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ALIENS-NATURALIZATION-"GOOD MORAL CHARACTER" UNDER THE NATIONALITY ACT

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RECENT DECISIONS

ALIENS—NATURALIZATION—"GOOD MORAL CHARACTER" UNDER THE NATIONALITY ACT—Petitioner owned and operated a saloon but, because operators' licenses are not issued to aliens in Louisiana, he had obtained his license in his son's name since 1943. From 1923 to 1942 he was convicted of five liquor law violations: two acts were punished by both state and federal authorities in 1923 and 1924; the fifth conviction was for violation of the Sunday laws in 1942. He had been arrested at other times for liquor violations and for operating slot machines, but the record showed no disposition of these cases. He had lived in Louisiana for forty-six years, and his family life and community reputation were exemplary. *Held,* petition for naturalization granted. Petitioner met the requirement of "good moral character" under the Nationality Act of 1940.[1] *Petition of Gani,* (D.C. La. 1949) 86 F. Supp. 683.

Under the Nationality Act "no person . . . shall be naturalized unless . . . during [the required five year residence period he] has been and still is a person of good moral character. . . ."[2] Various attempts to find some objective standard by which to measure this fundamentally subjective quality have produced confusion and contradiction in the cases involving the issue of good moral character.[3] Courts are agreed that morality can feasibly be measured only by behavior,[4]

[1] 54 Stat. L. 1137 (1940), 8 U.S.C.A. (1940) §707.

[2] Ibid. The requirement has been substantially the same since 1802: Ohlson, "Moral Character and the Naturalization Act," 13 BOST. UNIV. L. REV. 636 (1933). Like the principal case, most opinions hold that the act fixes only a minimum period so that the courts are free to consider petitioner's entire record. A first premise in all of these cases is that an alien has no right to citizenship, and all doubts must therefore be resolved for the government.

[3] See Persichette, "Good Moral Character as a Requirement for Naturalization," 22 TEMPLE L.Q. 182 (1948); 48 COL. L. REV. 622 (1948); Plischke, "'Good Moral Character' in the Naturalization Laws of the United States," 23 MARQ. L. REV. 117 (1939). For a comprehensive treatment and digest of early cases in this field, see Ohlson, "Moral Character and the Naturalization Act," 13 BOST. UNIV. L. REV. 636 (1933).

[4] Persichette, "Good Moral Character as Requirement for Naturalization," 22 TEMPLE L.Q. 182 at 184 (1948).

but until recent years an appraisal of behavior meant little more than a defining of morality in terms of familiar legal concepts. One major group of cases thus found moral standards to be practically synonymous with the criminal code,[5] although the obvious difficulty in this analysis led to many exceptions and modifications, distinctions between classes of crimes[6] and states of mind.[7] Other cases evaluated morality in terms of an "average citizen" test, finding morality to be what would be done by the average citizen of the community, just as common law legality is measured for some purposes by the actions of the reasonably prudent man as determined by a jury. Since no jury is required in naturalization cases, this test left the judge free to determine moral character by his own opinions and experience.[8] In 1944 a new approach was advocated in *Petition of R—*.[9] In defiance of precedent *R—* was admitted to citizenship although her marriage was legally void.[10] The court, instead of using the dogmatic approach of the earlier cases, based its judgment on the prevailing attitudes and standards of society and on knowledge of the actual habits of men. Under this standard courts may consider evidence of morés and customs but are not free to substitute their own standards either legal or moral for objective evidence.[11] Acceptance of this criterion coincided with a marked tendency to view the question of morality in a more liberal light. Thus, the moral standards of society have recently been found not to preclude petitions from persons who had (1) contracted an incestuous marriage in good faith;[12] (2) failed to support a minor child;[13] (3) entered into stable but meretricious relationships;[14] (4) admitted acts of fornication;[15] (5) served a prison sentence for manslaughter (part of it during the five year period).[16] In *Repouille v. United States*[17] euthanasia committed within the five year period was found on appeal to be contrary to the "generally accepted

[5] I.e., petitions were denied in: United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031 (1909) (violation of the Sunday laws); Estrin v. United States, (2d Cir. 1935) 80 F. (2d) 105 (single act of adultery); Petition of Gabin, (D.C. Cal. 1945) 60 F. Supp. 750 (peddling narcotics twenty-five years before date of petition).

