

From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?

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Homosexual aliens may be denied entry into the United States based solely on their sexual preference. This Article attempts to trace the evolution of American immigration policy regarding the exclusion of homosexual aliens. It first discusses and compares the historical treatment of homosexuals in the United States and abroad. It then considers United States immigration policy, focusing on how the immigration laws have dealt, and should deal, with homosexuality. Finally, it discusses the AIDS virus and the influence it has had upon public perception of homosexuality. In this controversial area, this Article attempts to develop a more coherent and rational policy regarding the exclusion of homosexual aliens than the practice that currently exists.¹

I. Public Attitudes Toward and Treatment of Homosexuals

Nations vary tremendously in their treatment of homosexuals. Public attitudes toward homosexuals in the United States shape their treatment in immigration law and policy.

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1. The scope of this article is limited to the *exclusion* of homosexual aliens. "Exclusion" in immigration law refers to the process of preventing aliens from making a formal entry into the country. T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 19 (1985). "Deportation," often referred to as expulsion, "means the removal of aliens already within the United States." *Id.* The Chinese Exclusion Case, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), clearly established Congress's plenary power to exclude aliens from the United States. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), augmented that power with the power of deportation. Justice Gray, writing for the majority, stated: "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Fong Yue Ting*, 149 U.S. at 713. Nonetheless, this Article considers only the issues surrounding the exclusion of homosexual aliens. Once the problem regarding the exclusion of homosexual aliens has been resolved, the means of resolving the controversy regarding the deportation of homosexual aliens should become clearer.

A. Treatment of Homosexuals in the United States

Public perception of homosexuality in the United States is a product of diverse religious and cultural influences. While public perception of homosexuality has changed dramatically since colonial times, our legal system has lagged behind. At one time, either through common law or by statute, every state in the union criminalized sodomy.² Most states, in very Blackstonian language, characterized homosexuality as "sinful, sick and criminal," a crime "not fit to be named."³ For example, the original North Carolina sodomy statute read: "Any person who shall commit the abominable and detestable crime against nature, not fit to be named among Christians, . . . shall be adjudged guilty of a felony and shall suffer death without the benefit of clergy."⁴

The prohibition against homosexual behavior, whether express or through sodomy statutes, continued in all fifty states and in the District of Columbia until the early 1960s.⁵ In 1961, by adopting the American Law Institute's Model Penal Code provision excluding adult, private, consensual, sexual practices from its list of acts subject to criminal sanctions, Illinois became the first state to decriminalize private, consensual sodomy between adults.⁶

Not until the penal reforms of the 1970s did legislators in other states finally begin to decriminalize private, consensual homosexual conduct.⁷ To this day, 25 states⁸ and the District of Columbia⁹ continue to classify as criminals individuals who engage in homosexual

2. Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 523 (1986).

3. *Id.* at 524.

4. *Id.* at 526 (quoting N.C. Rev. Code ch. 34, § 6 (1837)).

5. *Id.*

6. *Id.* at 526 (citing Crim. Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws 1985-2006 (codified as amended at Ill. Ann. Stat. ch. 38, §§ 11-2, 11-3)(Smith-Hurt 1979 & Supp. 1983)). "In supporting the decriminalization of sodomy, the American Law Institute (ALI) noted that such nations as France, Great Britain, Canada, Mexico, Italy, Denmark, and Sweden had repealed their sodomy statutes. The ALI further cited scientific studies that found homosexual conduct to be neither 'unnatural' nor socially harmful." *Id.* (citing Model Penal Code § 207.5 comment 276, at 278 (Tent. Draft No. 9, 1955)).

7. Some states have extended to homosexuals protection from any discrimination by recognizing an affirmative right to be free from discrimination based on "sexual orientation" or "sexual preference." See, e.g., Cal. Civ. Code § 51.7 (West 1988). Nevertheless, despite its decriminalization in some states, homosexuality is still grounds for restrictive treatment under many state laws. For example, it may be grounds for divorce, denial of child adoption or custody, denial of massagist license, denial/annulment of corporation charter, denial of alcohol license, denial of foster family license, and denial of casino license, and is a cause of action for legal separation of husband and wife.

8. Ala. Code § 13A-6-65 (1982) (punished as Class A misdemeanor); Ariz. Rev. Stat. Ann. § 13-1411 (Supp. 1985) (punished as Class 3 misdemeanor); Ark. Stat. Ann. § 41-1813 (1977) (punished as Class A misdemeanor); Fla. Stat. Ann. § 800.02 (West 1976)

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activity. Of these twenty-five states, sixteen classify sodomy as a felony, and nine consider it to be a misdemeanor. In 1988, a typical statute still read: "Sodomy and Buggery: Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast shall be punished by imprisonment in the state prison for not more than twenty years."¹⁰

The federal government continues to discriminate against homosexuals, although it has made several improvements in the situation of homosexuals as federal employees.¹¹ For example, homosexuals are often denied security clearance and cannot, therefore, seek employment with executive agencies like the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), or the Department of State, or with any private employer engaged in defense contract work.¹² Moreover, elimination of homosexuals from the military has been an official policy of the United States government since 1943.¹³

