A design patent, on the other hand, directly covers the work product of the architect—the design and appearance of the building. If its validity could be counted upon, the design patent would provide ideal coverage for the architect. However, the fact that the validity of the design patent is always questioned in an infringement suit, and the frequency with which courts rule patents invalid leaves the architect in a very insecure position. His dilemma becomes increasingly frustrating with the knowledge that he may expend much time, money and effort in obtaining a design patent, only to have the court strike it down.

Perhaps the answer is to obtain both types of protection. The *Stein* and *Vacheron* cases, while not expressly holding so, indicated that the law will allow double coverage. Another course which architects may pursue is to seek legislation which will grant a type of protection under either the copyright or patent laws which is particularly adapted to the architect's needs.

MICHAEL G. VOORHEES

TAX, TURPITUDE, AND A TECHNICAL TEST FOR DISBARMENT

In infrequent cases when an attorney runs afoul of the law it is not unusual that his offense is failure to pay personal income taxes. The manner in which he is treated by the Bar after his tax problems have been settled has brought widely diverging results, ranging from a mere reprimand to permanent disbarment. A critical look at this area of the law reveals that certain corrections may be long overdue, and the question remains whether or not the course charted in decisions of the last decade have supplied a basis for a fair and uniform solution to the problem. It is conceded that an attorney's tax infractions must be viewed in the historical perspective of general disbarment procedures.

Almost from its inception the profession of the law has been subject to regulation to protect the public interest.[1] It was soon recognized that requirements for admission to practice were alone inadequate to maintain consistently high ethical standards.[2] A continuing supervision was indicated because the profession occupied a unique position of trust and confidence, the breach of which could result in irreparable harm.[3] While early legislatures championed the rights of citizens in this area, with the rise of bar associations there has been a gradual shifting of responsibility from the former to the latter, with the end of the transition not yet completed.

In Iowa there are five express grounds for revocation or suspension of a license to practice law.[4] Significantly, conviction of a felony or a misdemeanor

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1 In 1292 the King of England placed control of the bar in the hands of the justices. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 311-319 (4th ed. 1936). *See also* 3 BLACKSTONE COMMENTARIES *25.

2 Parliament reasoned a statute would remedy the situation. Note the enactment asserts that attorneys are part of the judiciary and their admission and disbarment is a court function.

> Item, For sundry Damages and Mischiefs that have ensued before this Time to divers Persons of the Realm by a great Number of Attornies, ignorant and not learned in the Law, as they were wont to be before this time; (2) it is ordained and established, That all the Attornies shall be examined by the Justices, and by their Discretions their Names put in the Roll, and they that be good and vertuous, and of good Fame, shall be received and sworn well and truly to serve in their Offices, and especially that they make no Suit in a foreign Country; and the other Attornies shall be put out by the Discretion of the said Justices; (3) and that their Masters, for whom they were Attornies, be warned to take others in their Places so that in the mean Time no Damage nor Prejudice come to their said Masters. (4) And if any of the said Attornies do die, or do cease, the Justices for the time being by their Discretion shall make another in his Place, which is a vertuous Man and learned, and sworn in the same Manner as afore is said; (5) and if any such Attorney be hereafter notoriously found in any Default of Record, or otherwise, he shall forswear the Court, and never after be received to make any Suit in any Court of the King.

4 Hen. IV. c. 18 (1402). The statute is cited in State v. Cannon, 206 Wis. 374, 240 N.W. 441 (1932).

3 During the reign of Elizabeth I, a special jury was empaneled to investigate the profession and during the Cromwell regime both King's Bench and Common Pleas formed juries every third year to put an end to unethical practices.

4 IOWA CODE § 610.24 (1966) lists the following as sufficient cause for revocation or suspension:

1. When he has been convicted of a felony, or of a misdemeanor involving moral

involving turpitude is foremost on the list. A reading of the statute would indicate that a misdemeanor absent turpitude would not be grounds for disbarment. If the statutory "or" could be construed conjunctively, neither would a felony which did not involve turpitude. This idea has not found favor with most courts because it is a disjunctive reading which makes the statute conform with old common law concepts.[5] While the term moral turpitude was rarely used at common law to distinguish greater from lesser crimes,[6] other terms such as felony,[7] misdemeanor, *mala in se, mala prohibita,*[8] and *crimen falsi*[9] were in vogue. Courts utilizing a moral turpitude test may have been employing a common law standard for disbarment on conviction of any felony or conviction of a misdemeanor involving turpitude, but it is not clear whether use of the term established a new criterion or was a distillation of older distinctions.[10] Nevertheless, a turpitude standard became inherent to disbarment procedure under the felony disbarment rule. Criticism has resulted because the felony disbarment rule is so broad it fails to differentiate such crimes as murder from lesser crimes such as involuntary manslaughter or an unwitting statutory rape.[11] Moreover, certain jurisdictions define felonies as any crime with a penalty of imprisonment for more than one year.[12] Thus, any offense incurring a penalty of more than a year would be automatic grounds for disbarment no matter how remote the gravamen of the offense to the practice of law. Equally problematical are situations requiring the sanctioning of an attorney guilty of a turpitudinous misdemeanor because of the great difficulty in neatly defining what constitutes turpitude.[13] Because of the vagueness of the

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turpitude; in either of which cases the record of conviction is conclusive evidence. 2. When he is guilty of a willful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with or in the course of his profession. 3. A willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed. 4. Doing any other act to which such consequence is by law attached. 5. Soliciting legal business for himself or office, either by himself or representative. Nothing herein contained shall be construed to prevent or prohibit listing in legal or other directories, law lists and other similar publications, or the publication of professional cards in any such lists, directories, newspapers or other publication.

