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WHEN IS A FELONY A FELONY? AUTOMATIC DISBARMENT IN NEW YORK AFTER *IN RE* *JOHNSTON**

INTRODUCTION

Section 90(4) of the New York Judiciary Law provides that an attorney who is convicted of a felony is automatically disbarred.¹ The determination of whether an offense is a felony for purposes of the statute depends, in part, on whether the offense is committed in New York. When an attorney is convicted of a criminal offense under New York law, the application of section 90(4) is straightforward: an offense constitutes a felony if it is classified as such under the laws of New York.² When an attorney is convicted of an offense under the laws of a foreign jurisdiction,³ however, the application of section 90(4) is more complicated. Under such circumstances, an offense constitutes a felony for purposes of the statute only if it is classified as a felony under the law of the jurisdiction in which it is committed, and, were it committed in New York, it would constitute a felony under New York law.⁴ The New York Court of Appeals has

* 75 N.Y.2d 403, 553 N.E.2d 566, 554 N.Y.S.2d 88 (1990).

¹ Section 90(4)(a) provides in relevant part:

Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

N.Y. JUD. LAW § 90(4)(a) (McKinney 1983).

² Section 90(4)(e) provides:

For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

N.Y. JUD. LAW § 90(4)(e) (McKinney 1983).

This part of the statute was added by amendment in 1979. For further discussion, see text accompanying notes 87-93 *infra*.

³ Throughout this Comment, the term "foreign," when used in a discussion pertaining to the criminal offenses of another jurisdiction, will refer to the laws of any state, district, or territory of the United States other than New York, or to federal law and the criminal offenses defined thereunder.

⁴ N.Y. JUD. LAW § 90(4)(e). See note 2 *supra* for the text of this provision.

interpreted section 90(4) to mean that a felony committed in a foreign jurisdiction need not be a mirror image of a New York felony; rather, a foreign felony need only be "essentially similar" to a New York felony.⁵

The court of appeals recently confronted the difficult problem of determining when a felony conviction in a foreign jurisdiction requires automatic disbarment in New York. In *In re Johnston*,⁶ the court focused on the issue of whether an attorney's conviction of involuntary manslaughter in Texas, for killing another while driving under the influence of alcohol, constituted a felony within the meaning of section 90(4). The court concluded that it did not. It found that the Texas felony would not constitute a felony in New York, were it committed in New York, despite the existence of the New York felony of vehicular manslaughter. Instead of holding that Johnston was automatically disbarred as a result of her Texas felony conviction, the court remitted the matter for a disciplinary hearing.⁷ In so hold-

⁵ *In re Johnston*, 75 N.Y.2d 403, 406, 553 N.E.2d 566, 567, 554 N.Y.S.2d 88, 89 (1990); *In re Margiotta*, 60 N.Y.2d 147, 150, 456 N.E.2d 798, 799, 468 N.Y.S.2d 857, 858 (1983); *In re Cahn*, 52 N.Y.2d 479, 482, 420 N.E.2d 945, 946, 438 N.Y.S.2d 753, 754 (1981).

⁶ 75 N.Y.2d 403, 553 N.E.2d 566, 554 N.Y.S.2d 88 (1990).

⁷ *Id.* Under § 90(4), a foreign felony that does not constitute a felony under New York law constitutes a "serious crime." N.Y. JUD. LAW § 90(4) (McKinney 1983). Section 90(4)(d) provides in relevant part:

For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state

Id.

An attorney convicted of a "serious crime" must be suspended; but the appellate division may set aside the suspension if it deems it appropriate to do so. *Id.* § 90(4)(f). When the judgment of conviction becomes final, the convicted attorney must show cause why a final order of censure, suspension, or disbarment by the appellate division should not be made. *Id.* § 90(4)(g). But if the attorney so requests (as he or she virtually always will), the appellate division will refer the matter for a disciplinary hearing at which the attorney can present mitigating circumstances in his or her defense; however, he or she cannot relitigate the issue of guilt. *Id.* § 90(4)(h); see Maltz, *Impact of Criminal Conviction on the Right to Practice Law*, N.Y.L.J., Sept. 28, 1990, at 1, col. 1. In the first department, this hearing is conducted before a panel composed of members of the Departmental Disciplinary Committee (DDC). *Id.* After the hearing, the panel makes a report and a recommendation to the appellate division of the appropriate discipline to be imposed. N.Y. JUD. LAW § 90(4)(h). The appellate division can accept or reject the recommendation and will impose such discipline as it deems proper under the circumstances. *Id.*

Thus the consequences of conviction of a foreign felony that constitutes only a "seri-

ing, the court substantially narrowed its "essential similarity" test for determining when the commission of a foreign felony will constitute a felony under section 90(4). The court's decision suggests that it will now be significantly less likely that an attorney convicted of a foreign felony will be subject to automatic disbarment in New York.

This Comment analyzes the court of appeals's decision in *Johnston*. First, this Comment discusses the development and application of the court's essential similarity test. Second, this Comment demonstrates that the court significantly narrowed its test for essential similarity; it now requires a substantially stricter identity of elements between foreign and New York felonies. Third, this Comment closely examines the court's reasoning in *Johnston*. This Comment demonstrates the weaknesses in the court's analysis and argues that even under the narrower test for determining essential similarity that the court imposed, it should have found that Johnston's commission of involuntary manslaughter in Texas constituted a felony in New York under section 90(4). Finally, this Comment concludes that the court's unduly narrow interpretation of section 90(4) and the strict standard it appears to have created flout legislative intent and are inconsistent with the important goals that underlie attorney discipline.

ous crime" under § 90(4) are significantly different from the consequences of conviction of a foreign felony that constitutes a felony under the statute. Conviction of a "serious crime" does not result in automatic disbarment. Rather, the convicted attorney is entitled to a hearing in which he or she can present evidence of mitigating circumstances. Moreover, the conviction may not result in disbarment; rather, the appellate division may impose suspension, censure, or possibly no discipline at all.

In addition, the procedure for a hearing before the DDC, after which a recommendation to the appellate division of censure, suspension, or disbarment may or may not be made, is not limited to attorneys who have been convicted of crimes. Rather, it is the general procedure in any case where, after investigation, the DDC has determined that an attorney may have violated a disciplinary rule of the code of professional responsibility, and the violation appears to be serious enough that it requires more than an admonition (discipline that the DDC can impose on its own). N.Y. COMP. CODES R. & RECS. tit. 22, § 605.6 (1988). In many cases, therefore, an attorney convicted of a foreign felony that is deemed to lack essential similarity to a New York felony is not treated much differently, procedurally, than an attorney who has violated a disciplinary rule, but has committed no crime at all.

I. BACKGROUND

A. *Facts*

Ann Johnston was admitted to the practice of law in New York in 1984 by the Appellate Division of the Supreme Court in the First Judicial Department.⁸ In 1986, she was involved in an automobile accident in Texas.⁹ A woman in the car with which Johnston's car collided was killed as a result of the accident.¹⁰ Johnston was charged in Texas with one count of involuntary manslaughter in the first degree—a felony under Texas law—for driving a motor vehicle while intoxicated and, by reason of such intoxication, causing the death of another.¹¹ In 1988, a Texas jury convicted Johnston of this crime. She was sentenced to a term of imprisonment of ten years.¹²

As a result of this conviction, the Departmental Disciplinary Committee for the First Judicial Department in New York (DDC) moved pursuant to section 90(4) for an order striking Johnston's name from the roll of attorneys on the ground that she was disbarred as a result of her Texas felony conviction.¹³ In support of its motion, the DDC contended that the Texas felony of involuntary manslaughter is essentially similar to the New York felony of vehicular manslaughter.¹⁴ In opposition to the

⁸ *In re Johnston*, 146 A.D.2d 222, 223, 539 N.Y.S.2d 903, 903-04 (1st Dep't 1989) *rev'd*, 75 N.Y.2d 403, 553 N.E.2d 566, 554 N.Y.S. 2d 88 (1990).

⁹ *Id.* at 223, 539 N.Y.S.2d at 904.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* Section 90(4)(b) provides:

Whenever any attorney and counsellor-at-law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

N.Y. JUD. LAW § 90(4)(b) (McKinney 1983).

In New York, upon conviction of an offense that constitutes a felony under § 90(4), an attorney is ipso facto disbarred. *In re Barash*, 20 N.Y.2d 154, 157, 228 N.E.2d 896, 898, 281 N.Y.S.2d 997, 1000 (1967). The disbarment is automatic, and the attorney is prohibited from practicing law in New York as soon as the judgment of conviction is rendered. N.Y. JUD. LAW § 90(4)(a); see note 1 and accompanying text *supra*. Strictly speaking, therefore, the striking of the attorney's name from the roll of attorneys is merely a formality. See Note, *The New York Felony Disbarment Rule: A Proposal for Reform*, 47 FORDHAM L. REV. 606, 610 (1979).

¹⁴ *In re Johnston*, 146 A.D.2d 222, 223, 539 N.Y.S.2d 903, 904 (1st Dep't 1989).