(punished as 2d degree misdemeanor); Ga. Code Ann. § 16-6-2 (1984) (punished as felony: prison sentence between 1 and 20 years); Idaho Code § 18-6605 (1987) (prison term of 5 years or more); Kan. Stat. Ann. § 21-3505 (1981) (punished as Class B misdemeanor); Ky. Rev. Stat. Ann. § 510.100 (Baldwin 1978) (punished as Class A misdemeanor); La. Rev. Stat. Ann. § 14.89 (West 1986) (fine of \$2,000 or less and/or 5 year prison term or less); Md. Ann. Code §§ 553, 554 (1987) (sentence in penitentiary for 10 years or less and/or fine of up to \$1,000); Mass. Ann. Laws ch. 272, § 34-35 (Law. Co-op. 1980) (prison sentence of 20 years or less); Mich. Comp. Laws Ann. § 750.158 (West 1968) (prison term of 1 day to life); Minn. Stat. Ann. § 609.293 (West 1987) (prison term of 1 year or less/fine of \$3,000 or less); Miss. Code Ann. § 97-29-59 (1972) (imprisonment in penitentiary for 10 years or less); Mo. Ann. Stat. § 566.090 (Vernon 1979) (Class A misdemeanor); Mont. Code Ann. § 45-5-505 (1985) (prison term of 10 years or less and/or fine of \$50,000 or less); Nev. Rev. Stat. § 201.190 (1985) (prison term between 1 and 6 years); N.C. Gen. Stat. § 14-177 (1988) (Class H felony); Okla. Stat. Ann. tit. 21, § 886 (West 1983) (imprisonment in penitentiary for term of 10 years or less); R.I. Gen. Laws § 11-10-1 (1981) (prison term between 7 and 20 years); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985) (imprisonment in penitentiary for term of 5 years and/or fine of \$500 or more); Tenn. Code Ann. § 39-2-612 (1982) (imprisonment in penitentiary for term of 5 to 15 years); Tex. Penal Code Ann. § 21.06 (Vernon 1974) (punished as Class C misdemeanor); Utah Code Ann. § 76-5-403 (Supp. 1988) (punished as Class B misdemeanor); Va. Code Ann. § 1802-361 (1988) (punished as Class 6 felony).

9. D.C. Code Ann. § 22-3502 (1981) (prison term of 10 years or less or fine of \$1,000 or less).

10. Mass. Ann. Laws ch. 272, § 34 (Law. Co-op. 1980).

11. See Rivera, Recent Developments in Sexual Preference Law, 30 Drake L. Rev. 311, 317 (1980-1981).

12. See Rivera, *Queer Law: Sexual Orientation Law In the Mid-Eighties*, Part II, 11 U. Dayton L. Rev. 275, 275-76 (1986).

13. *Id.* at 287. *Contra*, *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988) (striking down army regulation barring homosexuals as violative of equal protection clause), *reh'g en banc granted*, 847 F.2d 1362 (9th Cir. 1988).

The United States Supreme Court has given its support to this policy of discrimination. In *Bowers v. Hardwick*, one of the most controversial decisions of the past decade, the Supreme Court upheld the constitutionality of a Georgia sodomy law similar to the statute quoted above.¹⁴ Decided in 1986, following numerous Supreme Court decisions expanding the constitutional right to privacy,¹⁵ *Bowers* effectively put a halt to this development and, in fact, signaled a retreat.

The *Bowers* case involved the constitutionality of a Georgia statute that criminalized consensual sodomy.¹⁶ In upholding the statute, the Court stated that fundamental liberties are those "deeply rooted in this Nation's history and tradition."¹⁷ Whereas the Court found family, marriage, and procreation to be deeply rooted liberties, it found that the right to engage in homosexual conduct was not.¹⁸ Indeed, the Court noted, "proscriptions against [sodomy] have ancient roots."¹⁹

Hardwick, in turn, argued that "majority sentiments about the morality of homosexuality should be declared inadequate" and that the right to engage in any type of private consensual sexual activity should be constitutionally safeguarded.²⁰ The Court concluded,

14. 478 U.S. 186 (1986). The Georgia statute considered in *Bowers* provided in pertinent part that:

- (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
- (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

Ga. Code Ann. § 16-6-2 (1984).

15. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973).

16. Michael Hardwick was arrested in 1985 for violating this statute when an Atlanta police officer, who had entered Hardwick's home on an unrelated matter, observed Hardwick through a partially open bedroom door engaging in an act of homosexual sodomy. Although Hardwick was arrested and charges were filed, the District Attorney decided not to pursue the case. Hardwick brought suit against Michael Bowers, Attorney General for the State of Georgia, and several other defendants, seeking to have the Georgia sodomy statute declared unconstitutional. Hardwick asserted that the statute placed him in imminent danger of arrest because he was a practicing homosexual who regularly engaged in private acts of sodomy. See *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985).

17. *Bowers*, 478 U.S. at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

18. The Court, after surveying cases in which the fourteenth amendment was found to confer a fundamental individual right with regard to decisions relating to family, marriage, and procreation, went on to state that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ." *Bowers*, 478 U.S. at 190-91.

19. *Bowers*, 478 U.S. at 192.

20. *Bowers*, 478 U.S. at 196.