5 *See Ex parte* Wall, 107 U.S. 265, 273-80 (1882).

6 *See* 43 HARV. L. REV. 117, 118 (1930).

7 A felony at common law occasioned forfeiture of lands or goods and sometimes additional capital punishment. Today the definition is statutory. *See* People v. Connors, 301 Ill. 112, 114, 133 N.E. 639, 640 (1921); Jones v. Brinkley, 174 N.C. 23, 24, 93 S.E. 372, 373 (1917); 18 U.S.C. § 1 (1964).

8 Acts *mala prohibita* are distinguished from crimes *mala in se* by the fact that the origin of the former is statutory. *See* State v. Trent, 122 Ore. 444, 450, 259 P. 893, 898 (1927).

9 *Crimen falsi* comes within the term infamous crimes. At common law the term included any offense which might impede the dispatch of justice due to falsehood or fraud. *See* Drazen v. New Haven Taxicab Co., 95 Conn. 500, 501, 111 A. 861, 862 (1920).

10 *See* 43 HARV. L. REV. 117, 118 (1930).

11 *See* 43 CORNELL L.Q. 489, 490 (1958).

12 Iowa achieves the result by indirection. Imprisonment for indictable misdemeanors may not exceed one year in a county jail. IOWA CODE § 687.7 (1966). Felonies are punishable by imprisonment only in the penitentiary or men's reformatory. IOWA CODE § 687.2 (1966). *See* 18 U.S.C. § 1 (1964).

13 A number of courts have defined moral turpitude as follows:

[M]oral turpitude is anything done contrary to justice, honesty, principle or good morals. It is also defined as an act of baseness, vileness, or depravity in private or

term, it is not surprising that diametrically opposed conclusions have been reached.

I. Turpitude as a Test For Disbarment

A review of cases in which moral turpitude was utilized as a test for disbarment also reflects a pattern of inconsistency. While the term moral as applied in the phrase moral turpitude is a tautology, a singular consideration of morality may mark the actual point on which a case turns. A lawyer who kept a house of prostitution in which he also allowed opium smoking was "morally unfit" to be a member of the bar.[14] Causing or conspiring to cause an abortion for his girl friend involved moral turpitude and was ground for disbarment.[15] Moral turpitude has also been held to include: fathering the child of a mentally deficient dwarf;[16] committing adultery;[17] renting real property which was used as a brothel;[18] soliciting selective service questionaires and issuing false affidavits to exempt these clients from military service;[19] attempting extortion;[20] falsifying bank records to secure ficticious loans;[21] conspiring to smuggle opium;[22] publication of defamatory matter;[23] libel and slander;[24] fraudulently misrepresenting location and value of real property;[25] and forging a prescription to obtain narcotics.[26] Conversely, the following were held not to involve turpitude: simple assault (unless done with malice);[27] gambling;[28] temper and abusive language;[29] and frequenting a disorderly house.[30] Violation

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social duties which man owes to his fellow men or to society in general contrary to accepted and customary rules of right and duties between man and man.

In re Jacoby, 74 Ohio App. 147, 155, 57 N.E.2d 932, 936 (1943).

That term [moral turpitude] is vague and indefinite, but imports an "act of baseness, vileness or depravity in private and social duties which a man owes to his fellowmen or to society in general contrary to the accepted and customary rule of right and duty between man and man."

United States *ex rel.* Ciarello v. Reimer, 32 F. Supp. 797, 798 (S.D.N.Y. 1940).

It would thus seem that the test in Ohio and generally is whether the act denounced by the statute offends the generally accepted moral code of mankind.

State v. Deer, 57 Ohio Op. 493, 494, 129 N.E.2d 667, 669 (1955).

Everything done contrary to justice, honesty, modesty, or good morals, is done with turpitude.

In re Kirby, 10 S.D. 322, 328, 73 N.W. 92, 94 (1897).

14 *In re* Marsh, 42 Utah 186, 129 P. 411 (1913).

15 *In re* Meyerson, 190 Md. 671, 59 A.2d 489 (1948).

16 *In re* Hicks, 163 Okla. 29, 20 P.2d 896 (1933).

17 Grievance Committee v. Broder, 112 Conn. 269, 152 A. 292 (1930).

18 *In re* Weare, 2 Q.B. 439 (1893).

19 *In re* Arctander, 110 Wash. 296, 188 P. 380 (1920); *In re* Wiltsie, 109 Wash. 261, 186 P. 848 (1920).

20 Librarian v. State Bar, 38 Cal. 2d 328, 239 P.2d 865 (1952); *In re* Coffey, 123 Cal. 522, 56 P. 448 (1899).

21 *In re* Peters, 73 Mont. 284, 235 P. 772 (1925).

22 *In re* Shepard, 35 Cal. App. 462, 170 P. 442 (1917).

23 *Ex parte* Mason, 29 Ore. 18, 43 P. 651 (1896).