DDC's motion, Johnston contended that the offenses significantly and lack essential similarity. She made two arguments. First, Johnston argued that the Texas involuntary manslaughter statute does not require proof of a culpable mental state, whereas the New York vehicular manslaughter statute requires proof of criminal negligence.¹⁵ Second, Johnston argued that the level of intoxication necessary to commit the crime of involuntary manslaughter in Texas is lower than the level required to commit vehicular manslaughter in New York.¹⁶

B. *The Appellate Division Decision*

The appellate division held that the New York and Texas offenses are essentially similar and ordered Johnston's name stricken from the roll of attorneys.¹⁷ The court addressed and dismissed Johnston's two arguments. First, the court considered the issue of mental culpability, examining the relevant New York and Texas statutes. It noted that in order to commit involuntary manslaughter in the first degree in Texas, a person must either: (1) recklessly cause the death of another; or (2) accidentally, in operating a motor vehicle while intoxicated and because of such intoxication, cause the death of another.¹⁸ The court then examined New York's vehicular manslaughter statute.¹⁹ It

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 227, 539 N.Y.S.2d at 906.

¹⁸ The Texas statute provides in relevant part:
Involuntary Manslaughter

(a) A person commits an offense if he:

(1) recklessly causes the death of an individual; or

(2) by accident or mistake when operating a motor vehicle . . . while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.

(c) an offense under this section is a felony of the third degree.

TEX. PENAL CODE ANN. § 19.05 (Vernon 1974) (amended 1987).

¹⁹ The New York statute provides:

A person is guilty of vehicular manslaughter when he:

(1) commits the crime of criminally negligent homicide as defined in section 125.10, and

(2) causes the death of such other person by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law

noted that in order to commit vehicular manslaughter under New York law, a person must commit criminally negligent homicide²⁰ by means of the operation of a motor vehicle while intoxicated.²¹

The appellate division found that a violation of either subsection of the Texas involuntary manslaughter statute involves an act of recklessness by the offender. At first glance it appears as though one can commit involuntary manslaughter in Texas in two different ways: either with the mens rea of "recklessness" or, instead, without any mens rea, but rather by "accident or mistake" while operating a motor vehicle while intoxicated.²² However, the court found that Texas case law indicates otherwise.²³ For purposes of the statute, driving while intoxicated constitutes recklessness per se under Texas law.²⁴ Thus the court found, a

Vehicular manslaughter is a class D felony.

N.Y. PENAL LAW § 125.12 (McKinney 1987) (amended 1989).

For the text of New York's criminally negligent homicide statute, see note 20 *infra*. For the text of § 1192 of the New York Vehicle and Traffic Law, see note 21 *infra*.

²⁰ New York Penal Law § 125.10 provides:

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony.

N.Y. PENAL LAW § 125.10 (McKinney 1987).

Criminal negligence is defined by New York Penal Law § 15.05(4) as follows:

A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

N.Y. PENAL LAW § 15.05 (4) (McKinney 1987).

²¹ Section 1192 of the New York Vehicle and Traffic Law provides:

1. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol. A violation of this subdivision shall be a traffic infraction
2. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva
3. No person shall operate a motor vehicle while in an intoxicated condition. . . .
5. A violation of subdivision two [or] three . . . of this section shall be a misdemeanor

N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1986) (amended 1988).

²² *In re Johnston*, 146 A.D.2d 222, 225, 539 N.Y.S.2d 903, 905 (1st Dep't 1989). See note 18 *supra* for the text of the Texas involuntary manslaughter statute.

²³ *Johnston*, 146 A.D.2d at 225, 539 N.Y.S.2d at 905.

²⁴ *Id.* at 225-26, 539 N.Y.S.2d at 905. See, e.g., *Guerrero v. State*, 605 S.W.2d 262,

finding of guilt under the Texas statute for causing the death of another by driving while intoxicated implicitly involves an act of recklessness.

The court further reasoned that while the Texas involuntary manslaughter statute requires a showing of recklessness, the New York vehicular manslaughter statute merely requires a showing of criminal negligence.²⁵ Thus, the court concluded that the Texas statute actually requires a higher degree of mental culpability than does the New York statute.²⁶ It therefore rejected Johnston's argument with respect to mental culpability.

The court then turned to the issue of intoxication. It found Johnston's contention that the Texas statute required a lesser showing of inebriation than the New York statute to be without merit. Again, the court examined the language of the relevant Texas and New York statutes and case law. Under the standard provided by the Texas involuntary manslaughter statute, an actor is intoxicated when the actor "does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body."²⁷ New York case

264 (Tex. Crim. App. 1980) ("a finding that the statutory elements of § 19.05(a)(2) have been fulfilled constitutes, as a matter of law, a finding of reckless conduct. This is what is meant by the term 'recklessness per se.'"); *Ormsby v. State*, 600 S.W.2d 782, 783 (Tex. Crim. App. 1979) ("Subsection (a)(2) [of Section 19.05] defin[es] driving while intoxicated as recklessness per se."); cf. *Daniel v. State*, 577 S.W.2d 231, 233 (Tex. Crim. App. 1979) (stating that the words "mistake" and "accident" as used in the statute only mean "unintentional").

²⁵ *Johnston*, 146 A.D.2d at 226, 539 N.Y.S.2d at 905. See note 20 *supra* for the text of the New York statute.

²⁶ In New York, culpable mental states are classified according to relative degrees. From highest to lowest they are: intent, knowledge, recklessness, and criminal negligence. N.Y. PENAL LAW § 15.05 (McKinney 1987). Texas's scheme of classification of culpable mental states is virtually identical to that of New York. TEX. PENAL CODE ANN. § 6.02 (Vernon 1974).

The appellate division's conclusion was in accord with *Ormsby v. State*, 600 S.W.2d 782, 783 (Tex. Crim. App. 1979). The defendant in *Ormsby* was convicted of involuntary manslaughter for killing another while driving under the influence of alcohol. On appeal, the judgment of conviction was reversed because the trial court failed to instruct the jury on criminal negligence, forcing the jury to choose between convicting *Ormsby* of involuntary manslaughter or acquitting him of any criminal wrongdoing. *Id.* at 785. The appellate court held that criminally negligent homicide is a lesser included offense of involuntary manslaughter because criminal negligence is a lower degree of mental culpability than recklessness. *Id.* The court explicitly rejected the state's contention that the culpable mental of criminal negligence is higher than that required for a conviction under the involuntary manslaughter statute. *Id.*

²⁷ *Johnston*, 146 A.D.2d at 226, 539 N.Y.S.2d at 906. See note 18 *supra* for the text

law provides that intoxication occurs "when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver."²⁸ The court concluded that based on a comparison of the foregoing language, it was evident that the definitions of intoxication under the New York and Texas statutes are essentially similar.²⁹

C. *The Court of Appeals Decision*

The court of appeals reversed the order of the appellate division, finding that the Texas and New York felonies are not essentially similar. In so concluding, the court of appeals, as had the appellate division, examined the relevant Texas and New York statutes and case law.

First, the court considered Johnston's argument with respect to the necessary level of intoxication. Under New York law, a driver violates different offenses depending upon her degree of inebriation. A driver may be convicted of driving while "impaired" or, instead, driving while "intoxicated," a greater offense requiring a higher level of inebriation.³⁰ By contrast, no distinction with respect to levels of inebriation is made under Texas law; the Texas involuntary manslaughter statute merely has as an element that a person drive while "intoxicated."³¹ The court reasoned that the distinction in New York between impairment and intoxication is important because in order to commit the offense of vehicular manslaughter under New York law, one must drive while intoxicated; driving while impaired is insufficient.³²

The Texas involuntary manslaughter statute defines the term intoxication. In New York, on the other hand, the terms

of the Texas involuntary manslaughter statute.

²⁸ *Id.* at 227, 539 N.Y.S.2d at 906. The definition is derived from the court of appeals's decision in *People v. Cruz*, 48 N.Y.2d 419, 339 N.E.2d 513, 423 N.Y.S.2d 625 (1979), *appeal dismissed*, 446 U.S. 901 (1980). See text accompanying note 70-77 *infra*.

²⁹ *Johnston*, 146 A.D.2d at 227, 539 N.Y.S.2d at 906.

³⁰ *In re Johnston*, 75 N.Y.2d 403, 408, 553 N.E.2d 566, 568-69, 554 N.Y.S.2d 88, 90-91 (1990). See note 21 *supra* for the text of New York Vehicle and Traffic Law § 1192.

³¹ See note 18 *supra*.

³² *Johnston*, 75 N.Y.2d at 409, 553 N.E.2d at 569, 554 N.Y.S.2d at 91.

impairment and intoxication have been defined by case law.³³ Relying on its previous interpretation of these terms, the court found that impairment means that a person "has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver."³⁴ It further found that intoxication is a greater degree of impairment which is reached "when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a motor vehicle as a reasonable and prudent driver."³⁵

After examining Texas case law, the court found that a showing of intoxication under the Texas involuntary manslaughter statute merely requires proof of impairment of physical and mental abilities "to any degree."³⁶ It reasoned that the showing of inebriation necessary for one to be considered intoxicated³⁷ in Texas closely approximates the showing of inebriation necessary for one to be considered impaired in New York, which the court had defined as the impairment of physical and mental abilities "to any extent."³⁸ It therefore found that the standard for intoxication in New York is significantly higher than the standard for intoxication in Texas.³⁹ Thus, the court concluded, the New York and Texas statutes lack essential similarity with respect to the level of inebriation needed for conviction.

Second, the court of appeals considered Johnston's argument regarding mental culpability. The court held that the

³³ In defining the terms impairment and intoxication under § 1192, the court relied on its decision in *People v. Cruz*, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979), *appeal dismissed*, 446 U.S. 901 (1980). See text accompanying notes 70-77 *infra*.