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however, that the “presumed belief of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” provides a rational basis for the challenged law.²¹ In essence, the Court preserved the majoritarian view of the morality of homosexuality at the expense of the minority’s right to privacy. Unfortunately, the Court skillfully ignored the reality that if majoritarian notions always prevail, advances in the area of civil rights will be illusory.

B. Treatment of Homosexual Aliens in Other Countries

Nations have reacted in very different ways to homosexuals. In most western European and Latin American countries, a private homosexual act between consenting adults is neither a civil nor a criminal offense.²² In contrast, the majority of African nations impose severe penalties on individuals caught engaging in homosexual acts.²³

Anglo-Saxon legal systems have shifted to a middle position toward homosexuality.²⁴ In England, for instance, homosexuality historically fell within the jurisdiction of the ecclesiastical courts along with such other crimes as blasphemy, heresy, witchcraft and adultery.²⁵ Those found to have engaged in homosexual acts were prosecuted as heretics and burned at the stake.²⁶ In 1533, the first secular statute proscribing acts of homosexuality was enacted.²⁷ Under the Act, persons convicted of sodomy suffered “pains of death.”²⁸ Although the penalty was later reduced to servitude for life under the Offenses Against the Person Act of 1861, sodomy was still termed “the infamous crime against nature.”²⁹ After a series of debates between ecclesiastical and secular authorities, England decriminalized homosexual conduct under the Sexual Offenses Act

21. *Bowers*, 478 U.S. at 196.

22. F. Whitam & R. Mathy, *Male Homosexuality in Four Societies: Brazil, Guatemala, the Philippines, and the United States* 129-40 (1986). There are a few countries in these regions, however, that do criminalize such behavior. *See, e.g.*, The Austrian Penal Act 64 (N. West & S. Shuman trans. 1966) (1-5 years in prison); The Columbian Penal Code 94-95 (P. Eder ed. 1967) (6 months to 2 years in prison).

23. *See, e.g.*, R. Seidman, *A Sourcebook of the Criminal Law in Africa* 75 (1966) (Nigeria treats sodomy as a felony carrying a 14 year prison term). M. Ganzglass, *The Penal Code of the Somali Democratic Republic* 456-57 (1971) (Somalia treats sodomy as a felony carrying a 3 month to 3 year prison term).

24. *See* F. Whitam & R. Mathy, *supra* note 22, at 130 table 6.1.

25. *See* W. Barnett, *Sexual Freedom and the Constitution* 80-81 (1973).

26. D. Bailey, *Homosexuality and the Western Christian Tradition* 146-47 (1955).

27. *See id.* (quoting 25 Hen. 8, ch. 6 (1533) (repealed by 9 Geo. 4, ch. 31 (1828))).

28. *Id.*

29. 4 W. Blackstone, *Commentaries* *215.

of 1967.³⁰ The current law permits private, consensual homosexual behavior between parties 21 years of age or older.³¹

An important contribution to the development of European law regarding homosexual acts was the decision of the European Commission of Human Rights in *Dudgeon v. United Kingdom*, adopted on March 13, 1980.³² In his application to the Commission, Mr. Dudgeon, age 30, of Northern Ireland, complained of the existence of laws in force in his country that made illegal certain sexual acts between members of the same sex.³³ He alleged that these laws violated Article 8 of the European Convention on Human Rights, which guarantees an individual "the right to respect for his private . . . life."³⁴ The Commission found that "the legal prohibition of private homosexual acts between consenting males over 21 years of age breached the applicant's rights under Article 8 of the Convention."³⁵

II. *The General Policy and Development of United States Immigration Law*

Some individuals maintain that the right to move from one country to another is absolute.³⁶ However, while it is generally accepted among democratic states that individuals are free to leave the country in which they reside, states are under no obligation to receive aliens unless a treaty mandates otherwise. If a state exercises its sovereign power to admit an alien to its territory, it is free to create the terms and conditions upon which entry is based.³⁷

States may protect themselves from undesirable aliens by excluding certain classes of individuals from their countries. Aliens may be

30. See Comment, *Bowers v. Hardwick: Balancing the Interests of the Moral Order and Individual Liberty*, 16 *Cumb. L. Rev.* 555, 559-60 (1986); see also J. Smith & B. Hogan, *Criminal Law* 443 (5th ed. 1983). The English Parliament enacted the statute based upon the recommendations of the English government's Committee on Homosexual Offenses and Prostitution. See Comment, *supra*, at 559-60. Shortly after the Sexual Offenses Act was passed, many of the Commonwealth nations followed the lead of their mother country and enacted similar legislation: Wales in 1967, Canada in 1969, Scotland in 1980, and Northern Ireland in 1982. See F. Whitam & R. Mathy, *supra* note 22, at 136.

31. See J. Smith & B. Hogan, *supra* note 30, at 443.

32. Eur. Comm'n H.R., Application No. 7525/76 (1980).

33. *Id.* at 1.

34. *Id.* at 1, 26.

35. *Id.* at 36.

36. A. Dowty, *Closed Borders* 7 (1987).

37. See 1 L. Oppenheim, *International Law* 675-76 (8th ed. 1957); I. Brownlie, *Principles of Public International Law* 519 (3d ed. 1979).

