “morality” of the relationship should be judged by the stability and faithfulness in the marital relation, rather than by the legality of the marriage.\textsuperscript{138}

\begin{enumerate}
\item \textsuperscript{133} \textit{E.g.}, \textit{In re J.}, 2 I. & N. Dec. 876 (BIA, 1947).
\item \textsuperscript{134} \textit{In re E.}, 5 I. & N. Dec. 522, 524 (BIA, 1953).
\item \textsuperscript{137} 159 F.2d 695 (2d Cir. 1947).
\item \textsuperscript{138} \textit{Id.} at 697-98.
\end{enumerate}
A new dimension was injected into the problem by the 1952 Act provision which precludes a finding of good moral character in the case of an alien who had committed adultery during the statutory period. The legislative history of the provision is sparse; however, there can be little doubt that the liberality of the Rudder decision and others that followed was disturbing to the drafters of the new code and provided much of the impetus for the restriction. Despite the congressional desire to avoid confusion and promote greater uniformity of decision, the provision has had the opposite effect. Because of the failure to define what it meant by the term "adultery" or to indicate which standards it intended to apply, Congress supplied a fruitful source of litigation, which continues to this day without definitive resolution.

It is generally agreed that the preclusion provision in the 1952 Act did not contemplate what had previously been considered "technical" adultery. Thus, when an alien remarried in good faith after a mail-order Mexican divorce, which was invalid in New Jersey (where he was remarried) and in New York (where he resided with his first wife and children), the court reversed the Service's denial of suspension of deportation for failure to establish good moral character. The court held that even under the 1952 Act adultery which was merely technical did not act as a bar. Other tribunals have reached the same conclusion.

However, there has been disagreement about whether other extenuating circumstances may be considered under the 1952 Act. As one court noted:

'The language of Section 1101(f)(2), contemporaneous construction and (to a lesser extent) the legislative history support the

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view that when Congress for the first time stated that adultery was inconsistent with good moral character, it intended to preclude a court from considering extenuating circumstances of the sort deemed controlling in Rudder.¹⁴²

Other courts have held that the alien's present legal marriage to the erstwhile paramour does not cure the adultery which occurred during the statutory period, for "[t]he offense of adultery is complete even if it existed for a single day."¹⁴³ The current Service position is that if an alien has engaged in culpable marital misconduct during the statutory period, the wrong is not cured merely because the parties to the misconduct later marry.¹⁴⁴

However some courts have held that extenuating circumstances may be considered mitigation.¹⁴⁵ Thus, when the marriage is question was factually at an end,¹⁴⁶ or when the adulterous intercourse did not contribute to the breakup of a marriage,¹⁴⁷ or when the parties thereafter marry,¹⁴⁸ a finding of good moral character is not precluded under the 1952 Act. The Service currently maintains that good moral character is not barred by sexual misconduct without cohabitation if the marriage had ceased to be viable and intact before the commission of the adultery, but that a different rule applies if the sexual conduct amounts to adulterous cohabitation.¹⁴⁹ When illicit intercourse takes place during the existence of a viable and intact marriage, a finding of good moral character is precluded "without regard to whether such misconduct did or did not disrupt or destroy the marriage, whether the innocent spouse was aware or ignorant of the misconduct . . . ."¹⁵⁰

¹⁴⁴. INS, INTERPRETATIONS § 316.1(f) (6), at 5246.8-9 (1971); id. § 316.1(g) (2) (vi), at 5248.2.5.
¹⁴⁶. Wadman v. INS, 329 F.2d 812 (9th Cir. 1964); In re Edgar, 253 F. Supp. 951 (E.D. Mich. 1966); In re Briedis, 238 F. Supp. 149 (N.D. Ill. 1965).
¹⁴⁹. INS, INTERPRETATIONS § 316.1(g) (2) (vi), at 5248.2.5-6 (1974).
¹⁵⁰. Id. § 316.1(g) (2) (vi), at 5248.2.5.
Further confusion is engendered by the failure of Congress to indicate any standard for determining what it meant by adultery. If the crime of adultery was contemplated, there is a vast disparity among the laws of the states about which sexual acts are criminal. For example, under Pennsylvania law, sexual intercourse by an unmarried man with a married woman constitutes fornication and not adultery. In New Jersey, intercourse by a married man with a woman other than his wife constitutes fornication and not adultery, unless the woman is married. And in California, adultery is not a crime unless there is cohabitation.