³⁴ *Johnston*, 75 N.Y.2d at 408-09, 553 N.E.2d at 568-69, 554 N.Y.S.2d at 90-91 (quoting *People v. Cruz*, 48 N.Y.2d 419, 427, 399 N.E.2d 513, 516, 423 N.Y.S.2d 625, 628, *appeal dismissed* 446 U.S. 901 (1980)) (emphasis added by *Johnston* court).

³⁵ *Id.* at 409, 553 N.E.2d at 569, 554 N.Y.S.2d at 91.

³⁶ *Id.* For a discussion of why the court's finding is probably erroneous, see note 69 *infra*.

³⁷ See TEXAS PENAL CODE ANN. § 19.05(b) (Vernon 1974) (amended 1987); see note 18 *supra* for the text of § 19.05(b).

³⁸ See text accompanying note 34 *supra*.

³⁹ *Johnston*, 75 N.Y.2d at 409, 553 N.E.2d at 569, 554 N.Y.S.2d at 91. In addition, the court found that the Texas statute focuses upon the subjective tolerance of the individual in determining intoxication, while the New York test employs an objective test that measures the actor's control of his physical and mental abilities against that of the reasonable prudent driver. *Id.*

Texas and New York felonies differ significantly with respect to the culpable mental state required.⁴⁰ Essentially, the court found, as had the appellate division, that the presence of a culpable mental state need not be independently proved to establish the Texas felony; rather, proof of driving while intoxicated constitutes recklessness per se under Texas law.⁴¹ By contrast, the New York felony of vehicular manslaughter requires proof that the actor drove while intoxicated *and* that the actor acted with criminal negligence.⁴² The court simply did not accept the implicit presence of recklessness inherent in a violation of the statute under Texas law as sufficient to find essential similarity. Instead, the court held that the elements of the statutes and the proof of mental culpability required thereunder differ so that the statutes lack essential similarity.

II. ANALYSIS

A. *The Court of Appeals Narrows the Test of "Essential Similarity"*

In *Johnston*, the court of appeals significantly narrowed its essential similarity test for determining whether conviction of a foreign felony will constitute conviction of a felony under section 90(4). Previously, it was not required that every element of a New York felony be present in the foreign felony, as long as the core of the offense proscribed by the statutes was the same. Moreover, it was formerly irrelevant that the foreign statute included a legislative presumption, rather than required direct proof, of an element present in a New York statute. Application of the court's new, narrower standard will inevitably reduce the class of cases in which a foreign felony will constitute a felony under section 90(4). Under this narrower standard, therefore, it is significantly less likely that an attorney convicted of a foreign felony will be subject to automatic disbarment in New York.

1. The Development of the Essential Similarity Test

The essential similarity test was primarily developed in two

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

opinions of the court of appeals: *In re Chu*⁴³ and *In re Margiotta*.⁴⁴ These decisions hold that in order for a foreign felony conviction to require automatic disbarment in New York, the foreign felony need not be a mirror image of an analogous New York felony. Rather, the two felonies need only have essential similarity.⁴⁵

The essential similarity test originated in the court of appeals's decision in *In re Chu*.⁴⁶ Chu, an attorney, was convicted of four counts of a federal felony offense of making and submitting false documents to the Immigration and Naturalization Service in connection with the fraudulent procurement of permanent residence in the United States for aliens.⁴⁷ The appellate division rejected the bar association's contention that, owing to its similarity to the New York felony of offering a false instrument for filing in the first degree,⁴⁸ Chu was automatically disbarred as a result of his federal felony conviction.⁴⁹

⁴³ 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977).

⁴⁴ 60 N.Y.2d 147, 456 N.E.2d 798, 468 N.Y.S.2d 857 (1983).

⁴⁵ *In re Margiotta*, 60 N.Y.2d 147, 150, 456 N.E.2d 798, 799, 468 N.Y.S.2d 857, 858 (1983); *In re Cahn*, 52 N.Y.2d 479, 482, 420 N.E.2d 945, 946, 438 N.Y.S.2d 753, 754 (1981) (citing *In re Chu*, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977)).

⁴⁶ 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977). For a general discussion of the *Chu* decision, see Comment, *Attorney Discipline: Disbarment: The Mandatory Result of a Federal Felony Conviction*, 44 BROOKLYN L. REV. 646 (1978).

⁴⁷ *Chu*, 42 N.Y.2d at 491, 369 N.E.2d at 1, 398 N.Y.S.2d at 1001.

⁴⁸ The statute provides:

A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

Offering a false instrument for filing in the first degree is a class E felony. N.Y. PENAL LAW § 175.35 (McKinney 1988).

⁴⁹ The federal statute under which Chu was convicted, 18 U.S.C. § 1001, provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1988).

The decision in *Chu* was rendered before the 1979 amendment to New York's Judiciary Law adding § 90(4)(e). See note 2 *supra* and notes 88-94 and accompanying text *infra*. Thus, the bar association's contention that Chu's federal felony conviction war-

The court of appeals reversed the decision of the appellate division, holding that an attorney's conviction of *any* federal felony is sufficient to invoke automatic disbarment.⁵⁰ However, in dicta,⁵¹ the court also rejected Chu's argument that the federal and state offenses at issue in the case differed significantly.⁵²

ranted automatic disbarment under § 90(4) as it then existed, *see* note 89 *infra*, was based on the rule established in *In re Donegan*, 282 N.Y. 285, 26 N.E.2d 260 (1940), that conviction of a foreign felony warranted automatic disbarment in New York if the foreign felony was "cognizable" as a felony under New York law. *See* notes 93-94 *infra*.

⁵⁰ *Chu*, 42 N.Y.2d at 493, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003. *See also* text accompanying notes 90-93 *infra*.

⁵¹ Although the *Chu* court's analysis that the federal and state statutes at issue sufficiently matched to require automatic disbarment was, strictly speaking, dicta, the court of appeals has relied on and explicitly approved of this analysis in its decisions construing § 90(4)(e) rendered since 1979. *See In re Margiotta*, 60 N.Y.2d 147, 150, 456 N.E.2d 798, 799, 468 N.Y.S.2d 857, 858 (1983) ("In *Matter of Chu*, by way of example, essential similarity was found in the core of the offense under State and Federal statutes, although only the New York felony required specific intent to defraud.") (citation omitted); *In re Cahn*, 52 N.Y.2d 479, 482, 420 N.E.2d 945, 946, 438 N.Y.S.2d 753, 754 (1981) ("[T]he felony in the other jurisdiction need not be a mirror image of the New York felony, precisely corresponding in every detail (*see Matter of Chu*), though it must have essential similarity.") (citation omitted).

There have also been numerous appellate division decisions since 1979 that, in reliance on *Chu*, specifically hold that 18 U.S.C. § 1001 is essentially similar to N.Y. PENAL LAW § 175.35. *See, e.g., In re Sparrow*, 161 A.D.2d 829, 556 N.Y.S.2d 176 (3d Dep't 1990); *In re Darlington*, 136 A.D.2d 339, 527 N.Y.S.2d 441 (2d Dep't 1988); *In re Galang*, 94 A.D.2d 280, 464 N.Y.S.2d 163 (1st Dep't 1983).

Finally, it is notable that three judges concurred in the *Chu* decision in a separate opinion. Although they believed that an extension of the scope of § 90(4) to cover *any* federal felony was unwarranted, they concluded that "the parallels between the elements of the Federal felonies at issue in this case are so similar to their New York State analogues that automatic disbarment is an appropriate result." *Chu*, 42 N.Y.2d at 495, 369 N.E.2d at 4, 398 N.Y.S.2d at 1004 (Wachtler, J., conc. ring).

⁵² *Chu* had pointed out that in order to be convicted under § 175.35, the state must prove that the defendant acted "with intent to defraud the state or any political subdivision thereof." *Chu*, 42 N.Y.2d at 494, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003. *See* note 48 *supra* for the full text of § 175.35. Such specific intent is not an element of and need not be proved under 18 U.S.C. § 1001. *See* note 49 *supra*. Unpersuaded, the court stated that "there is a very close, if not a precise, parallelism between the conduct proscribed by section 1001 and that proscribed by section 175.35." *Chu*, 42 N.Y.2d at 494, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003. The court reasoned that "[t]he core of the offense under both statutes is the willful filing in a governmental office of a false statement knowing it to be false" and that in the case before it "such matching suffices." *Id.* Indeed, the court asserted that "[t]o accord determinative significance to such statutory discrepancy would be to elevate insignificance." *Id.*

The breadth of the essential similarity test established in *Chu* is more clearly illustrated by observing that there exists under New York law a misdemeanor denominated offering a false instrument for filing in the second degree. N.Y. PENAL LAW § 175.30 (McKinney 1988). This misdemeanor is a lesser included offense of offering a false instrument for filing in the first degree, § 175.35, the New York felony found to be essentially

Under the test for essential similarity established in *Chu*, conduct that constitutes a felony in a foreign jurisdiction also constitutes a felony for the purposes of section 90(4), as long as the core of the offense is the same as that under an existing New York statute.⁵³ The statutes may have essential similarity, even though the New York felony requires proof of an element absent from the federal offense, and despite the fact that there exists a more closely analogous New York statute whose violation does not constitute a felony.⁵⁴

The second decision in which the court developed the scope of the essential similarity test is *In re Margiotta*.⁵⁵ In *Margiotta*, an attorney was convicted under federal law of extortion in violation of the Hobbs Act.⁵⁶ The appellate division found that

similar to the federal felony of which *Chu* was convicted. Section 175.30 consists of the same elements as § 175.35, except that § 175.30 does not require a showing of a specific intent to defraud. It is, therefore, clearly more closely analogous to 18 U.S.C. § 1001 than is § 175.35. Indeed, it seems apparent that by creating separable offenses, the New York legislature specifically intended that when an actor files a false statement, but lacks a specific intent to defraud, the actor's conduct does not rise to the level of a felony. Nevertheless, the *Chu* court found the federal and New York felonies at issue to be essentially similar.