24 Hughey v. Bradrick, 39 Ohio App. 486, 177 N.E. 911 (1931).

25 Mauer v. State Bar, 219 Cal. 271, 26 P.2d 14 (1933).

26 Butler County Bar Ass'n v. Schaeffer, 172 Ohio St. 165, 174 N.E.2d 103 (1961).

27 *In re* Rothrock, 16 Cal. 2d 449, 106 P.2d 907 (1940). *See also* United States *ex rel.* Ciarello v. Reimer, 32 F. Supp. 797 (S.D.N.Y. 1940).

28 *Ex parte* Stratford, 12 L.J.Q.B. 331 (1843).

29 *In re* Washington, 82 Kan. 829, 109 P. 700 (1910).

30 People *ex rel.* Black v. Smith, 290 Ill. 241, 124 N.E. 807 (1919).

of the National Prohibition Act was held to involve turpitude[31] in some jurisdictions but not in others.[32] These liquor violation cases illustrate as well as any that the concept of morality is an individual one, almost totally subjective, displaying a great variation from one community to another. For this reason uniformity could not be expected from any interpretation based on a simple concept of morality.

In the same manner that the old common-law writs could not be made to cover every crime, a listing of common law offenses involving moral turpitude[33] is now also inadequate. Older courts viewed moral turpitude as a standard similar to the test which separates felonies and misdemeanors.[34] Modern courts have been unable to adopt this reasoning because felonies and misdemeanors

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31 Where a retired policeman was convicted of the unlawful possession and transportation of intoxicating liquors, the court held these acts constituted moral turpitude. The court stated:

> There is no hard and fast rule as to what constitutes moral turpitude. It cannot be measured by the nature or character of the offense, unless, of course, it be an offense, inherently criminal, the very commission of which implies a base and depraved nature. The circumstances attendant upon the commission of the offense usually furnish the best guide. For example, an assault and battery may involve moral turpitude on the part of the assailant in one case and not in another. Intent, malice, knowledge of the gravity of the offense, and the provocation, are all elements to be considered.

Rudolph v. United States, 6 F.2d 487, 488 (D.C. Cir. 1925). *See* Riley v. Howes, 17 F.2d 647 (S.D. Me. 1927); *In re* Finch, 156 Wash. 609, 287 P. 677 (1930). For violation of state liquor laws *see* State v. Malusky, 59 N.D. 501, 230 N.W. 735 (1930); State v. Bieber, 121 Kan. 536, 247 P. 875 (1926); Kurtz v. Farrington, 104 Conn. 257, 132 A. 540 (1926); State v. Edmunson, 103 Ore. 243, 204 P. 619 (1922); Hendrix v. State, 4 Okla. Crim. 611, 113 P. 244 (1911); Underwood v. Commonwealth, 32 Ky. L. Rptr. 32, 105 S.W. 151 (1907).

32 An attorney manufactured and had in his home for his own consumption seven hundred quarts of beer which did not constitute moral turpitude. The court explained:

> This [moral turpitude] is an old phrase in the law, and its meaning is demonstrated in cases in which a prior conviction is attempted to be proven for the purpose of impeaching a witness. It is subjective in meaning and restricted to those who commit the gravest offenses,—felonies, infamous crimes, those that are malum in se. They disclose the inherent character, that he is of depraved mind, and because thereof he is not worthy of belief even under oath. Crimes of a heinous nature have always been considered by laymen and lawyers alike as involving moral turpitude, regardless of legislative action on the subject. A thief is a debased man, he has no moral character. The fact that a statute may classify his acts as grand and petit larceny, and not punish the latter with imprisonment and declare it to be only a misdemeanor, does not destroy the fact that the theft, whether it be grand or petit larceny involves moral turpitude. It is malum in se, and so the consensus of opinion—statute or no statute—deduces from the commission of crimes malum in se the conclusion that the perpetrator is depraved in mind and is without moral character, because, forsooth, his very act involves moral turpitude.

Bartos v. United States District Court, 19 F.2d 722, 724 (8th Cir. 1927). Comparing *Bartos* and Rudolph v. United States, 6 F.2d 487 (D.C. Cir. 1925), it is interesting that the court with a definite concept of turpitude failed to convict, while the "uncertain" court convicted. *See* Coykendall v. Skrmetta, 22 F.2d 120 (5th Cir. 1927); People v. Cook, 220 App. Div. 110, 221 N.Y.S. 96 (1927). *Accord*, for violation of state prohibition laws: Osborn v. State, 32 Ala. App. 188, 23 So. 2d 14 (1945); Saint v. Irion, 165 La. 1035, 116 So. 549 (1928); Baugh v. State, 215 Ala. 619, 112 So. 157 (1927); Jennings v. State, 82 Tex. Crim. 504, 200 S.W. 169 (1918); Edenfield v. State, 14 Ga. App. 401, 81 S.E. 253 (1914); Swope v. State, 4 Ala. App. 83, 58 So. 809 (1912); Fort v. City of Brinkley, 87 Ark. 400, 112 S.W. 1084 (1908); McGovern v. Smith, 75 Md. 104, 53 A. 326 (1902).

33 Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 16n.32 (1935), lists murder, larceny, embezzlement, forgery, perjury, bribery, blackmail, and making false reports to public officials.