This disparity in the criminal laws of the states has led various tribunals to construe the 1952 Act’s adultery provision as mandating a uniform national standard, with oddly inconsistent results. One theory is that a uniform national standard cannot be based on the vagaries of state law and that Congress must have contemplated a rule which takes into account extenuating circumstances. Another theory holds that, in view of the conflicting state criminal laws, section 101(f)(2) must be construed in terms of the civil law of the various states, which uniformly declare adultery to be a ground for divorce.

The Board has utilized both standards, based upon its view “that Congress’ desire that there be uniformity related not to the method to be used in determining whether adultery has been committed, but related rather to the desire that all persons who had committed adultery should be barred from the prizes of the law.” Thus, when the substantive criminal law of the state made adultery a crime, the Board used a criminal standard as a basis for finding

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154. Wadman v. INS, 329 F.2d 812 (9th Cir. 1964).
a lack of good moral character. The Board applied this standard even though the state statute did not provide any punishment for the crime unless the spouse prosecutes, and here the alien's wife had elected not to prosecute. When the sexual act in question did not constitute a crime under the state law, the Board used a civil standard as a basis for denial. The Service has adopted the position that the distinction between civil and criminal standards is not decisive.

The limitation in the 1952 Act has engendered confusion and has raised questions about whether it does not unduly restrict the courts from taking into account prevailing standards. It can hardly be doubted that a marked change in public attitudes toward permissible sexual behavior has occurred during the years since 1952. Extramarital sex has been recognized as on the increase, not only on the part of men but also on the part of women. Additionally it is common knowledge that many couples now live together in stable relationships without being married. The Service position that otherwise unobjectionable sexual relations become immoral if there is cohabitation invites Service officers to snoop even further into the intimate details of an alien's private life. This position also indicates how far the Service and the courts have deviated from the realistic approach utilized in Petitions of Rudder.

The current confusion indicates that the best service the Congress can now perform in this regard is to wipe the slate clean by removing section 101(f)(2) from the Act. Administrative agencies and the courts would ascertain what is the common conscience and would work out practical standards in light of current realities.

160. INS, INTERPRETATIONS § 316.1(g) (2) (iv), at 5248.2.1 (1975).
161. In a recent Redbook survey conducted among 100,000 female subscribers, about one-third of the married women reported having had sexual relations with men other than their husbands. Of working wives, almost half had done so. Levin, The Redbook Report on Premarital and Extramarital Sex, Redbook, Oct. 1975, at 40, 42.
162. See, e.g., In re Van Dessel, 243 F. Supp. 328, 329 (E.D. Pa. 1965), in which the question and answer statement taken by the Service from the alien contained inquiries about whether the couple continued to have sexual relations, when the last time was, where did it occur, does he spend the night at her apartment, how many times has he stayed over, how frequently do they have sexual relations, did they ever register as husband and wife, did she ever represent herself as his wife, etc.
163. 159 F.2d 695, 697 (2d Cir. 1947).
Fornication

The question of whether and to what extent an unmarried person's heterosexual and private love life bears upon his good moral character has been the subject of much discussion throughout the years. Only recently have the courts held that a single person's sexual relations, although constituting fornication under the criminal laws of some jurisdictions, do not impugn his good moral character.

Some of the earlier decisions adopted the opposite view, and some even exhibited what seems to be a double standard. The Service argued that acts of fornication on the part of either sex were incompatible with societal norms. In one case involving an unmarried man who admitted that he had had meretricious relations with a single woman for pay, the court of appeals sitting en banc divided evenly. In another case, involving not only fornication but also cohabitation, naturalization was denied for lack of good moral character. In one early case, a single woman's marriage to a man, divorced by his first wife, during the period of the divorce decree's conditional prohibition against remarriage was held invalid and thus precluded a showing of good moral character.

The trend, however, is toward greater tolerance if the subject of the inquiry was unmarried. In the leading case of Schmidt v. United States, a single man who had had sexual relations with single women was not precluded from showing good moral character. The Second Circuit noted the then recent Kinsey investigation into "the actual habits of men in the petitioner's position, and they have disclosed—what few people would have doubted in any event—that his practice is far from uncommon." Subsequent cases

164. United States v. Manfredi, 168 F.2d 752 (3d Cir. 1943). Because the court divided evenly, no opinion was issued. However, the facts of the case were referred to in a later decision, Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949). I appeared for the Government before the court of appeals en banc in the Manfredi case. One of the incidents involved took place in Atlantic City. In response to a question from the bench about pertinent standards, I had referred to some of the recent court holdings. I can still hear Judge Biggs' next question: "Do you think the moral feelings of the people of Atlantic City would be outraged by this behavior?"