⁵³ It is notable that in its decisions rendered prior to *Johnston*, the court of appeals made clear that the determination of whether two criminal offenses are essentially similar should be made with an awareness that the court is reasoning within the broader framework of attorney discipline, as opposed to the narrower framework of criminal punishment. See *Chu*, 42 N.Y.2d at 493, 369 N.E.2d at 2, 398 N.Y.S.2d at 1002 ("[T]he perspective with which the sentencing of convicted criminals is approached—the imposition of individual punishment—is quite different from that involved in professional disciplinary proceedings"); *In re Margiotta*, 60 N.Y.2d 147, 151, 456 N.E.2d 793, 800, 468 N.Y.S.2d 857, 859 (1983) (emphasizing that in attorney disciplinary proceedings, "our focus is different," and finding that, "[f]or purposes of determining only 'essential similarity,' " a violation of the Hobbs Act is essentially similar to a commission of larceny by extortion under New York law); see notes 57-61 and accompanying text *infra*.

⁵⁴ See note 52 *supra*.

⁵⁵ 60 N.Y.2d 147, 456 N.E.2d 793, 468 N.Y.S.2d 857 (1983).

⁵⁶ 18 U.S.C. § 1951(a), (b) (1988). The statute provides in relevant part:

The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2) (1988).

Margiotta was chairman of the Republican Committee of both Nassau County and the Town of Hempstead, New York. *United States v. Margiotta*, 662 F.2d 131, 134 (2d Cir. 1981). Although he held no elective office, his position as chairman gave him substantial control over republican public officials in Hempstead and Nassau County. *Id.* at 134-35. *Margiotta* played a dominant role in hiring and promotion decisions. *United States v. Margiotta*, 688 F.2d 108, 117 (2d Cir. 1982).

Margiotta had the Presiding Supervisor of Hempstead appoint a long-time political

Margiotta's federal felony conviction was essentially similar to the New York felony of larceny by extortion,⁵⁷ and, therefore, that he was automatically disbarred.⁵⁸

The court of appeals affirmed the decision of the appellate division, rejecting Margiotta's arguments on appeal.⁵⁹ Under the

associate of Margiotta as the Broker of Record for the Town of Hempstead. *United States v. Margiotta*, 662 F.2d 131, 135 (2d Cir. 1981). It was the Broker's responsibility to obtain insurance on properties owned by the Town. *Id.* Upon placing a policy on municipal property, the Broker received, as a commission, a portion of the insurance premiums paid by the municipality. *Id.* As a result of a deal between Margiotta and the Broker, 50% of the commissions earned by the broker were paid as "kickbacks" to political allies of Margiotta. *Id.* at 136.

At trial, the Government contended that Margiotta was guilty of extortion in violation of the Hobbs Act. The government claimed that Margiotta, through his control of the Presiding Supervisor (the public official responsible for appointing the Broker of Record), induced the Broker to pay the "kickbacks," and that Margiotta did so by acting under color of official right and by means of the wrongful use of fear. *Margiotta*, 688 F.2d at 114.

⁵⁷ N.Y. PENAL LAW § 155.05. The statute provides in relevant part:

2. Larceny includes a wrongful taking . . . of another's property . . . committed in any of the following ways:

. . .

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will

. . .

(viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as affect some person adversely . . .

N.Y. PENAL LAW § 155.05 (McKinney 1988).

⁵⁸ *In re Margiotta*, 87 A.D.2d 336, 451 N.Y.S.2d 454 (2d Dep't 1982).

⁵⁹ On appeal, Margiotta argued that under the Hobbs Act, an actor can be convicted of extortion for obtaining the property of another, with his consent, *either* by instilling fear in the victim *or* by acting under color of official right. *See* note 56 *supra*. Therefore, there is no requirement of instilling fear in order to establish the federal crime. By contrast, the New York felony of larceny by extortion *requires* a showing that an actor compelled his victim to deliver property *by means of instilling fear* in his victim. *See* note 57 *supra*. Thus, in order to be convicted under the New York statute, it must be shown that by "acting under color of official right," an actor *in fact* instilled fear in his victim. Margiotta contended that because the jury at his trial rendered a general verdict, it was impossible to determine if it even considered whether he had instilled fear in his victim. *In re Margiotta*, 60 N.Y.2d 147, 151, 456 N.E.2d 798, 800, 468 N.Y.S.2d 857, 859 (1983).

In rejecting Margiotta's argument, the court reasoned that while there may be no requirement of instilling fear under the Hobbs Act, the federal statute reflected the "common law belief" that the element of fear is implicit when one extorts money by acting under color of public office. *Id.* Accordingly, the court stated that even though Margiotta may have been convicted solely for obtaining property under color of official right, the federal and New York felonies are essentially similar. *Id.* at 153, 456 N.E.2d at

essential similarity test as applied in *Margiotta*, the court of appeals found that a foreign felony may be essentially similar to a New York felony even though the foreign felony implicitly involves the presence of conduct that must be expressly proved under the New York statute.

2. The Narrowing of the Essential Similarity Test in *Johnston*

An examination of the court of appeals's reasoning in *Johnston* reveals that it has substantially narrowed the essential similarity test developed in *Chu* and *Margiotta*. The court now seems to require that a foreign offense and a New York offense have a considerably stricter identity of elements than was previously necessary.

A comparison of the *Johnston* court's analysis of the issue of intoxication with the application of the essential similarity test in *Chu* is illustrative. In *Johnston*, the court held that the differences it perceived between the standards for determining intoxication under Texas and New York law deprived the two felonies at issue of essential similarity.⁶⁰ Specifically, the court found that the standard of intoxication under Texas law more nearly approximates the standard of impairment under New York law, a level of inebriation insufficient to support a conviction under New York's vehicular manslaughter statute.

Because section 90(4) focuses on an attorney's conduct,⁶¹ the court's reasoning presumably was as follows: Although it is possible that the Texas jury that convicted Johnston believed her to be so inebriated that she was intoxicated under New York's definition of that term, the jury was only *required* to find that she was intoxicated under Texas's supposedly lower stan-

801, 468 N.Y.S.2d at 859.

Interestingly, Margiotta was recently reinstated by the appellate division pursuant to N.Y. Judiciary Law § 90(5). N.Y.L.J., Mar. 22, 1991, at 1, col. 1. Section 90(5) provides: "If . . . removal or debarment was based upon conviction for a felony . . . the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period." N.Y. JUD. LAW § 90(5)(b) (McKinney 1983).

⁶⁰ See notes 30-39 and accompanying text *supra*.

⁶¹ The statute provides for automatic disbarment when the foreign offense of which the attorney is convicted, "if committed within this state, would constitute a felony in this state." N.Y. JUD. LAW § 90(4)(e). See note 2 *supra* for the text of the statute.

dard. Because it is impossible to know exactly how inebriated the jury found Johnston to be, it is impossible to know whether her level of inebriation was sufficiently high to constitute intoxication under New York law. Since it is impossible to know whether Johnston's level of inebriation satisfies the element of intoxication under New York's vehicular manslaughter statute, it is impossible to know if her conduct was such that she could be guilty of that crime. It is therefore impossible to know whether her conduct constitutes a felony under New York law. Hence, she could not be subject to automatic disbarment under section 90(4).

In *Chu*, on the other hand, the court found that the foreign and New York felonies at issue are essentially similar, even though conviction under the New York statute requires a showing of a specific intent to defraud, an element that does not have to be proved under the federal statute.⁶² The *Chu* court found it irrelevant that it was impossible to know whether the jury that convicted Chu believed or even considered whether he possessed a specific intent to defraud. The court in *Chu* reasoned that the felonies match sufficiently because the core of the offense under both statutes is the same.

The *Johnston* court offered no explanation why knowing for certain whether the jury that convicted Johnston believed that her inebriation reached the level of intoxication, rather than impairment, under New York law, is any more important than knowing whether the jury that convicted Chu believed that he had, rather than lacked, the specific intent to defraud required for conviction under the New York statute at issue in his case. In addition, it is equally difficult to understand why the court of appeals would fail to find that the "core of the offense" proscribed by the Texas and New York statutes in *Johnston* is the same, when the court had found essential similarity between the New York and foreign felonies in *Chu* on that basis. It seems patently clear that the core of the offense under both the Texas and New York statutes at issue in *Johnston* is killing another while driving under the influence of alcohol. Indeed, both statutes were unquestionably enacted to deter precisely the same conduct, drunken driving, in almost precisely the same way: by

⁶² See notes 46-54 and accompanying text *supra*.

subjecting to enhanced penalties⁶³ those who kill others because they drive while under the influence.⁶⁴ Because the court in *Johnston* offered no explanation for the inconsistencies in reasoning evident upon a comparison of the decisions in the two cases, the logical conclusion is that it simply narrowed the standard for determining essential similarity.