34 *Id.* at 20.

are mostly statutory and are separated not in accordance with the nature of the wrongful act but on the basis of the punishment meted out for the crime. Theoretically as many shadings or variations are possible as the number of jurisdictions surveyed. It will be noted the same criticism leveled at the felony disbarment rule, which fails to differentiate crimes directly related to the practice of law with those offenses more remote, is also applicable to a moral turpitude test. Because turpitude is a constitutent of the felony disbarment rule it may be the underlying cause for its failure.

Another method of viewing the moral turpitude test is to utilize it in a manner so as to isolate acts *mala in se* from acts *mala prohibita.* This distinction may be even more confusing than trying to separate misdemeanors and felonies, again for the reason of statutory enactment.[35] A felony in one jurisdiction may be a misdemeanor in another and each may or may not involve turpitude. In one case where an attorney was convicted of petty larceny in a justice of the peace court, the state supreme court would not distinguish petty larceny and grand larceny and disbarred the attorney on the basis that conviction of violating any statute involved turpitude.[36] Crimes *malum in se* have generally been said to involve turpitude due to their infamous or heinous nature and *crimen falsi* usually have turpitude at base.[37] Justice Traynor's reasoning in the case of *In re Hallinan,*[38] that moral turpitude includes an intent to defraud, reflects the fraud and deceit elements which go to make up *crimen falsi* and serve as a basis for turpitude determinations. Where an attorney placed slugs in a parking meter over an extended period and was subsequently disbarred,[39] the court, looking to both morality and fraud in reaching its decision, stated: "Morally, the offense was as great as though he had stolen money deposited by others in the meters, and amounts at least to 'fraud or deceit.' "[40]

The term "turpitude" becomes even more ambiguous when we consider its use in other areas such as the exclusion of aliens,[41] deportation,[42] compe-

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35 For example, rape, a common law felony, *mala in se,* was made statutory in 1275. Because the offense is statutory most jurisdictions treat it as *mala prohibita,* California being a notable exception, allowing mistake of fact as a defense to statutory rape. People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

36 *In re* Henry, 15 Idaho 755, 99 P. 1054 (1909).

37 Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment,* 24 CALIF. L. REV. 20n.41 (1935). *See also In re* Burrus, 364 Mo. 22, 24, 258 S.W.2d 625, 627 (1953).

38 43 Cal. 2d 243, 272 P.2d 768 (1954).

39 Fellner v. Bar Ass'n of Baltimore City, 213 Md. 243, 131 A.2d 729 (1957).

40 *Id.* at 247, 131 A.2d at 731.

41 8 U.S.C. § 1182(a)(9) (1964); Bermann v. Reimer, 123 F.2d 331 (2d Cir. 1941) (false representations constituted moral turpitude); United States *ex rel.* Mylius v. Uhl, 210 F. 860 (2d Cir. 1914) (conviction of criminal libel does not involve moral turpitude).

42 8 U.S.C. § 1251(a)(4) (1964). In the following cases aliens were deported for assault (held to constitute moral turpitude): United States *ex rel.* Mazzillo v. Day, 15 F.2d 391 (S.D.N.Y. 1926); United States *ex rel.* Ciccerelli v. Curran, 12 F.2d 394 (2d Cir. 1926); United States *ex rel.* Morlacci v. Smith, 8 F.2d 663 (W.D.N.Y. 1925); Weedin v. Toyokichi Yamada, 4 F.2d 455 (9th Cir. 1925); *Ex parte* George, 180 F. 785 (N.D. Ala. 1910). *Contra:* United States *ex rel.* Griffo v. McCandless, 28 F.2d 289 (E.D. Penn. 1928); Ciambelli *ex rel.* Maranci v. Johnson, 12 F.2d 465 (D. Mass. 1926). Second degree manslaughter was held not to involve moral turpitude. United States *ex rel.* Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929).

tency of witnesses[43] and the regulation of other professions.[44] In this context adultery,[45] bigamy,[46] statutory rape,[47] perjury[48] and theft[49] were said to involve turpitude but fornication did not,[50] absent a showing that illicit intercourse was a criminal offense in the jurisdiction concerned. Physicians and dentists may lose their licenses to practice because of moral turpitude;[51] yet "turpitude" in these cases may not be identical with "turpitude" in disbarment proceedings. Conviction of an illegal sale of narcotics by a physician was held not to involve moral turpitude,[52] but using the mail to advertise and procure abortions resulted in license revocation.[53] Indecent exposure by a dentist was turpitudinous.[54] When applied to other professions turpitude generally seems to be limited to acts directly related to the particular profession. Physicians and pharmacists would probably have their licenses revoked for smuggling opium, illegally disposing of narcotics[55] or committing abortions,[56] but most likely would escape revocation procedures for adultery, forgery, embezzlement, or failure to file income tax forms because these acts have no bearing on their ability to practice medicine or pharmacy. However, if statutes regulating these professions were strictly enforced these grounds might be adequate. If an employed pharmacist was guilty of embezzling from his employer and society demanded only the statutory penalty without revocation of license, it may be said that an attorney guilty of the same offense is subject to being twice penalized with the penalty of disbarment the more serious of the two.[57] However,

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43 ALA. CODE tit. 7, § 434 (1960).

44 IOWA CODE § 147.55 (1966); MINN. STAT. ANN. § 147.02 (1946).

45 *Ex parte* Rodriguez, 15 F.2d 878 (S.D. Tex. 1929).