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excluded for health reasons,³⁸ for political reasons, for national security reasons,³⁹ or for economic reasons. States also use their immigration power to give preference in the admission process to certain occupational groups or highly skilled individuals, or for humanitarian reasons. The United States, for example, has welcomed refugees from Cambodia, the “boatpeople,” who were forced to flee their homeland following the Vietnam War because of persecution they experienced under Cambodia’s communist regime.

The United States Supreme Court has stated that “‘over no conceivable subject is the Legislative power of Congress more complete than it is over’ the admission of aliens.”⁴⁰ Once Congress has decided to exclude aliens possessing certain characteristics, the Court, without exception, has sustained its plenary power to regulate this area of immigration law.⁴¹

Use of this power has led to discriminatory immigration practices. Despite the legal entry of nearly 100 million aliens during the past century,⁴² the United States’ borders remain impenetrable to various groups. For years the nation’s immigration law was designed to preserve the ethnic status quo, a concept known as “nativism.”⁴³ Americans feared and disliked new immigrants, considering them inherently and biologically inferior. For example, Edward Ross, a leading academic proponent of nativism, considered Jews to be “undersized and weak muscled . . . and exceedingly sensitive to pain.”⁴⁴ Of Italians, he wrote, “[Italians] possess a distressing frequency of low foreheads, open mouths, weak chins, poor features, skewed faces, small or knobby crania and backless heads.”⁴⁵ Still others

38. See, e.g., 8 U.S.C. § 1182(a)(6), (g) (1952) (excluding aliens afflicted with dangerous contagious diseases).

39. See, e.g., 8 U.S.C. § 1182(a) (28), (29), (33) (1982) (denying admission to anarchists, communists, individuals connected with the Nazi regime, terrorists and spies).

40. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 334 (1909)).

41. *Kleindienst*, 408 U.S. 753. The United States Constitution does not specifically delegate to the federal government the power to regulate immigration. Nonetheless, the Supreme Court has held that Congress’s power to regulate immigration may be implied from those provisions of the Constitution governing the regulation of foreign commerce, declarations of war, and treaty and naturalization powers. See Comment, *Reevaluating Alien Exclusion in Light of AIDS*, 6 *Dick. J. Int’l L.* 119, 122-23 (1987); see also U.S. Const. art. I, § 8, cl. 4 (permitting Congress to establish uniform rule of naturalization).

42. Select Commission on Immigration and Refugee Policy, *Immigrants: How Many?*, Staff Report 28 (1980), reprinted in T. Aleinikoff & D. Martin, *supra* note 1, at 60.

43. This concept was advocated by groups such as the Know-Nothing Party, which advocated eliminating even naturalized immigrants from participation in the political process. See T. Aleinikoff & D. Martin, *supra* note 1, at 43.

44. *Id.* at 44.

45. *Id.*

considered Jews to be "clever thieves" who were "filthy, un-American, and often dangerous in their habits"; Russians were the "red menace"; the conquered Germans were the "bestial hordes"; and Chinese were "inferior to any race God ever made . . . hav[ing] no souls to save, and if they [did], they [were] not worth saving."⁴⁶ Ross concluded that the new immigrants in general were undesirable because they "[were] beaten men from beaten races, representing the worst failures in the struggle for existence."⁴⁷ One report stated, "Abraham Lincoln's fear that when nativists gained control of U.S. policy they would rewrite the Declaration of Independence to read: 'All men are created equal except Negroes, and foreigners, and Catholics' seemed to be coming true."⁴⁸

The efforts of this nation's first Catholic president, John F. Kennedy, marked the turning point in the history of United States immigration policy. As President, Kennedy introduced legislation to abolish the 40 year old national origins quota system.⁴⁹ The time was ripe for change: stimulated by the civil rights movement, Congress welcomed Kennedy's proposal to liberalize immigration policy. Kennedy's assassination in 1963 prevented him from witnessing the culmination of his efforts, the passage of the Immigration and Nationality Act Amendments of 1965. The Amendments abolished the national origins formula and heralded a new era in United States immigration policy. They also brought this country one step closer to George Washington's vision of the United States as "an asylum to the oppressed and the needy of the earth."⁵⁰ Although groups from nearly every race, creed, religion, and culture benefited from the new and liberal immigration policy, homosexuals remained barred from entry.

III. *Homosexual Aliens and Immigration Law*

Homosexual aliens were first excluded from entry into the United States by the Immigration Act of 1917, based on the belief held by the medical and psychiatric communities that homosexuality was a disease.⁵¹ Under the 1917 Act, individuals who were certified by an

46. *Id.* at 45, 50.

47. *Id.* at 45.

48. *Id.* at 51.

49. The quota system was a numerical control device implemented by Congress based on the nationality of the individuals. It was intended to restrict immigration from disfavored regions by assigning a preestablished percentage to some nations while completely excluding others.

50. T. Aleinikoff & D. Martin, *supra* note 1, at 51.

51. Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 875 (1917).

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examining physician as “mentally defective” or afflicted with a “constitutional psychopathic inferiority” were denied admission into the country.⁵² For years, both the Immigration and Naturalization Service (INS) and the Public Health Service (PHS) classified homosexual aliens as psychopathic inferiors or mental defectives.⁵³ Although medical and societal attitudes toward homosexuality have since changed,⁵⁴ the immigration statutes pertaining to the exclusion of homosexuals have not been altered in any substantive way.⁵⁵ Various federal courts of appeals have interpreted the same statutes with conflicting results, thus adding to the controversy and confusion in this area. This section analyzes some of the most significant decisions.