The court's analysis of the issue of mental culpability in *Johnston* also demonstrated a substantially narrower application of the essential similarity test than that used in *Margiotta*. The *Johnston* court held that the New York and Texas statutes lack essential similarity because no mental culpability need be proved in order to establish the Texas felony.⁶⁵ It refused to adopt the determination of the Texas courts that the legislature considered any violation of the involuntary manslaughter statute to involve an act of recklessness.

In *Margiotta*, however, the court found essential similarity between the New York and foreign felonies at issue.⁶⁶ The New York extortion statute requires the defendant to have instilled fear in his victim by acting under color of official right, while the federal statute under which *Margiotta* was convicted requires only that the defendant instilled fear *or* that he acted under official right. The *Margiotta* court found it irrelevant that the jury that convicted *Margiotta* rendered a general verdict, making it impossible to determine whether or not he instilled fear in his victim. It held that the federal statute reflects the common law belief that the element of fear is implicit when one extorts money by acting under color of official right. Thus, the court accepted that Congress promulgated the Hobbs Act against the background of this common law belief and determined that any

⁶³ Under New York law, criminally negligent homicide is a class E felony, N.Y. PENAL LAW § 125.10 (McKinney 1987), and carries a sentence of up to four years. Vehicular manslaughter (i.e., the commission of criminally negligent homicide by operation of a vehicle while intoxicated) is a class D felony, *id.* § 125.10, and carries a sentence of up to seven years. Similarly, under Texas law criminally negligent homicide is a class A misdemeanor, TEX. PENAL CODE ANN. § 19.07 (Vernon 1974), and carries a sentence of up to two years in jail, while involuntary manslaughter is a felony of the third degree, *id.* § 19.05, and carries a sentence of up to ten years in prison.

⁶⁴ Indeed, the court conceded that "both the Texas and the New York statutes are directed at the evil of drunken driving." *In re Johnston*, 75 N.Y.2d 403, 410, 553 N.E.2d 566, 569, 554 N.Y.S.2d 88, 91 (1990).

⁶⁵ See notes 40-42 and accompanying text *supra*.

⁶⁶ See notes 55-59 and accompanying text *supra*.

violation of the statute implicitly involves the act of instilling fear in the victim.

The court's application of its essential similarity test in *Johnston* is inconsistent with, and narrower than, its application in *Margiotta*. In *Margiotta*, the court was willing to accept the determination of Congress that, under federal law, the conduct of extorting money by acting under color of official right implicitly involves instilling fear in the victim. In *Johnston*, however, the court was unwilling to accept the determination of the Texas legislature that, under Texas law, the conduct of killing someone by driving drunk implicitly involves an act of recklessness. There does not appear to be any logical reason, and the court offered no explanation, for this inconsistency. The only logical conclusion is that the court narrowed its test for determining essential similarity.⁶⁷

⁶⁷ There are, of course, obvious distinctions between the felonies of which Chu and Margiotta were convicted, on the one hand, and the felony of which Johnston was convicted, on the other. Chu engaged in the criminal conduct for which he was convicted, submitting false documents, in the course of his law practice. Although the conduct for which Margiotta was convicted, abusing his public office to extort money, did not occur as a part of the practice of law, it clearly evinced seriously deficient qualities relevant to the practice of law. By contrast, the relevance of Johnston's commission of involuntary manslaughter to her ability to practice law is arguably more remote.

It must be assumed that the court of appeals was aware of these distinctions. Indeed, it seems plausible that these distinctions may have motivated the court's decision. In its analysis, however, the court quite properly did not address this issue.

The fact that there is a closer nexus between the ability to practice law and the felonies committed by Chu and Margiotta than between the ability to practice law and involuntary manslaughter would be inappropriate as a basis for the court's decision. Section 90(4) explicitly provides for automatic disbarment upon conviction of any criminal offense that constitutes a felony in New York. N.Y. JUD. LAW § 90(4)(a). Moreover, the structure of the statute evinces the legislature's intent to provide for automatic disbarment without regard to the type of felony committed. Section 90(4)(d) defines the term "serious crime." It provides in relevant part:

[T]he term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

N.Y. JUD. LAW § 90(4)(d) (McKinney 1983).

Section 90(4)(e) goes on to provide that the term felony means any New York felony or any foreign felony that, if committed in New York, would constitute a felony in New York. N.Y. JUD. LAW § 90(4)(e). See note 2 *supra*.

In subdivision d, the legislature makes clear that only certain types of misdemean-

B. *The Weaknesses in the Johnston Court's Analysis*

In some ways, it is strange that the court of appeals should choose the *Johnston* case as a vehicle for narrowing its essential similarity test. In order to find that *Johnston* was not automatically disbarred as a result of her Texas felony conviction, the court engaged in a rather weak, result-oriented analysis. This is readily apparent because even under the narrower test for essential similarity that the court applied, it should have found that the felonies at issue are essentially similar. First, the court should have concluded that the standard for determining intoxication in Texas is the same as the standard in New York. Second, the court should have found that the mens rea requirement of New York's vehicular manslaughter statute was satisfied because *Johnston* acted with criminal negligence.

1. The Standard of Intoxication in Texas is the Same as the Standard in New York

The court in *Johnston* held that the Texas and New York statutes at issue lack essential similarity with respect to the element of intoxication.⁶⁸ In so finding, the court noted that under Texas law, unlike under New York law, the act of driving under the influence of alcohol is not separated into the greater and lesser offenses of driving while intoxicated and driving while impaired. Rather, under Texas law only the term intoxicated is

ors, those which clearly evidence deficient qualities relevant to the practice of law, are to be considered serious crimes that subject an attorney to discipline under the statute. However, no such limitation is made with respect to the type of crime committed when the offense of which an attorney is convicted is a felony. The legislature thus clearly expressed its belief that when an attorney commits *any* offense that constitutes a felony under New York law, it is sufficiently serious to require automatic disbarment. Therefore, a decision that held that the commission of involuntary manslaughter in Texas does not require automatic disbarment under § 90(4), because the nexus between the commission of involuntary manslaughter and the practice of law is insufficiently close, would be flatly inconsistent with legislative intent and would entail an inappropriate analysis.

Moreover, it is superficial simply to state that the commission of involuntary manslaughter does not directly reflect on an attorney's ability to practice law. Killing another because one chose to drive while intoxicated demonstrates an irresponsibility and lack of concern for others that could well be dangerous in law practice.

Furthermore, the protection of the public from incompetent attorneys is not the only rationale behind the imposition of attorney discipline. The protection of the public image of the bar, for the benefit of both the public and the profession, is another important goal. See notes 99-103 and accompanying text *infra*.

⁶⁸ See notes 30-39 and accompanying text *supra*.

used. Because the court believed that the measure of intoxication under Texas law more closely approximates the measure of impairment under New York law,⁶⁹ it concluded that the jury that convicted Johnston was not required to find that her level of inebriation was sufficient to constitute intoxication under the New York standard. Thus, the court held that the statutes lack essential similarity.

Under New York law, a driver is considered intoxicated when he "has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver."⁷⁰ The court of appeals could properly have found that Johnston was intoxicated under the New York standard based on her Texas conviction. This is so

⁶⁹ See notes 36-39 and accompanying text *supra*.

After quoting the language of Texas's statutory definition of intoxication, *see* note 18 *supra*, and of the definition of intoxication provided in *Cruz*, *see* text accompanying note 35 *supra*, the court merely stated, without further analysis, that "[t]he New York standard for determining 'intoxication' is significantly higher than the standard in Texas." *In re Johnston*, 75 N.Y.2d 403, 409, 553 N.E.2d 566, 569, 554 N.Y.S.2d 88, 91 (1990). Primarily, the court relied on its finding that the Texas standard merely requires proof of intoxication "to any degree," *id.*, and compared this with the New York standard of "impairment," which merely requires the impairment of physical and mental abilities "to any extent." *See* text accompanying notes 34-39 *supra*. The court then concluded that the Texas standard of intoxication more nearly approximates the New York standard of "impairment" than the New York standard of "intoxication."

The phrase "to any degree" comes from *Lockhart v. State*, 108 Tex. Crim. 597, 1 S.W.2d 894, 895 (1927), the case from which the definition of intoxication under the Texas involuntary manslaughter statute is derived. Searcy & Patterson, 1973 Practice Commentary, TEX. PENAL CODE ANN. at 110 (Vernon 1989). However, the phrase so extracted is misleading. Quoted more completely, the *Lockhart* court held: "the term, 'intoxicated . . . to any degree' . . . [means] that a person has taken into his stomach a sufficient quantity of intoxicating liquor so as to deprive him of the normal control of his bodily or mental faculties." *Lockhart*, 108 Tex. Crim. at 599, 1 S.W.2d at 895. Indeed, *Lockhart* was not a case that interpreted the definition of intoxication in the Texas involuntary manslaughter statute; quite the opposite, the definition of intoxication in Texas instead derives from *Lockhart*, a case decided long before Texas' involuntary manslaughter statute was enacted. It is therefore significant that neither the "to any degree" language, nor anything like it, was imported into the statute's definition of intoxication, which instead merely provides that "'intoxication' means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body." TEX. PENAL CODE ANN. § 19.05 (Vernon 1974) (amended 1987).