46 United States *ex rel.* Rennie v. Brooks, 284 F. 908 (E.D. Mich. 1922).

47 Bendel v. Nagle, 17 F.2d 719 (9th Cir. 1927).

48 United States *ex rel.* Karpay v. Uhl, 70 F.2d 793 (2d Cir. 1934); Masaichi Ono v. Carr, 56 F.2d 772 (9th Cir. 1932); Kaneda v. United States, 278 F. 694 (9th Cir. 1922); United States v. Carrollo, 30 F. Supp. 3 (W.D. Mo. 1939); United States *ex rel.* Carella v. Karnuth, 2 F. Supp. 998 (W.D.N.Y. 1933).

49 United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929); United States *ex rel.* Teper v. Miller, 87 F. Supp. 285 (S.D.N.Y. 1949); United States *ex rel.* Fracassi v. Karnuth, 19 F. Supp. 581 (W.D.N.Y. 1937).

50 *Ex parte* Rocha, 30 F.2d 823 (S.D. Tex. 1929); *Ex parte* Isojoki, 222 F. 151 (N.D. Cal. 1915); United States *ex rel.* Huber v. Sibray, 178 F. 150 (C.C.W.D. Pa. 1910).

51 Miller v. Board of Regents of Univ. of State of N.Y., 279 App. Div. 447, 111 N.Y.S.2d 393 (1952), *aff'd*, 305 N.Y. 89, 111 N.E.2d 222 (1953), *reargument denied*, 305 N.Y. 69, 112 N.E.2d 773 (1953); Bancroft v. Board of Governors of Registered Dentists, 202 Okla. 108, 210 P.2d 666 (1949); State Medical Bd. v. Rodgers, 190 Ark. 266, 79 S.W.2d 83 (1935); State *ex rel.* Tullidge v. Hollingsworth, 108 Fla. 607, 146 So. 660 (1933).

52 State Bd. of Medical Examiners v. Friedman, 150 Tenn. 152, 263 S.W. 75 (1924).

53 Kemp v. Board of Supervisors, 46 App. D.C. 173, 181 (1917).

54 Board of Dental Examiners v. Lazzell, 172 Md. 314, 321, 191 A. 240, 243 (1937).

55 State v. Willstead, 248 Wis. 240, 21 N.W.2d 271 (1946); Speer v. State, 109 S.W.2d 1150 (Tex. 1937); Du Vall v. Board of Medical Examiners of Ariz., 49 Ariz. 329, 66 P.2d 1026 (1937); Seitz v. Ohio State Medical Bd., 24 Ohio App. 154, 157 N.E. 304 (1926).

56 Murphy v. Board of Medical Examiners of Cal., 75 Cal. App. 2d 161, 170 P.2d 510 (1946); Bold v. Board of Medical Examiners, 133 Cal. App. 23, 23 P.2d 826 (1933); State *ex rel.* Sorenson v. Lake, 121 Neb. 331, 236 N.W. 762 (1931); Tapley v. Abbott, 111 Cal. App. 397, 295 P. 911 (1931).

57 A court looking beyond disbarment declared, "Disbarring an attorney is a very serious matter. It brings disgrace upon him and deprives him of the right to engage in work for which he has prepared himself through years of schooling. If the attorney has borne a good reputation, the disbarment results in besmirching his good name. These considerations must be taken into account." *In re* Randolph, 347 S.W.2d 91, 109 (Mo. 1961).

an attorney with embezzling tendencies is not limited to an employer's cash register. His depredations may include an estate or a client's funds held in trust.

Since turpitude has become a legal chameleon it is not unexpected that courts are divided on the issue of whether failure to file income tax forms involves turpitude[58] or whether it does not.[59] In one aspect tax evasion is a wrongful act because there is a statutory penalty; yet when countless citizens gleefully applaud cartoonists and comedians depicting irate taxpayers and tax dodgers, one court's opinion that failure to pay taxes does not intrinsically offend the morals of society[60] is well nigh impervious to attack. For this reason the morality test as a component of turpitude is unfeasible. Accordingly, courts have devised alternatives, one of which focuses on the willfulness of the act. Willfulness[61] in the violation of tax laws may be divided into two categories: a willful failure to file, or the willful filing of a fraudulent return. The United States Supreme Court examined the term, "willful," as applied to the Internal Revenue Code in *United States v. Murdock*,[62] in which the defendant willfully refused to supply information about his deductions under claim of privilege against self-incrimination. Turning aside his claim, the court held that the privilege could not be invoked and defined willfully as:

> [A]n act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, perversely. . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act. . . .[63]

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58 Chanan Din Khan v. Barber, 147 F. Supp. 771 (N.D. Cal. 1957); *In re* McLendon, 337 S.W.2d 56 (Mo. 1960); *In re* Pennington, 220 Ore. 343, 348 P.2d 774 (1960); *In re* Seijas, 52 Wash. St. 2d 1, 318 P.2d 961 (1957); *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1957); *In re* Burrus, 364 Mo. 22, 258 S.W.2d 625 (1953); Rheb v. Bar Ass'n of Baltimore City, 186 Md. 205, 46 A.2d 289 (1946); *In re* Diesen, 173 Minn. 297, 215 N.W. 427, 217 N.W. 356 (1928).