167. 177 F.2d 450 (2d Cir. 1949).
168. Id. at 451-52.
held that sexual relations by an unmarried alien do not impugn good moral character, regardless of the alien's gender.\textsuperscript{169} However, in one peculiar case naturalization was denied to an unmarried woman who lived in a hotel room that had a connecting door with a room occupied by a man with whom she admitted having had sexual relations on one occasion under extenuating circumstances.\textsuperscript{170}

In a recent case, the court recognized changes that had taken place "in national standards of morality during the postwar decades" and referred to the "obvious change in the mores of society concerning family formation."\textsuperscript{171} Another court granted naturalization to an unmarried women whose sexual relations with a married man did not constitute adultery. The court indicated that the decision might have been otherwise if promiscuity or an illegitimate child had been involved.\textsuperscript{172} However, another court granted naturalization to an alien who had fathered an illegitimate child, noting: "That the possibility of conception exists whenever sexual relations take place cannot be debated. Because conception took place in this instance should not render petitioner any more immoral than if it had not taken place."\textsuperscript{173}

The Service's current position is that fornication alone, whether or not accompanied by cohabitation, does not impugn good moral character\textsuperscript{174} unless the other party is married. If the other party

\textsuperscript{169} Posusta v. United States, 285 F.2d 533 (2d Cir. 1961) (single woman lived with married father of her children prior to statutory period and continued to live with him without marriage even after his wife was granted a divorce; finally married him within statutory period); \textit{In re} Mortyr, 320 F. Supp. 1222 (D. Ore. 1970) (single alien lived with single man who wanted to marry her, but she refused); \textit{In re} Garstka, 295 F. Supp. 833 (W.D. Mich. 1969) (alien widower had sexual relations with single woman who gave birth to a child which he acknowledged and supported pursuant to court order); \textit{In re} Van Dessel, 243 F. Supp. 328 (E.D. Pa. 1965) (divorced woman had sexual relations with single man whom she refused to marry because of religious differences); \textit{In re} Sotos, 221 F. Supp. 145 (W.D. Pa. 1963) (unmarried alien had sexual relations with his landlord's wife; under Pennsylvania criminal law this conduct constituted fornication, which was not a felony); \textit{In re} Denessy, 200 F. Supp. 354 (D. Del. 1961) (single alien had sexual relations with single woman who wanted to marry him, but he refused); \textit{In re} Kielblock, 163 F. Supp. 687 (S.D. Cal. 1958) (unmarried alien had sexual relations with single woman who obtained interlocutory divorce decree; not adultery under California law because adultery required cohabitation).

\textsuperscript{170} Flumerfelt v. United States, 230 F.2d 870 (9th Cir. 1956).


\textsuperscript{172} \textit{In re} Kielblock, 163 F. Supp. 687 (S.D. Cal. 1958).


\textsuperscript{174} INS, \textit{INTERPRETATIONS} § 316.1(f) (6), at 5246.7-8 (1974).
is married and “maintaining a viable, intact marriage” a finding of
good moral character is precluded.\textsuperscript{175} It is not clear whether a “via-
bile, intact marriage” would encompass an open marriage, in which
both partners agree to tolerate mutual sexual freedom. No such
case has yet arisen.

If the misconduct does not disrupt or destroy the marriage, the
Service position presents somewhat of an anomaly. In a recent
court decision which the Service did not challenge further,\textsuperscript{176} a
married man who had sexual relations with an unmarried woman
was held not to be precluded from showing good moral character
because his marriage did not break up. Nevertheless, in the Serv-
vice’s view, good moral character on the part of the unmarried
women would be impugned.