⁷⁰ *In re Johnston*, 75 N.Y.2d 403, 409, 553 N.E.2d 566, 569, 554 N.Y.S.2d 88, 91 (1990) (quoting *People v. Cruz*, 48 N.Y.2d, 419, 428, 399 N.E.2d 513, 517, 423 N.Y.S.2d 625, 629 (1979), *appeal dismissed*, 446 U.S. 901 (1980)). *See* notes 33-35 and accompanying text *supra*.

because the Texas involuntary manslaughter statute explicitly requires the jury to find that the defendant's intoxication *caused* the death of another.⁷¹ Therefore, when a defendant is convicted under the Texas statute, the jury cannot find that the defendant drove as a reasonable and prudent driver, but simply got into an accident purely by mistake and happened to be under the influence at the time. Rather, a jury necessarily must find that the defendant's inebriation caused her to drive in a substandard manner. After all, if they do not so find, it is unclear how they could possibly find that the accident was caused by the defendant's intoxication.

Thus, in order to convict under the Texas statute, a jury must find present exactly those elements that constitute intoxication under New York law. The jury must find that the defendant voluntarily consumed alcohol, and that, as a result, the defendant was unable to employ "the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." The court of appeals could therefore have properly concluded that, based on her Texas conviction, Johnston was intoxicated under New York law.

In addition, because the terms intoxicated and impaired are not defined by statute in New York, in its analysis the court relied on the definitions of those terms provided by New York case law. Specifically, the court relied on its decision in *People v. Cruz*.⁷²

The defendant in *Cruz* had challenged the constitutionality of section 1192 of the New York Vehicle and Traffic law by asserting that its use of the terms impairment and intoxication, without further clarification of their meaning, rendered the statute unconstitutionally vague.⁷³ The court of appeals upheld the

⁷¹ See note 18 *supra* and notes 80 & 86 *infra*.

⁷² 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979), *appeal dismissed*, 446 U.S. 901 (1980).

⁷³ *Cruz* argued that because the legislature had omitted any definition or standard of comparison for the terms "impairment" and "intoxication" under the statute, it failed to satisfy due process requirements. *Cruz*, 48 N.Y.2d at 423, 399 N.E.2d at 514, 423 N.Y.S.2d at 626. He contended that with respect to the term impairment, it was unclear whether a driver is prohibited from driving when he is extremely impaired, moderately impaired, or only slightly impaired. *Id.* at 426, 399 N.E.2d at 516, 423 N.Y.S.2d at 628. Moreover, he argued that the line between impairment and intoxication under the statute was vague because a driver has no warning as to when he might cross the line from impairment to intoxication and thereby be guilty of the more serious offense. *Id.* at 427,

statute. It reasoned that the failure of the legislature to provide a definition of intoxication did not render that term without a definite or ascertainable meaning.⁷⁴ The court stated: "Intoxication is not an unfamiliar concept. It is intelligible to the average person. It is familiar to the law A statute which employs terms having an accepted meaning 'long recognized in law and life' cannot be said to be so vague and indefinite as to afford . . . inadequate guidelines for adjudication."⁷⁵ The statute was adequate because "the concept of intoxication does not require expert opinion. A layman . . . should be able to determine whether the defendant's consumption of alcohol has rendered him incapable of operating a motor vehicle as he should."⁷⁶

The court's reasoning in *Johnston* is logically inconsistent with its reasoning in *Cruz*. Under the court's analysis, the concept of intoxication is familiar and intelligible to the average person. Presumably, the average Texan shares the same conception of intoxication as the average New Yorker. Therefore, when, pursuant to the Texas statute, the average Texans who composed the jury that convicted Johnston were asked to determine whether she was "intoxicated," they ought to have applied the same understanding of intoxication that a New York jury would have applied.⁷⁷ Under the reasoning in *Cruz*, therefore, the standard applied in determining intoxication under New York law ought to be the same as the standard applied in determining intoxication under Texas law. Thus, the court of appeals could logically and properly have found that, based on her conviction in Texas, Johnston was intoxicated within the meaning of section 1192.

399 N.E.2d at 516, 423 N.Y.S.2d at 628-29.

⁷⁴ *Id.* at 427, 399 N.E.2d at 517, 423 N.Y.S.2d at 629.

⁷⁵ *Id.* at 427-28, 399 N.E.2d at 517, 423 N.Y.S.2d at 629 (citation omitted).

⁷⁶ *Id.*

⁷⁷ Notably, in 1987, after the commission of the offense for which Johnston was convicted, Texas amended its involuntary manslaughter statute. Intoxication is now defined as not having the normal use of mental or physical faculties or having a blood alcohol concentration of .10% or more. See TEX. REV. CIV. STAT. ANN. art. 6701-1((2)(A), (B) (Vernon Supp. 1991). Section 1192 also uses a .10% blood alcohol concentration level to define intoxication. N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 1986) (amended 1988); see also N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney Supp. 1990) (amended version of § 1192 which, *inter alia*, explicitly defines driving with a blood alcohol level of .10% or more as "[d]riving while intoxicated: per se."). Johnston was not given a blood alcohol test.

2. Johnston Acted with Criminal Negligence

The court of appeals should also have found that Johnston acted with criminal negligence. Under New York law, criminal negligence is defined as the failure to perceive a substantial and unjustifiable risk.⁷⁸ The risk must be such that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.⁷⁹

It is difficult to see how someone who drives while inebriated to such a degree that her inebriation causes her to kill another has not taken a substantial and unjustifiable risk.⁸⁰ The risks associated with drinking and driving are well known. Surely, the failure to perceive those well-known risks and to drive under such circumstances constitutes a gross deviation from the standard of care that the "reasonable person" would observe.

Apparently anticipating this argument, the court, near the end of its opinion, stated: "It has long been the rule in this State that proof of intoxication alone is insufficient to establish criminal negligence"⁸¹ However, in so stating, the court ignored and misinterpreted prior New York case law.

First, there is significant New York authority which holds that by virtue of driving while intoxicated, one acts with criminal negligence.⁸² Second, in stating that intoxication alone is insufficient to establish criminal negligence, the court quoted from its decision in *People v. Bast*.⁸³ The court's reliance on *Bast*,

⁷⁸ N.Y. PENAL LAW § 15.05 (McKinney 1937).

⁷⁹ *Id.*

⁸⁰ It is important to remember that the Texas involuntary manslaughter statute, see note 18 *supra*, explicitly requires that the defendant's intoxication cause him to kill another. TEX. PENAL CODE ANN. § 19.05 (Vernon 1974) (amended 1937).

⁸¹ *In re Johnston*, 75 N.Y.2d 403, 409-10, 553 N.E.2d 566, 569, 554 N.Y.S.2d 83, 91 (1990) (quoting *People v. Bast*, 19 N.Y.2d 813, 815, 227 N.E.2d 47, 47, 280 N.Y.S.2d 149, 150 (1967)).

⁸² See, e.g., *People v. Holt*, 109 A.D.2d 174, 176, 491 N.Y.S.2d 526, 528 (4th Dep't 1985) ("Certainly, driving while intoxicated is sufficient evidence of a 'gross deviation' from the required standard of care to permit a jury to find a defendant has acted with criminal negligence."); *People v. Osburn*, 155 A.D.2d 926, 928, 547 N.Y.S.2d 749, 751 (4th Dep't 1989) (same); *People v. Rennoldson*, 117 A.D.2d 994, 994, 499 N.Y.S.2d 292, 293 (4th Dep't 1986) (same); cf. *People v. Daley*, 54 A.D.2d 1007, 1008, 388 N.Y.S.2d 359, 361 (3d Dep't 1976) (proof that defendant drove while under the influence of marijuana was sufficient to allow a jury to find that he acted with criminal negligence).

⁸³ *Johnston*, 75 N.Y.2d at 409-10, 553 N.E.2d at 569, 554 N.Y.S.2d at 91 (quoting *People v. Bast*, 19 N.Y.2d 813, 815, 227 N.E.2d 47, 280 N.Y.S.2d 149, 150 (1967)).

however, was misplaced. That decision is properly construed as standing for the more modest proposition that where no causal connection is established between the defendant's intoxication and an accident, it cannot be inferred that the defendant acted with criminal negligence.⁸⁴ Since the Texas statute explicitly requires proof of a causal connection between the defendant's intoxication and the death of another,⁸⁵ a finding of criminal negli-

⁸⁴ *Bast* concerned the appeal of a defendant convicted of now-repealed Penal Law § 1053-a, Criminal Negligence in Operation of Vehicle Resulting in Death. The substance of New York's vehicular manslaughter statute is derived from former Penal Law § 1053-a, which provided: "A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death." N.Y. PENAL LAW § 1053-a (McKinney 1936) (repealed 1965).