A. Case Law on the Exclusion of Homosexual Aliens

The statutory provision authorizing the exclusion of aliens afflicted with psychopathic personalities has often been used to justify the exclusion of homosexuals. The first major case addressing the applicability of the psychopathic personality categorization to the exclusion of homosexuals was *United States v. Flores-Rodriguez*.⁵⁶ Flores-Rodriguez had been convicted of perjury for failing to disclose in a sworn application for an immigration visa that he had been convicted of loitering in a public place for the purpose of soliciting men. On appeal, Flores-Rodriguez asserted that his false statement was immaterial because disclosure of his conviction would not have affected his visa application under the existing immigration law.

The court of appeals disagreed. Based on the 1917 Immigration Act, which was then in force, the court held that Flores-Rodriguez

52. *Id.*

53. *See, e.g.,* *In re La Rochelle*, 11 I. & N. Dec. 436 (BIA 1965) (holding that homosexuality comes within meaning of constitutional psychopathic inferiority).

54. The American Psychiatric Association in 1973 removed homosexuality from the class of mental disorders known as “sexual deviation.” The American Psychological Association, the American Public Health Association, the American Nurses Association, and the Council of Advanced Practitioners in Psychiatric and Mental Health Nursing of the American Nurses’ Association have since endorsed this position. Memorandum from Julius Richmond, Surgeon General and Assistant Secretary for Health, United States Department of Health, Education, and Welfare, to William Foege and George Lythcott (Aug. 2, 1979), *reprinted in* 56 Interpreter Releases 398-99 (1979).

55. Since the 1917 Act, the term “constitutional psychopathic inferiority” has been modified to “psychopathic personality,” and the term “sexual deviation” has been added. *See* Immigration and Nationality Act, 8 U.S.C. § 1182(a)(4) (1982).

56. 237 F.2d 405 (2d Cir. 1956).

could have been excluded either as a person of "constitutional psychopathic inferiority" or as "mentally defective."⁵⁷ While the government failed to present any evidence that homosexuals were included in the category of "constitutional psychopathic inferiority," the court concluded that the defendant's professed homosexuality and conviction were "evidence of homosexual tendencies of an extremely offensive exhibitionistic nature" and may have been enough to put him in the psychopathic category.⁵⁸ Furthermore, the court concluded that the term "mentally defective" encompassed more than intellectual capacity; it was "designed to exclude homosexuals with exhibitionistic tendencies and other groups with lewd proclivities similarly repugnant to the mores of our society."⁵⁹

In 1952, the language "persons of constitutional psychopathic inferiority" was replaced with the language "afflicted with psychopathic personality."⁶⁰ The applicability of this category to homosexuals was first tested in 1961 in *Quiroz v. Neelly*.⁶¹ *Quiroz* involved the deportation of a Mexican woman who was found to be afflicted with a psychopathic personality based upon evidence of her homosexuality. Despite the testimony of two doctors that homosexuals were not necessarily considered psychopathic personalities by the medical profession, the Court of Appeals for the Fifth Circuit found this language applicable to homosexuals. The court concluded from the legislative history of the act that "[w]hatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts."⁶²

Within a year, however, the Court of Appeals for the Ninth Circuit rendered a conflicting decision in *Fleuti v. Rosenberg*.⁶³ *Fleuti* was a Swiss national who had been lawfully admitted to the United States as a permanent resident in 1952. He remained in this country continuously until 1956, when he traveled to Ensenada, Mexico, "for a

57. *Flores-Rodriguez*, 237 F.2d at 411.

58. *Flores-Rodriguez*, 237 F.2d at 410.

59. *Flores-Rodriguez*, 237 F.2d at 411.

60. 8 U.S.C. § 1182(a)(4) (1982). The term "sexual deviation" was not included in the Immigration and Nationality (McCarran-Walter) Act of 1952. Nonetheless, the absence of the term "sexual deviation" was "not to be construed in any way as modifying the intent to exclude all aliens who [were] sexual deviates. The provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . [was] sufficiently broad to provide for the exclusion of homosexuals and sex perverts." S. Rep. No. 1137, 82d Cong., 1st Sess. 9 (1951).

61. 291 F.2d 906 (5th Cir. 1961).

62. *Quiroz*, 291 F.2d at 907.

63. 302 F.2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963).

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few hours.”⁶⁴ Three years later, the INS sought to deport Fleuti on the ground that at the time of his return in 1956, he “was within one or more of the classes of aliens excludable by laws existing at the time of such entry.”⁶⁵ Specifically, the Service alleged that Fleuti was an alien afflicted with a psychopathic personality based on evidence of his homosexual tendencies and homosexual activities.⁶⁶ The district court upheld the deportation order.