59 United States v. Carrollo, 30 F. Supp. 3 (W.D. Mo. 1939); *In re* Ford's Case, 102 N.H. 24, 149 A.2d 863 (1959); *In re* Corcoran, 215 Ore. 660, 337 P.2d 307 (1959); Kentucky State Bar Ass'n v. Brown, 302 S.W.2d 835 (Ky. 1957); Kentucky State Bar Ass'n v. McAfee, 301 S.W.2d 899 (Ky. 1957); Baker v. Miller, 236 Ind. 20, 138 N.E.2d 145 (1956); People v. Fischer, 132 Colo. 131, 287 P.2d 973 (1955); Louisiana State Bar Ass'n v. Connolly, 206 La. 883, 20 So. 2d 168 (1944).

60 In United States v. Carrollo, 30 F. Supp. 3, 7 (W.D. Mo. 1939), the court stated:

> We are not prepared to rule that an attempt to evade payment of a tax due the nation, or the commonwealth, or the city, or the school district, wrong as it is, unlawful as it is, immoral as it is, is an act evidencing baseness, vileness, or depravity of moral character. The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion.

61 An oft cited definition of willfulness was given by the court in United States v. Martell, 199 F.2d 670 (3d Cir. 1952). The court, at 672, stated:

> It [willfulness] is best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the government which he seeks to conceal. A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable.

62 290 U.S. 389 (1933).

63 *Id.* at 394.

Under this interpretation a jury might, however, find that the defendant's actions were not prompted by bad faith or evil intent.

While willfulness was an essential element[64] for violation of section 145(b)[65] of the Internal Revenue Code of 1939, fraud was not.[66] Yet some measure of bad faith or evil intent was essential.[67] This could be inferred by evidence that the defendant acted without justifiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts; all of which would not necessarily constitute moral turpitude. The term willful is difficult to omit because it is found in the statute and quite naturally enters the proceedings via the pleadings. A California court in the *In re Hallinan*[68] case pondered whether an attorney could be summarily disbarred on conviction of willfully and knowingly filing false and fraudulent income tax returns. Because section 6101 and 6102 of the Business and Professions Code required a showing of turpitude, conviction of a crime absent such a showing would not be grounds for summary disbarment. The crucial problem became, therefore, whether or not an intent to defraud the United States was an essential element of the crime proscribed by section 145(b) of the Internal Revenue Code of 1939. If an intent to defraud was not an essential element, conviction without proof of moral turpitude would not satisfy the California requirement for summary disbarment. A number of courts have held that an intent to defraud is not an essential element and that conviction does not necessarily involve moral turpitude.[69] On the basis of these decisions the *Hallinan* court referred the matter to the Board of Governors of the state bar for a determination of whether or not the offense for which Hallinan had been convicted did in fact involve moral turpitude. It may be observed that a test for moral turpitude is utilized twice in certain cases. First, the court may require a showing of turpitude to establish guilt in the tax matter, and second, proof of turpitude may be required to sustain disbarment. However, where a statute provides for summary disbarment as in California, only the first showing may be required.

II. Tax Evasion Without Turpitude

If neither fraud nor moral turpitude is an essential element in a conviction for tax evasion, a court relying solely on a turpitude test would naturally experience difficulty in disbarring an attorney convicted of the offense. This was the situation in *Baker v. Miller*,[70] where the court stated: "This court

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64 United States v. Martell, 199 F.2d 670, 671 (3d Cir. 1952).

65 Int. Rev. Code § 7201 (1954) is the successor of § 145(b).

66 *In re* Hallinan, 43 Cal. 2d 243, 250, 272 P.2d 768, 774 (1954).

67 *Id.*

68 43 Cal. 2d 243, 272 P.2d 768 (1954).

69 Louisiana State Bar Ass'n v. Connolly, 206 La. 883, 20 So. 2d 168 (1944). A Minnesota court insisted tax evasion did involve moral turpitude, but referred the proceeding to a referee for an independent investigation of that question. *In re* Diesen, 173 Minn. 297, 215 N.W. 427, 217 N.W. 356 (1928).

70 236 Ind. 20, 138 N.E.2d 145 (1956).

cannot bring itself to say that a wilful attempt to evade a tax imposed by statute, even if defined by the statute as a felony, should automatically disbar an attorney from his profession. . . ."[71] Here the defendant drew a nine month suspension. It has become commonplace for attorneys charged with tax evasion to cite *Baker* and other cases which hold tax evasion does not involve moral turpitude.

In *Iowa State Bar Association v. Kraschel*,[72] attorney Fred J. Kraschel, who was charged with failure to timely file federal and state income tax returns, relied on *Baker* alleging that failure to file tax returns did not involve moral turpitude. Therefore he was beyond the statute. In his defense Kraschel also relied on *State v. Roggensack*,[73] in which a young county attorney failed to file income tax returns for two years. Roggensack ignored several communications from the tax department, then received notice of a doomage assessment approximately the amount of his tax bill, and decided to allow the tax department to have a lien for that sum. The following year he anticipated an identical result, but the tax department initiated a criminal complaint instead. Roggensack paid his tax plus a twelve percent interest fee. Later the department notified him of a hundred percent penalty. In disbarment proceedings before the Wisconsin Supreme Court, the court on reviewing a finding of no evidence of moral turpitude declared: "Nevertheless, the fact that defendant was not guilty of moral turpitude, in the sense of an intention to evade payment of taxes, does not relieve him from discipline. This is because defendant's failure to file income tax returns, after being repeatedly notified by the department to do so, was intentional on his part even though he did not expect thereby to escape payment of any taxes."[74]