The court misinterpreted the decision in *Bast*. When the *Bast* court stated that "[p]roof of intoxication alone is not enough to sustain a conviction of criminal negligence," 19 N.Y.2d 813, 815, 227 N.E.2d 47, 47, 280 N.Y.S.2d 149, 150, it did not state that proof that one drives while intoxicated is insufficient to show that one acted with the mens rea of criminal negligence. Rather, the court's statement was a shorthand for the proposition that proof of intoxication alone is not enough to sustain a conviction of the crime of criminal negligence in the operation of a vehicle resulting in death (i.e., § 1053-a). This latter interpretation is more logical because the *Bast* court spoke in terms of conviction and, after all, one can only be convicted of a crime; one cannot be convicted of "criminal negligence" in the abstract. Thus, interpreted properly in the context in which it was made, the court's statement in *Bast* makes sense. The court merely stated that one could not be convicted of former Penal Law § 1053-a merely because one killed another while driving, and one happened to be intoxicated at the time. Rather, in order for the fact that one was intoxicated to have relevance with respect to the statute, it must be proved that one's intoxication caused one to act in a reckless or culpably negligent manner and caused one to kill another. See *People v. Fink*, 18 A.D.2d 220, 225, 238 N.Y.S.2d 847, 852 (3d Dep't 1963) (Bergan, P.J., concurring), upon which the *Bast* court relied: "Unless the prosecution is prepared to prove that alcohol had some actual and adverse effect on the manner in which a vehicle is operated, an expression such as 'while under the influence of alcohol' should not be included in the indictment or charged to the jury . . . [I]f a physical condition of the operator . . . is [to be] germane at all in a prosecution under section 1053-a of the Penal Law, it must play some effective role in the occurrence of the accident." See *Bast*, 19 N.Y.2d at 815, 227 N.E.2d at 47, 280 N.Y.S.2d at 150.

Indeed, quoted more completely and in context, the decision in *Bast* reads as follows: "Proof of intoxication alone is not enough to sustain a conviction of [the crime of] criminal negligence [in the operation of a vehicle resulting in death]. *The People must also prove that the defendant's intoxication affected his physical and mental capacity to the extent that it caused him to operate his vehicle in a culpably reckless manner. The evidence adduced by the People failed to establish that defendant drove at an excessive rate of speed or that his intoxication caused him to strike the decedent.*" *Id.* (citations omitted) (emphasis added). The holding in *Bast* simply does not stand for the proposition for which the *Johnston* court relied upon it.

⁸⁵ See note 18 *supra*. See also *Daniel v. State*, 577 S.W.2d 231, 233 (Tex. Crim. App. 1979).

gence can properly be found upon conviction under the statute.⁸⁶ Therefore, the court should have found that the required showing of criminal negligence under the New York vehicular manslaughter was satisfied.

C. *Legislative Intent and the Goals of Attorney Discipline*

Section 90(4)(e), which provides that an attorney convicted of a foreign felony is subject to automatic disbarment only if the foreign felony would also constitute a felony under New York law,⁸⁷ is the result of an amendment to the statute in 1979.⁸⁸ Prior to the amendment, the statute merely provided for automatic disbarment upon conviction of a felony, without reference to whether the offense was committed in New York or in a foreign jurisdiction.⁸⁹ In *In re Chu*⁹⁰ and *In re Thies*,⁹¹ the court of appeals held that an attorney's conviction of any federal felony was grounds for automatic disbarment under section 90(4).⁹² By

⁸⁶ The necessity of proving a causal connection between the defendant's intoxication and the death of another requires that the jury find that the defendant drove in a substandard manner. See notes 70-71 and accompanying text *supra*. Thus, a finding that a defendant acted with criminal negligence is proper upon conviction under the Texas statute. Choosing to drive while sufficiently drunk so that one's inebriation causes such substandard driving that it results in the death of another should constitute taking a substantial and unjustifiable risk sufficient to constitute criminal negligence. Conviction under the Texas statute requires the jury to find that the defendant drove under just such circumstances. Therefore, it requires the jury to find that the defendant acted with criminal negligence. Indeed, this is undoubtedly the precise basis on which Texas courts have found that conviction under the statute implicitly involves an act of recklessness.

⁸⁷ See note 2 *supra* for the text of § 90(4)(e).

⁸⁸ Attorneys, Counsellors-At-Law—Admission and Removal by Appellate Court Act, ch. 674, 1979 N.Y. Laws 1306.

⁸⁹ The statute previously provided:

Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney or counsellor-at-law, or to be competent to practice law as such.

N.Y. JUD. LAW § 90(4) (McKinney 1968), amended by ch. 674, 1979 N.Y. Laws 1306.

⁹⁰ 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977).

⁹¹ 45 N.Y.2d 865, 382 N.E.2d 1351, 410 N.Y.S.2d 575 (1978), *appeal dismissed*, 441 U.S. 939 (1979).

⁹² The court in *Chu* stated, "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment." *Chu*, 42 N.Y.2d at 493, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003 (citation omitted). For a thorough discussion of the *Chu* decision, see notes 46-54 and accompanying text *supra*; see also Comment, *supra* note 46.

The attorney in *Thies* had been arrested and charged with a federal offense. See Bonomi, *Professional Responsibility*, N.Y.L.J., Apr. 14, 1978, at 1, col. 1. At arraign-

its holdings in *Chu* and *Thies*, the court of appeals overruled the construction of section 90(4) that it had authorized thirty-eight years before in *In re Donegan*.⁹³ In response, the statute was amended by the legislature to provide for automatic disbarment upon conviction of a foreign felony only if the crime would constitute a felony if committed in New York.

The result in *Johnston* is contrary to the legislature's intent in amending section 90(4). The legislature, in light of the court's holdings in *Chu* and *Thies*, added section 90(4)(e) because it was concerned that conviction of a *minor* offense in a foreign jurisdiction would result in automatic disbarment in New York.⁹⁴ However, involuntary manslaughter cannot reasonably

ment, the magistrate dismissed the complaint as insufficient. *Thies* erroneously believed that the arrest was unlawful and that he was free to go. When federal agents attempted to prevent him from leaving the courthouse, a shouting and pushing match ensued. During the scuffle, an agent suffered a bruised thumb. *Thies* was charged and convicted of assault on a federal officer, 18 U.S.C. § 111 (1988), a felony under federal law. As a result, he was automatically disbarred. *Bonomi, supra*, at 1; *see also Note, supra* note 13, at 618.

Three judges dissented from the court's opinion in *Thies*, finding, as they had in the concurring opinion in *Chu*, *see* note 53 *supra*, that the extension of § 90(4) to all federal felony convictions was unwarranted. They stated that "[t]he aberrational results which today's determination will bring may now be avoided only by legislative action." *Thies*, 45 N.Y.2d at 867, 382 N.E.2d at 1352, 410 N.Y.S.2d at 577 (Wachtler, Fuchsberg, and Cooke JJ., dissenting from per curiam opinion).

⁹³ 282 N.Y. 285, 26 N.E.2d 260 (1940). In *Donegan*, the court held that a felony conviction in a foreign jurisdiction would not warrant automatic disbarment unless the foreign felony was "cognizable" as a felony under New York law. *Id.* at 292, 26 N.E.2d at 263. For a more thorough discussion of the court's decision in *Donegan*, *see* note 94 *infra*.

It is interesting to note that before *Donegan*, it was the general practice of New York courts to invoke automatic disbarment for any foreign felony conviction. *Note, supra* note 13, at 617 n.100.

⁹⁴ Governor's Mem. of Approval, Attorneys, Counsellors-At-Law—Admission and Removal by Appellate Court, ch. 674, 1979 N.Y. Laws 1306, 1822 ("Valid concerns have been raised that the *Chu* and *Thies* decisions could result in the automatic disbarment of an attorney upon conviction of a relatively minor offense merely because it is denominated as a felony in the jurisdiction where the offense occurred. The bill deals with this issue by eliminating automatic disbarment for the commission of a felony which is not a felony under the laws of this State."); *see also* Bill Jacket, Legislation Report # 121 of the Committee on Professional Discipline of the New York State Bar Association, 1979 (condemning automatic disbarment "for conduct which constitutes, for example, a minor offense or a mere technical violation").

The lack of recorded legislative history makes it difficult to assess the legislature's intent in passing 1979 N.Y. Laws 674. However, an examination of the bill jacket and the context in which the amendment was passed suggests that it was not the intention of the legislature that a conviction of involuntary manslaughter in Texas be considered a minor offense from which an attorney deserves protection from automatic disbarment.

First, it is clear that the legislature intended expressly to overrule the court of appeals's holdings in *Chu* and *Thies*. See Governor's Mem. of Approval, 1979 N.Y. Laws 674 at 1822; see also Bill Jacket, Legislation Report #121 of the Committee on Professional Discipline of the New York State Bar Association, 1979 ("The Cooperman bill, Assembly No. 6252-A . . . accomplishes repeal of Matter of *Chu*, which requires automatic disbarment of attorneys convicted under the federal law even though the same conduct would have constituted only a misdemeanor . . .") (citation omitted). It also appears that the legislature approved of the court's holding in *In re Donegan* and of the result reached in that case. See A. 6252-A, 1979-1980 Reg. Sess. ("Section 90(4) of the Judiciary Law provides for automatic disbarment upon conviction of a 'felony.' In Matter of *Donegan*, 'felony' was interpreted as a New York State felony or a foreign felony cognizable as a felony under New York law. In 1977 the Court of Appeals in Matter of *Chu* changed this . . .") (citations omitted).

The attorney in *Donegan* was convicted under federal conspiracy law. *In re Donegan*, 282 N.Y. 285, 287, 26 N.E.2d 260, 261 (1940). In New York at that time, conspiracy to commit any crime constituted only a misdemeanor. *Id.* The *Donegan* court held that *Donegan* was not subject to automatic disbarment because the federal offense was not "cognizable" as a felony under New York law. *Id.* at 292, 26 N.E.2d at 263. Under *Donegan*, therefore, an attorney was not subject to automatic disbarment under § 90(4) when there existed a New York State offense that was clearly analogous to the foreign felony of which the attorney had been convicted, but the analogous New York offense had been deemed to constitute merely a misdemeanor. Since the legislature approved of and amended § 90(4) against the background of the result in *Donegan*, it is reasonable to infer that a result contrary to that in *Donegan* is what it wanted to prevent. That is, the legislature intended to prevent the automatic disbarment of an attorney convicted of a foreign felony whose New York analogue it had already denominated a misdemeanor because, although an analogous New York offense clearly exists, the legislature had already considered it and deemed it to be minor.