On appeal, the Court of Appeals for the Ninth Circuit voided the alien’s deportation order on the grounds that the phrase “psychopathic personality” was too vague to give notice that homosexuals were included in this group; nowhere in the statute was the term “psychopathic personality” defined. The court concluded that the statute violated Fleuti’s right to due process as guaranteed by the fifth amendment.⁶⁷

In response to the *Fleuti* decision, Congress amended the Immigration and Nationality Act in 1965 to provide that persons afflicted with “sexual deviation” would be excluded from entering the United States.⁶⁸ Nonetheless, confusion surrounded the use of the phrase “psychopathic personality” to exclude homosexual aliens. In 1967, the United States Supreme Court sought to clarify the law in *Boutilier v. I.N.S.*⁶⁹ Clive Boutilier was a Canadian national who was admitted to the United States as a permanent resident on June 22, 1955, at the age of 21.⁷⁰ Several years later, Boutilier applied for citizenship. On the affidavit he submitted to the naturalization

64. *Fleuti*, 302 F.2d at 653.

65. *Fleuti*, 302 F.2d at 653.

66. The INS alleged that Fleuti had “been afflicted with the desire for sexual relations with members of [his] own sex for approximately twenty-two (22) years, [and had] indulged in the practice of sexual relations with members of [his] own sex at periodic intervals, averaging about once a month for the past twenty-two (22) years.” *Fleuti*, 302 F.2d at 654 n.3.

67. *Fleuti*, 302 F.2d at 658.

68. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 919 (codified at 8 U.S.C. § 1182(a)(4) (1982)). The INA had previously provided in pertinent part that:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.

8 U.S.C. § 1182(a)(4) (1964). After the amendment in 1965, the statute read:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect.

8 U.S.C. § 1182(a)(4) (1982).

69. 387 U.S. 118 (1967).

70. *Boutilier*, 363 F.2d 488, 490 (1966).

examiner, Boutilier admitted that he had once been arrested on a charge of sodomy.⁷¹ In a subsequent affidavit, Boutilier revealed the full history of his sexually deviant behavior.⁷² Based on this document, the PHS issued a certificate stating that Boutilier "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States."⁷³ Armed with this certificate, the government initiated deportation proceedings. Based on the undisputed evidence of Boutilier's homosexuality the special inquiry officer ordered Clive Boutilier deported. He wrote, "Boutilier had been a homosexual at the time of entering the United States and, thus, was excludable as one afflicted with a 'psychopathic personality.'"⁷⁴

The United States Supreme Court granted certiorari to determine "whether the term 'psychopathic personality' included homosexuals and if it suffered illegality because of vagueness."⁷⁵ After reviewing the history of the Act, the Court concluded that the phrase "psychopathic personality" was not used in the clinical sense in the statute, but as a term of art by which the Congress intended to "effectuate its purpose to exclude from entry all homosexuals and other sex perverts."⁷⁶ Furthermore, the Court rejected the argument that the term was void for vagueness. The Court reasoned that "[t]he constitutional requirement of fair warning has no applicability to standards . . . for admission of aliens to the United States" because Congress has plenary power to exclude persons with characteristics that Congress has forbidden.⁷⁷ This decision, in conjunction with the 1965 amendment, left no doubt that the United States' borders were closed to homosexuals.

Medical advances, however, led to a 1979 PHS policy change regarding the treatment of homosexual aliens. Before 1979, INS personnel who suspected an alien of homosexuality referred the individual to the PHS for an examination.⁷⁸ If PHS medical officers determined that the alien was a homosexual, the alien was excluded under a Class A medical certificate.⁷⁹ In 1979, however, following a

71. *Boutilier*, 363 F.2d at 490.

72. *Boutilier*, 363 F.2d at 490-91.

73. *Boutilier*, 363 F.2d at 491.

74. *Boutilier*, 363 F.2d at 491.

75. *Boutilier*, 387 U.S. at 120.

76. *Boutilier*, 387 U.S. at 122.

77. *Boutilier*, 387 U.S. at 123.

78. *Hill v. I.N.S.*, 714 F.2d 1470, 1472 (9th Cir. 1983) (citing 8 U.S.C. § 1224 (1976 & Supp. V 1981)).

79. *Hill*, 714 F.2d at 1472 (citing 8 U.S.C. § 1224 (1976 & Supp. V 1981)).

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proclamation by the American Psychiatric Association that it no longer considered homosexuality a mental disease, the Surgeon General of the United States ordered its personnel not to issue Class A certificates excluding aliens solely because those aliens were suspected of being homosexual.⁸⁰ The reasons given for the policy change were that the medical profession no longer considered homosexuality per se to be a mental disorder, and that homosexuality was not properly determined through a physical examination.⁸¹

Following this development, the INS allowed homosexuals to enter the country conditionally under parole status until its legal counsel in the Justice Department could provide further guidance.⁸² The Justice Department found that the Surgeon General's discretion with regard to medical determinations was limited by congressional intent to prohibit the entry of homosexuals,⁸³ and advised the INS to continue its practice of denying homosexual aliens admission to the United States.⁸⁴

In response to this advice, the INS initiated a new procedure regarding the inspection of aliens who were suspected of being homosexuals.⁸⁵ Under the new procedure, unless an arriving alien made an "unambiguous oral or written admission of homosexuality" or a third person arriving at the same time "voluntarily state[d], without prompting or prior questioning, that an alien who arrived in the United States at the same time . . . [was] a homosexual," the alien was not to be questioned about his or her sexual preference.⁸⁶ If, however, the arriving alien volunteered the information or a third party arriving at the same time identified the alien as a homosexual, the alien would then become excludable.⁸⁷ This new policy was first tested in *Hill v. I.N.S.*⁸⁸

Hill wanted to enter the country as a nonimmigrant visitor.⁸⁹ Because Hill made an unsolicited statement that he was a homosexual

80. 56 Interpreter Releases 387 (1979). The American Psychiatric Association adopted a resolution on December 15, 1973, declaring that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." D. Knutson, *Homosexuality and the Law* 21 n.42 (1980).