[6] In re Paoli, (D.C. Cal. 1943) 49 F. Supp. 128; Petition of Schlau, (D.C. N.Y. 1941) 41 F. Supp. 161.

[7] United States v. Rubia, (5th Cir. 1940) 110 F. (2d) 92; In re Camaras, (D.C. R.I. 1913) 202 F. 1019.

[8] The leading case is In re Hopp, (D.C. Wis. 1910) 179 F. 561; Application of Polivka, (D.C. Pa. 1939) 30 F. Supp. 67.

[9] (D.C. Mass. 1944) 56 F. Supp. 969, noted in 33 ILL. B.J. 241 (1945).

[10] See Estrin v. United States, supra note 5.

[11] "By using . . . 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. . . ." Petition of R—, supra note 9 at 971.

[12] United States v. Francioso, (2d Cir. 1947) 164 F. (2d) 163, noted in 96 UNIV. PA. L. REV. 584 (1948).

[13] Petition of De Leo, (D.C. Pa. 1948) 75 F. Supp. 896. But see United States v. Konevitch, (D.C. Pa. 1946) 67 F. Supp. 250, following the traditional approach.

[14] Petitions of Rudder et al., (2d Cir. 1947) 159 F. (2d) 695.

[15] Schmidt v. United States, (2d Cir. 1949) 177 F. (2d) 450.

[16] Daddona v. United States, (2d Cir. 1948) 170 F. (2d) 964, noted in 23 TEMPLE L.Q. 90 (1949). See In re McNeil, (D.C. Cal. 1936) 14 F. Supp. 394.

[17] (2d Cir. 1947) 165 F. (2d) 152 at 153, noted in 1949 WIS. L. REV. 382; 15 BROOKLYN L. REV. 154 (1948). See 48 COL. L. REV. 622 (1948).

moral conventions current at the time," but the court expressed regret in its decision and left petitioner free to apply again. The principal case follows the liberal tendencies of the most recent cases without adopting their test of character.[18] Relying almost exclusively on *In re Hopp*,[19] one of the few cases in which a liquor law violation did not preclude citizenship, the case reiterates the average citizen test: "the term . . . does require that a petitioner . . . affirmatively establish good moral character up to the standard of the average citizen."[20] Decentralized authority to grant or deny citizenship has resulted naturally in conflicting views on this subject, but the decision of the principal case is not wholly inconsistent with other current decisions because, although the trend has been toward a more liberal construction of the Nationality Act in terms of ascertainable objective standards, the courts have not actually used such standards.[21] The evidence admitted and the factors considered in these cases do not vary appreciably with the test used. The judiciary is not entirely at fault; in most cases the sociological data needed is not available. In this area at least, courts have indicated a willingness to accept the challenge of modern developments in the social sciences but have been stopped by the lack of adequate and reliable empirical knowledge.[22] To the extent that the principal case rejects the possibility of a judgment of good moral character based on purely objective standards, it illustrates a realistic but unfortunate approach to this problem.

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[18] There are other cases decided since 1944 that have not used the new test. In re Mogus, (D.C. Pa. 1947) 73 F. Supp. 150, reverts to the average citizen test to deny citizenship on the ground of non-support. Petition of F—, (D.C. N.Y. 1947) 73 F. Supp. 655, follows precedent in finding adultery to be a bar to citizenship. And In re Lipsitz, (D.C. Md. 1948) 79 F. Supp. 954, claims a right in the court to grant or deny citizenship at its discretion when a criminal record is involved.

[19] Supra note 8. *Contra*: Turlej v. United States, (8th Cir. 1929) 31 F. (2d) 696; United States v. Villaneuva, (D.C. Nev. 1936) 17 F. Supp. 485; In re Trum, (D.C. Mo. 1912) 199 F. 361.

[20] Principal case at 685.

[21] At least one court seems, however, to have taken judicial notice of the Kinsey report: Schmidt v. United States, supra note 15 at 451.

[22] The courts are not unaware of the problem involved. In Repouille v. United States, supra note 17 at 153, Judge Learned Hand expressed grave doubts about the decision: "Left . . . without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative." The dissenting judge asked that the case be sent back to the lower court with directions to get actual data on the attitudes of ethical leaders on euthanasia.