Such an intent on the part of the legislature makes sense. Situations such as that which confronted the court in *Donegan* are unavoidable. It is inevitable that a court will occasionally be presented with a case where a foreign offense and a New York offense are perfectly analogous—indeed, where the conduct at issue (e.g., conspiracy to commit a felony) is universally recognized as criminal—but where one jurisdiction has decided that the conduct constitutes a felony while the other has decided that it constitutes only a misdemeanor. The New York legislature's denomination of the level of the offense simply reflects its value judgment regarding the seriousness of the crime. It is that value judgment, reflected in the denomination of the offense as a felony or a misdemeanor, to which New York attorneys are held accountable.

Section 90(4) was amended also in response to the court's decision in *Thies*, and it is logical to believe that the legislature intended to prevent results such as the result in *Thies*. The foreign felony at issue in *Thies* was assault upon a federal officer. In that case, unlike in *Donegan*, no analogous New York offense existed, because an integral element of what makes the conduct that constitutes the federal felony seriously offensive (i.e., assault upon a federal officer) is peculiar to the foreign jurisdiction. See also Bill Jacket, Legislation Report #121 of the Committee on Professional Discipline of the New York State Bar Association, 1979 (condemning the holding in *Chu* because it would result in disbarment when the federal felony was defacement of a coin. 18 U.S.C. § 331 (1988)).

Like its approval of the result in *Donegan*, the legislature's disapproval of the result in *Thies* is similarly sensible. Situations such as that which confronted the *Thies* court are also inevitable. For certain foreign felony offenses (e.g., assault on a federal officer or

be considered a minor offense.⁹⁵ The facts in *Johnston* do not present a case where an analogous New York offense exists, but only constitutes a misdemeanor in New York.⁹⁶ Nor is it a case where no analogous New York offense exists because the foreign felony is composed of conduct the offensive nature of which is peculiar to the jurisdiction in which it is committed.⁹⁷ On the contrary, taking the life of another because one drove after drinking is universally condemned. The construction given section 90(4) by the court of appeals in *Johnston* results in the conclusion that *Johnston's* commission of involuntary manslaughter in Texas would not constitute even a misdemeanor were it committed in New York.⁹⁸ Such a construction gives the 1979 amendment an overly broad effect and hinders the effectuation of the legislature's intent.

The decision in *Johnston* is also logically inconsistent with the general purpose of section 90(4) because it is inconsistent with the goals that underlie attorney discipline. One of the primary reasons attorney discipline is imposed is to protect the public image of the bar.⁹⁹ The public is ill-served by a profession

defacement of a coin) there simply will not exist any truly analogous New York crime, because the conduct at issue is considered seriously offensive for reasons peculiar to the jurisdiction that has criminalized it. In contrast to the situation in *Donegan*, the relevant conduct at issue in such cases is not universally recognized as criminal; rather, the foreign felony offense is, in essence, *malum prohibitum*. Because such offenses generally criminalize conduct for reasons peculiar to a particular jurisdiction, it is quite unlikely that the New York legislature ever even thought of punishing such conduct. Therefore, because New York attorneys are accountable to the value judgments of the New York legislature regarding what constitutes seriously offensive conduct (as expressed in the criminal statutes enacted by it), automatic disbarment upon conviction of such foreign felonies would be inappropriate.

⁹⁵ See note 94 *supra*.

⁹⁶ See the discussion of *In re Donegan* in note 94 *supra*.

⁹⁷ See the discussion of *In re Thies* in note 94 *supra*.

⁹⁸ According to the court's analysis, see text accompanying notes 30-39 *supra*, the most it could find is that *Johnston* drove while impaired, a traffic violation. N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1986) (amended 1988); see note 21 *supra*.

⁹⁹ See C. WOLFRAM, MODERN LEGAL ETHICS 82 (1986) ("Members of the public may reasonably conclude, if the lawyer's conduct is unchecked, that lack of competence or character typifies lawyers generally. Unless discipline is effectively imposed, the policy of protection of the bar will be distorted into a practice of protecting offending members of the bar against the embarrassment and inconvenience of professional discipline . . ."); see also Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489 (1958); Note, *supra* note 13, at 606; Comment, *Disbarment — Felony Conviction*, 21 ALB. L. REV. 100, 102 (1957).

the integrity and character of whose members it questions.¹⁰⁰ Many of society's most important economic, social, and political conflicts are resolved through the legal system.¹⁰¹ It is therefore essential that the public believe in the integrity of the legal system and perceive lawyers as honest, trustworthy, and possessed of high moral standards.¹⁰² Allowing convicted felons to continue to practice law denigrates the image of the bar in the eyes of the public.¹⁰³

Moreover, the court's decision will have a negative impact generally on the disciplinary system in New York. More cases will require a hearing and subsequent determination by the appellate division.¹⁰⁴ Each such hearing and determination will require the participation of the state's disciplinary and grievance committees, which are already severely overburdened and understaffed.¹⁰⁵

¹⁰⁰ See, e.g., *United States v. Jennings*, 724 F.2d 436, 449 (5th Cir. 1984) (discussing need to uphold public confidence in the bar); *In re Mitchell*, 40 N.Y.2d 153, 156-57, 351 N.E.2d 743, 745-46, 386 N.Y.S.2d 95, 97 (1976) (stating that public confidence is necessary for the effective administration of the legal system); Gentile & McShea, *Automatic Disbarment: A Convicted Felon's Just Desserts*, 13 HASTINGS CONST. L.Q. 433, 441 (1986) ("The public's trust in the honesty and integrity of lawyers is absolutely critical to the legal profession's ability to assist in the resolution of conflicts and the dispensation of justice.").

¹⁰¹ Gentile & McShea, *supra*, note 100, at 440.

¹⁰² *Id.*

¹⁰³ See, e.g., *In re Stoner*, 507 F. Supp. 490, 492 (N.D. Ga. 1981) ("[T]he fact that the attorney is a 'convicted felon' . . . tends to impair public confidence in the judicial system and the integrity of the bar as a whole."); *In re Mitchell*, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 745, 386 N.Y.S.2d 95, 97 (1976) ("To permit a convicted felon to continue to appear in our courts . . . would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law.").

Of course, by amending § 90(4) to provide that not every foreign felony conviction will result in automatic disbarment, the legislature obviously contemplated that some attorneys convicted of felonies would continue to practice law. However, the legislature intended to prevent automatic disbarment as a result of the conviction of a *minor* offense in a foreign jurisdiction which happened to be denominated a felony. See note 94 *supra*. The amendment is, therefore, consistent with the goal of protecting the reputation of the bar because the adverse effect on the bar's public image when an attorney is convicted of a minor offense (e.g., defacement of a coin) is likely to be insignificant.

¹⁰⁴ See note 7 *supra*.

¹⁰⁵ An examination of the DDC's caseload and its disposition is illustrative. The state's disciplinary committees handled a record number of new matters in 1989, 12,355, which represented a significant increase over the 11,825 new matters handled in 1988, also a record. Fox, *48 New York Lawyers Disbarred Last Year*, N.Y.L.J., Nov. 29, 1990, at 1, col. 3. Of the 12,355 new matters filed, 5,278 were handled by the DDC. *Id.* The staff of the DDC, responsible for the investigation and prosecution of all complaints against attorneys in the first department, is composed of only 13 members. Wise, *Disci-*

CONCLUSION

The *Johnston* court broke with precedent, imposing an unduly narrow construction on section 90(4) of New York's Judiciary Law. The court now requires that when an attorney is convicted of a felony under the law of another jurisdiction there be a strict identity of elements between the felony of which the attorney is convicted and a New York felony offense. This strict standard allows an attorney to escape disbarment under the statute by relying on hyper-technical distinctions between statutes enacted in New York and those enacted in other jurisdictions.

Attorney misconduct continues to be a growing problem in New York. The legal system can only function effectively if errant attorneys are effectively disciplined by the courts. Allowing attorneys convicted of serious offenses to continue to practice law undermines public confidence in the bar. Imposing on New York's courts and disciplinary committees the burden of an increased number of disciplinary proceedings lessens the effectiveness and increases the cost of attorney discipline. The *Johnston* decision is inconsistent with the intent of the legislature and with the goals of attorney discipline.

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plinary Caseload Continues to Mount, N.Y.L.J., Nov. 8, 1989, at 1, col. 3.

In 1989, the DDC received approximately 1,422 new complaints against attorneys each quarter, an increase of 9.4% over the quarterly average of 1,300 in 1988. *Id.* An analysis of the DDC's handling of cases shows a concomitant increase in the number of cases disposed of without the more time-consuming process of a disciplinary hearing and subsequent recommendation to the appellate division, which must approve and impose any recommendation for a formal sanction, see note 7 *supra*, such as censure, suspension, or disbarment. Wise, *supra* at 1. The number of cases dismissed after investigation rose by 12%. *Id.* In addition, the number of letters of caution and admonitions, actions which the DDC can take on its own, see note 7 *supra*, rose 67% and 31% respectively during the first three quarters of 1989. Wise, *supra* at 1. At the same time, the number of cases referred to the appellate division with a recommendation of public sanction dropped by 67%.