81. 56 Interpreter Releases 387-88 (1979).

82. *Hill*, 714 F.2d at 1473 (citing 8 U.S.C. § 1182(d)(5) (1976 & Supp. V 1981)).

83. *Hill*, 714 F.2d at 1473 (citing 8 U.S.C. § 1182(d)(5) (1976 & Supp. V 1981)).

84. 57 Interpreter Releases 440, 441-42 (1980).

85. *Hill*, 714 F.2d at 1473 (citing 57 Interpreter Releases 440 (1980)).

86. *Hill*, 714 F.2d at 1473 (citing 57 Interpreter Releases 440 (1980)).

87. *Hill*, 714 F.2d at 1473 (citing 57 Interpreter Releases 440 (1980)).

88. 714 F.2d 1470.

89. *Hill*, 714 F.2d at 1473.

to an INS official upon entry, he was subjected to an exclusion hearing. At the exclusion hearing, however, the immigration judge ruled that Hill was not excludable because the government could not present a medical certificate stating that Hill was afflicted with a sexual deviation or mental defect, as required by the statute.⁹⁰ The INS appealed to the Board of Immigration Appeals (BIA), which reversed the decision.⁹¹ The BIA reasoned that the applicant in an exclusion hearing had the burden of proving his admissibility, and where the applicant had made an unsolicited statement that he was a homosexual, no medical certificate was necessary to exclude him.⁹²

Hill petitioned the Federal District Court for the Northern District of California for a writ of habeas corpus.⁹³ The court granted the writ and permitted Hill to enter the country, basing its holding on legislative history indicating that Congress intended the exclusion of homosexuals to be a medical exclusion.⁹⁴ Thus, under the statute, a medical certificate was required to exclude even declared homosexuals.⁹⁵ The court further reasoned that if homosexuality was a medical exclusion, and the medical profession no longer considered homosexuality to be a medical illness, mental disorder, or sexual deviation, the congressional intention to exclude homosexuals no longer existed.⁹⁶ The court distinguished *Boutilier* and found that it was not controlling where medical authorities had not merely changed the label applied to homosexuality, but had determined that homosexuality was not an illness.⁹⁷ Thus, the court concluded that "*Boutilier* does not preclude the Court from finding that Congress did not intend that homosexuals be excluded from entry into the United States solely because they are homosexuals once medical authorities have determined that homosexuality is not a medical illness, mental disorder, or sexual deviation."⁹⁸ The Court of Appeals for the Ninth Circuit affirmed the decision that a medical certificate is necessary for exclusion where such exclusion is based on medical

90. *In re Hill*, 18 I. & N. Dec. 81, 82 (BIA 1981).

91. *Id.* at 81.

92. *Id.* at 85-86.

93. *Lesbian/Gay Freedom Day Comm. v. I.N.S.*, 541 F. Supp. 569 (N.D. Cal. 1982).

94. *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 577.

95. *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 579.

96. *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 584.

97. *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 584.

98. *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 585.

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reasons, but did not reach the issue of whether Congress had intended a per se exclusion of homosexuals independent of medical reasons.⁹⁹

Shortly after the *Hill* decision, the Court of Appeals for the Fifth Circuit reached the opposite conclusion. Its *In re Longstaff*¹⁰⁰ decision upheld the denial of naturalization to an alien who had lived in the United States for 15 years on the grounds that he had never been lawfully admitted to the country because he was a homosexual and, therefore, was excludable as a psychopathic personality when he entered. Longstaff argued that the psychopathic categorization was a medical exclusion and that the only evidence an immigration judge could consider was a PHS medical certificate. The court rejected this argument, noting that current INA procedure no longer relied on medical certification; an alien's unsolicited, unambiguous admission of homosexuality warranted exclusion.¹⁰¹ Thus, Longstaff's statement that he was a homosexual at the time of his entry was enough evidence to bar his naturalization.¹⁰² The court emphasized the plenary power of Congress to exclude aliens even for arbitrary or discriminatory reasons.¹⁰³ According to the court, if such policies resulted in injustice, then it was the duty of the legislature, not the courts, to correct the injustice.¹⁰⁴

In a dissenting opinion, Judge Tate adopted the rationale enunciated by the Ninth Circuit in *Hill*, arguing:

Congress did so intend to treat medical causes for exclusion or deportation differently from non-medical causes for denial of lawful admission to the United States, and . . . we must respect the intended illogic of Congress in according such talismanic significance to the presence or absence of a conclusive medical certification as determinative of admissibility or deportability.¹⁰⁵

Since the court in *Hill* and the majority in *Longstaff* interpreted congressional intent for the same statute, yet reached different results, Congress has spoken ambiguously.¹⁰⁶ Either the Supreme Court or Congress must resolve this ambiguity.