Kraschel's dependence on *Roggensack* was based on tenuous grounds, as a thorough reading of that case would have revealed. Since Roggensack merely received a censure for his actions, it may have been that Kraschel was relying more on the result than the theory utilized to achieve it. In considering Kraschel's defense the Iowa court accepted Justice Traynor's statement from *In re Hallinan*:[75]

> Although the problem of defining moral turpitude is not without difficulty . . . it is settled that whatever else it may mean, it includes fraud and that a crime in which an intent to defraud is an essential element is a crime involving moral turpitude. . . . It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude.[76]

The Internal Revenue Service had not charged fraud which was an essential element of moral turpitude but had charged negligence. Kraschel had

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71 *Id.* at 27, 138 N.E.2d at 149.
72 148 N.W.2d 621 (Iowa 1967).
73 19 Wis. 2d 38, 119 N.W.2d 412 (1963).
74 *Id.* at 44, 119 N.W.2d at 416.
75 43 Cal. 2d 243, 272 P.2d 768 (1954).
76 *Id.* at 247, 272 P.2d at 771.

neither been indicted nor convicted of tax violations. Lack of conviction notwithstanding, the Iowa court declared: "We hold willful failure by a member of the legal profession to file income tax returns as required by law warrants professional disciplinary action. We do not deem it necessary to determine whether turpitude is involved here."[77]

After embarking on a journey concerned with a consideration of turpitude, the Iowa court took a circuitous detour to reach their destination and then solemnly pronounced that a showing of turpitude was in reality immaterial. Finding the statutory requirement of turpitude was unnecessary in disbarment cases based on tax evasion meant adopting a substitute test. The court chose Canon 32 of the Canons of Professional Ethics of the American Bar Association, as cited in *Roggensack*. The Wisconsin court there declared: "*He must also observe* and advise his client to observe *the statute law*, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. (Italics supplied.)"[78] Employing the Canons of Ethics eliminated the necessity of considering turpitude, a test which had become unworkable. It afforded the court an opportunity to view tax violations in the overall framework of conduct which is to be required of an officer of the court. While this was an improvement, some practical problems remain. The guideline enunciated by the court in *State v. McCarthy*[79] has not been eliminated. In *McCarthy* the court stated, "Whether a person is guilty of moral turpitude depends upon the circumstances of each case. The same rule cannot be applied to every case involving a violation of law."[80] The same reasoning must be applied to the Canons.

The maintainance of high professional standards is not only noble and laudable; it is a necessity.[81] Yet, in the fervor to achieve these high goals there is a danger that the pendulum may swing too far, depriving a lawyer of a private life where his conduct is a matter for his own conscience. Disciplinary action in other professions affords an interesting comparison. An embezzling pharmacist may injure his employer, but his act in no way affects his relationship or impairs his ability to fill a prescription. Tax evasion does not affect a surgeon's dexterity with a scalpel and may not require revocation of his license. Tax evasion by a lawyer may not injure his client, but nonpayment of taxes defrauds the government, which is tantamount to defrauding a person. Because

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77 148 N.W.2d 621, 628 (Iowa 1967).

78 19 Wis. 2d 38, 44, 119 N.W.2d 412, 416 (1963).

79 255 Wis. 234, 38 N.W.2d 679 (1949).

80 *Id.* at 250, 38 N.W.2d at 687.

81 Former Associate Justice of the United States Supreme Court, Thomas Clark declared:

> There must be stricter discipline within the Bar. The Canons of Ethics must be enforced without fear or favor. Those not maintaining the highest standard of ethical conduct should be disciplined or removed on repetition. In this regard there should be a closer liason between the Bar and the law school—in-training programs, such as counsel for indigents, should include law school participation. Assistance to the law schools should be given in the raising of standards and the protection of the Bar from entrants who are morally unfit or educationally unqualified.

40 WIS. B. BULL. 7 (Feb. 1967).

an attorney's duties generally encompass the broad fabric of the law, misconduct arising out of a willful failure to pay taxes directly concerns an area in which he is licensed to practice. Failure to observe tax laws leaves a tarnished aura about the profession. Damage to the profession can no more be tolerated than injury to a client. However, while a lawyer's conduct must be circumspect and above reproach in matters concerning the law, criticism obtains from the overextension of the Canons into an attorney's private life. The United States Supreme Court has recognized a citizen's right to privacy,[82] and a lawyer as a citizen is entitled to a private life.

Violation of tax laws by an attorney not only undermines public confidence in the profession but also deprives the client of a broad area in which to repose a trust and may induce the public to emulate the bad example. Arguendo, wholesale disregard of tax laws might follow, ushering in a new wave of civil disobedience. The ability of an attorney to confine his dereliction to his own taxes is open to conjecture. The lure of securing an attorney who would assist citizens in violating tax laws with impunity is equally obvious. On the other hand, an offense such as drunkeness is not at the heart of the profession but is of a private nature, reflecting mostly upon the individual involved.