In the main, the courts seem to have agreed with the attitude
expressed some years ago that “[t]he satisfaction of sexual appetite
is a peculiarly private matter, ordinarily concerning only the par-
ticipants in the sexual act.”\textsuperscript{177}

Deviate Sex Acts

Crimes based on deviate sexual conduct, usually manifesting
some public behavior which is considered offensive, have been held
to involve moral turpitude. Whether such acts are immoral when
performed in private by consenting adults is another issue, one to-
ward which there appears to be increasing tolerance. Considerable
change has taken place since a court declared that any conduct out-
side “the normal sexual act,” even by husband and wife in private,
could be punished as a criminal offense.\textsuperscript{178} A growing body of evidence
reveals that sexual activities heretofore considered unortho-
dox may be more common than had previously been supposed.\textsuperscript{179}

\begin{enumerate}
\item\textsuperscript{175} Id. \S 316.1(f)(6), at 5246.8-9.
\item\textsuperscript{176} Moon Ho Kim v. INS, 514 F.2d 179 (D.C. Cir. 1975).
\item\textsuperscript{177} In re Kielblock, 163 F. Supp. 687 (S.D. Cal. 1958).
\item\textsuperscript{178} State v. Nelson, 199 Minn. 47, 271 N.W. 114, 118 (1937): “Thus hus-
band and wife, if violating this [sodomy] statute could undoubtedly be
punished, whereas the normal sexual act would not only be legal but per-
haps entirely proper.” Could the use of the “perhaps” indicate some doubt
in the court’s mind that “the normal sexual act” is entirely proper, even
between husband and wife?
\item\textsuperscript{179} The recent Redbook magazine survey of 100,000 women subscribers
reflects that
oral-genital sex is an almost universal experience. It is practiced

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In 1959, a New Jersey court observed that "[f]ew behavioral deviations are more offensive to American mores than is homosexuality." A decade later, naturalization was denied to an alien woman who privately engaged in homosexual practices with consenting adults in her own home; the court concluded that no reason existed to believe the practice had become generally accepted. Nevertheless, judicial attitudes toward sexual deviancy are beginning to change. In the case of a man who described himself as "bisexual with homosexual tendencies," the court found the petitioner "no more than an ailing person whose compulsive behavior, private, unobtrusive and noncriminal, does not offend community standards unless brought to its notice by official inquisition." In another case, a court granted naturalization to an admitted homosexual. The court emphasized that private conduct should not be deemed violative of public morality. Similarly the Second Circuit, in affirming the denial of a homosexual's naturalization petition because he had testified falsely concerning his homosexual activities, made it plain that the denial was not based on those activities themselves:

We pause to note what we are not holding. Petitioner is not being denied naturalization for his sexual activities—but rather for his lack of candor under oath. This is not a case like Labady, . . . where the applicant testified truthfully about prior homosexual acts, yet still was granted naturalization because of the private character of his sexual life. Had Kovacs testified truthfully about his past, the petition might well have been granted.

In the most recent case, the court took into account current developments regarding homosexuality and concluded "that the community regards homosexual behavior between consenting adults with tolerance, if not indifference." The homosexual alien was found with varying frequency by 9 out of 10 women under the age of 40 and by 8 out of 10 women who are 40 or older. Husbands and wives share about equally in giving each other pleasure—there is no appreciable difference in the extent to which the wife is likely to play the active role (fellatio) or the husband (cunnilingus).

Levin & Levin, Sexual Pleasure: The Surprising Preferences of 100,000 Women, Redbook, Sept. 1975, at 52.

182. In re M.B., Civil No. 63121 (E.D.N.Y., Feb. 19, 1969). Although the decision is unreported, it is digested at 46 Interpreter Releases 78 (1969), and it is referred to in In re Labady, 326 F. Supp. 924, 928 n.2, 928 (S.D.N.Y. 1971).
to be a person of good moral character, and his naturalization petition was granted.

Notwithstanding the change which has occurred in judicial attitudes the Service continues to adhere to the view that deviate sexual conduct precludes a showing of good moral character:

The Service holds that a petitioner for naturalization who is or has been a practicing sexual deviate, a homosexual, during the relevant statutory period is precluded from establishing the good moral character required for admission to citizenship. Moreover, this rule shall prevail even though performance of the homosexual act(s) in question does not constitute a violation of relevant state law; and even though the conduct engaged in was purely private and not public or was the result compulsive behavior.186

Incest

Whether a sexual relationship between close relatives precludes good moral character is dependent upon the facts of each case. Good moral character was found in a case in which an uncle and his niece had married and had children. Twenty-two years later, after learning that the marriage was illegal in New York, they were remarried by a rabbi in Rhode Island, where such marriages are valid. The court held that although the marriage was incestuous under New York law, the valid Rhode Island marriage should be recognized, and the naturalization petition was granted.187 This decision was followed a few years later by another case involving an uncle and niece who, concealing their relationship, were married in 1925 in Connecticut, where such marriages are unlawful. The couple now had four children. The district court granted naturalization, and the court of appeals affirmed on the Service’s appeal, despite the fact that the parties were not legally married. The court reiterating its view that “[t]he trend of recent naturalization decisions is to stress stability and faithfulness in the ‘marital’ relationship rather than the mere legality of ties . . . .”188

However, a naturalized citizen convicted of pre-naturalization incestuous relationships with his daughters was held to lack the good moral character required for naturalization, and his citizenship was

186. INS, Interpretations § 316.1(f)(7) at 5246.10 (1973) (footnotes omitted).
188. United States v. Francioso, 164 F.2d 163, 164 (2d Cir. 1947).
Adjustment of status under section 245 of the Act was denied because of poor moral character to an applicant who was living with his first cousin pursuant to an Illinois marriage regarded as criminally incestuous by the laws of that state.\textsuperscript{189}

**SHAM MARRIAGES**

Aliens who seek priority in the issuance of immigrant visas on the basis of marriage to a United States citizen or to a legally resident alien sometimes resort to sham marriages. The number of such fraudulent marriages is on the increase,\textsuperscript{190} and the Service is exercising great efforts to detect them. One means used to determine the bona fides of the alleged marital relationship is to question separately both parties to the relationship about the details of their life together in order to ascertain whether meaningful discrepancies indicate a sham marriage. Sometimes the questions involve intimate details of their relationship.\textsuperscript{192} In a recent case in which it had been concluded administratively that the marriage was not bona fide because of the parties' separations and the wife's freedom of action, the court of appeals reversed, stating: "The bona fides of a marriage do not and cannot rest on either marital partner's choice about his or her mobility after marriage."\textsuperscript{193}

**SOME CONCLUSIONS**

The foregoing survey, however incomplete and sketchy, should indicate that changes are long overdue in official thinking on the criteria governing the sex lives of the many aliens in our midst. Unless we are to acknowledge a double standard, a rigid one for aliens and a more flexible one for the rest of us, the hands of the administrators and the courts should not be tied by statutory restrictions which prevent them from taking into account the shift in sexual mores evidenced by changing actions and attitudes on the part of the general populace. Certainly section 101(f) of the Act has long demonstrated its uselessness as a gauge, not only with re-

\textsuperscript{190} In re S., 8 I. & N. Dec. 234 (BIA, 1958).
\textsuperscript{191} 1975 INS, Annual Report 18.
\textsuperscript{192} In one case which came before the Board, the Service had denied a visa petition because of doubt about the bona fides of the marriage; the alien beneficiary of the visa petition, a dapper young man, had admitted on Service questioning that he continued to date other women. At oral argument before the Board, his attorney contended that the marriage was entered into in good faith and subsisted. Asked how he could reconcile this position with the alien's acknowledged extramarital performances, counsel responded, "That's simple. He cheats on his wife."
\textsuperscript{193} Bark v. INS, 511 F.2d 1200, 1201-02 (9th Cir. 1975).
regard to adultery, but also with regard to other proscribed conduct. The repeal of section 101(f) would help to restore the problem to the arena where realistic solutions are feasible.

Apart from the unfairness to the aliens affected, these unnecessary statutory mandates waste Government resources sorely needed elsewhere. The snooping into aliens' private lives now required by law is undoubtedly embarrassing not only to the aliens but also to the Service personnel compelled to do the snooping. Beyond that, precious official time and effort are wasted by an agency entrusted with an important mission in which it publicly acknowledges it will fail for lack of resources.

Section 244(e) of the Act, which requires good moral character for the privilege of voluntary departure, is another instance of the frustration of official efforts by outmoded legislation. An alien seeking to enter the United States need not establish good moral character. Yet, if he remains here illegally and wishes to depart voluntarily at his own expense, he is not permitted to do so and must be deported at Government expense unless he first establishes good moral character for the statutory five-year period!

This requirement not only involves all concerned in the tedious procedures needed for the resolution of such issues. But it also actually frustrates the enforcement of the laws. There are times when the Service, periodically confronted with temporary shortages of funds, rearranges its priorities and temporarily suspends the execution of deportation orders in order to avoid transportation charges. Deportable aliens who would otherwise long since have left the country at their own expense if granted voluntary departure are thus permitted to remain here and to hold jobs. To the degree that the good moral character requirement impedes the grant of voluntary departure, it is not only an anomaly but also an obstacle to realistic and effective law enforcement. Certainly Congress, in its current deliberations over amendments to the Act, should give some thought to these additional changes called for by experience throughout the years.