If an attorney was intoxicated at the club every Saturday night, this would be at least habitual drunkeness; yet if he was at all other times sober and competent, it is doubtful that his clients would suffer. It is also doubtful that clients would suffer if their attorney habitually violated traffic laws such as overtime parking and minor speeding infractions. Nor would clients suffer in every instance where an attorney was guilty of fornication or an unwitting statutory rape. It is common knowledge that even those states with fornication statutes do not enforce them.[83] This is not to infer that these crimes should go unpunished, but rather, a lawyer should not be singled out for extraordinary sanction when society, to a greater or lesser degree, condones such conduct by members of other professions and the public in general. Ethical standards should not be so stringent as to attempt to prepare an attorney for sainthood. The *Baker* court stated: "True, an attorney's conduct should be of the highest character, but the difference between striving for perfection, and the attainment of perfection in conduct, is a margin of some width for all of us."[84]

In *In re Gorsuch*,[85] the court attempted to preserve both a lawyer's rights and the integrity of the Bar when it declared:

> This does not mean that the court has the function or right to regulate the morals, habits or private lives of lawyers, who like other citizens are free to act and be responsible for their acts, but when the morals, habits or conduct of a lawyer demonstrate

82 *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Silverman v. United States, 365 U.S. 505 (1961).

83 MODEL PENAL CODE § 207.1 (Tent. Draft No. 4, 1955), comment at 204.

84 236 Ind. 20, 27, 138 N.E.2d 145, 149 (1956).

85 76 S.D. 191, 75 N.W.2d 644 (1956).

> unfitness to practice law or adversely affect the proper administration of justice, then the Court may have the duty to suspend or revoke the privilege to practice law in order to protect the public.[86]

An attorney who is a civil rights advocate may find himself morally obligated to lead protest marches which may result in violation of the law, while a colleague who happens to be a racist advocating the return of the colored race to Africa is equally scorned and may also violate the law. Unpopular opinions should not be magnified beyond proportion to allow minor violations of law to become the basis for disbarment. Courts have consistently asserted that the purpose for disbarment is not punishment, but to protect the public.[87] Apropos here is Abraham Lincoln's classic observation that calling a dog's tail its fifth leg does not make it so. If no valid connection exists between an offense and protection of the public, disbarment for such an offense becomes punishment.

Conclusion

As a solution, it is suggested a clear cut distinction be drawn between offenses that warrant disbarment and those warranting suspension. This can be accomplished by amending the Canons of Ethics and interposing a suitable guideline, carving out an area for allowable private conduct. The solution may require courts taking judicial notice that disbarments not only protect the public but may indeed punish[88] an errant attorney. This acknowledgement would lay the foundation for an enumeration of specific offenses with related punishment, whether it be temporary suspension or permanent disbarment, or censure. The Iowa court has moved forward by utilizing suspension[89] for offenses which do not warrant disbarment, but there is no guarantee that an attorney with unpopular views and a ten dollar income tax evasion could not be disbarred. By clarifying an area now beset with ambiguities, professional

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86 *Id.* at 197, 75 N.W.2d at 648.

87 *In re* Gorsuch, 76 S.D. 191, 199, 75 N.W.2d 644, 649 (1956); *In re* Meyerson, 190 Md. 671, 678, 59 A.2d 489, 491 (1948); State v. Kirby, 36 S.D. 188, 203, 154 N.W. 284, 289 (1915); *Ex parte* Wall, 107 U.S. 265, 273 (1882), quoting 1 Tidd, Prac. 89 (9th ed.), " 'The question is,' said Lord Mansfield, '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. . . . It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.' "

88 One Iowa court readily conceded disbarment was punishment.

> In arriving at the punishment which should be imposed, each case must be largely governed by its particular facts, and the matter rests in the sound discretion of the court. *The question is not what punishment may the offense warrant, but what does it require as a penalty to the offender, as a deterrent to others, and as an indication to laymen that the courts will maintain the ethics of the profession.*

In re DeCaro, 220 Iowa 176, 184, 262 N.W. 132, 136 (1935).

89 Iowa State Bar Association v. Kraschel, 148 N.W.2d 621 (Iowa 1967) (2 year suspension plus 2 years probation for tax evasion and commingling funds); *In re* Glenn, 256 Iowa 1233, 130 N.W.2d 672 (1964) (1 year suspension for publishing malicious misrepresentation about local court); *In re* Meldrum, 243 Iowa 777, 51 N.W.2d 881 (1952) (1 year suspension for soliciting legal business).

ethics would be enhanced because minor infractions warranting censure would receive it. Currently some questionable practices and minor infractions are overlooked. An intermediate class of acts would warrant suspension for a definite period, correlating the length of the period with the gravity of the offense, and the remaining class of serious crimes would incur disbarment. A completely effective defense strategy may require knowledge of the maximum penalty. An enumeration of punishments relating to offenses has worked fairly and well in our system of criminal law. Then too, lawyers currently reluctant to bring charges against a colleague because he might be disbarred when they felt he should only be censured or suspended would no longer be inclined to look askance.

Drawing a line would also have a deterrent affect on a potential offender. By correlating the punishment with the gravity of the offense, the erring lawyer would be able to ascertain what the result of such conduct might be. If a lawyer knew failure to pay a tax of less than $500 meant a definite suspension from six months to two years, he would probably think twice about losing his livelihood before proceeding. If he also knew with assurance that evasion of a sum greater than $500 would mean positive permanent disbarment, he would have another opportunity to reflect on the consequences and be deterred. The same reasoning may be applied to other acts condoned by other professions and society in general. Whatever the standard of conduct, it must be realistic. It must be within the realm of reasonability. The result will not only be workable, but will obviate the hypocrisy of unequal application and unequal enforcement of existing Canons.

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