99. *Hill v. I.N.S.*, 714 F.2d 1470 (9th Cir. 1983).

100. 716 F.2d 1439 (5th Cir. 1983). Although this decision involved a denial of naturalization, it is discussed in this section because the essence of the decision concerned issues related to admission.

101. *In re Longstaff*, 716 F.2d at 1451.

102. *In re Longstaff*, 716 F.2d at 1451.

103. *In re Longstaff*, 716 F.2d at 1442, 1451.

104. *In re Longstaff*, 716 F.2d at 1451.

105. *In re Longstaff*, 716 F.2d at 1453 (Tate, J., dissenting).

106. Despite the fact that the courts in *Hill* and *Longstaff* arrived at opposite conclusions, the practical consequences for homosexual aliens have remained unchanged.

B. Uniform Interpretation of Immigration Statutes

Tension exists regarding the treatment of homosexuals in both our society and our legal system. The above discussion illustrates this tension: on two separate occasions the Fifth and Ninth Circuits reached opposite results on two significant issues.¹⁰⁷ The Fifth Circuit in *Quiroz v. Neelly* ruled that the phrase "psychopathic personalities" was meant to include homosexuals; in contrast, the Ninth Circuit in *Fleuti v. Rosenberg* found the phrase to be unconstitutionally vague. Twenty years later, in *In re Longstaff*, the Fifth Circuit held that an alien's unsolicited, unambiguous admission of homosexuality warrants that alien's exclusion; the Ninth Circuit, on the other hand, ruled in *Hill v. I.N.S.* that an alien could not be excluded without a medical certificate issued by the PHS. Because these issues concern immigration policy and the control of our borders, implementation of a uniform national policy is imperative. Immigration policy is not something to be left to regional concerns. If it were, our borders could resemble a large sieve where an alien excluded at one location on the border could be admitted at another. Mobility facilitated by modern means of transportation would certainly permit the alien to reach his or her original destination in contravention of that jurisdiction's immigration policy, thereby undermining this nation's entire immigration system.

To prevent such an occurrence, the United States Supreme Court must resolve the *Hill/Longstaff* conflict.¹⁰⁸ More importantly, the Court should reexamine section 212(a) of the INA and determine

Although the government did not appeal the *Hill* decision to the United States Supreme Court, it took action through the Attorney General's office. In a letter dated April 5, 1984, the Acting Deputy Attorney General instructed the Assistant Secretary for Health in the Department of Health and Human Services to institute a new policy for the PHS in the region of the Ninth Circuit. The letter stated that the INS had a congressionally mandated duty to exclude self-proclaimed homosexuals. 61 Interpreter Releases 374, 377-78 (1984). Pursuant to this responsibility, within the Ninth Circuit the PHS is required to issue certificates to self-proclaimed homosexuals who are referred to the PHS for an examination. *Id.* at 378. Thus, the trend toward liberalization of the policy for entry of homosexuals into the United States has been effectively circumvented by this revision.

107. See *Quiroz v. Neelly*, 291 F.2d 906 (5th Cir. 1961); but see *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963). See *Hill v. I.N.S.*, 714 F.2d 1470 (9th Cir. 1983); but see *In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983).

108. The Supreme Court refused the opportunity to resolve the conflict. In *Longstaff*, a petition for certiorari was filed on the single issue of whether an alien's admission of homosexual activity was statutorily and constitutionally sufficient to support a finding that he was excludable under section 212(a)(4) of the INA, 8 U.S.C. § 1182 (1982), despite the absence of the PHS medical examination and certification required by Congress under section 234 of the Act. The petition was denied. 467 U.S. 1219 (1984).

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congressional intent regarding the exclusion of homosexual aliens. This reexamination would require a reconsideration of the *Boutilier* decision. Even though *Boutilier* is settled law, prevailing views of the medical profession suggest that the decision deserves rethinking.

Policy considerations suggest that the Court should resolve the conflict between the circuits and reinterpret our immigration statute. The significance of having a uniform rule is perhaps best articulated by one commentator:

Both Judge Rubin (writing for the majority) and Judge Tate (dissenting) in *Longstaff* recognize that Congress could act to clarify its current intent in light of changes in medical and ethical thinking since 1965. . . . But it is not easy to get a legislature to take up such a controversial topic. The majority and minority in *Longstaff* essentially differ, then, only as to what rule should prevail in the meantime, until Congress chooses to legislate anew (if it ever does). Or to put the matter another way, they differ over which side in the ongoing policy debate over exclusion of homosexuals should bear the burden of overcoming legislative inertia—and which side's views will be implemented in default of new congressional action.¹⁰⁹

Until some external force, either public outcry or judicial pronouncement, provides the impetus for Congress to reexamine the statute, lower courts will continue to issue their own contradictory interpretations of the law.

C. *Resolving the Conflicting Interpretations*

The first split between the Fifth and Ninth Circuits arose over the meaning of “psychopathic personality.” In 1961, the Court of Appeals for the Fifth Circuit held that the clear intent of Congress was to exclude homosexuals. Judge Jones wrote:

We find it unnecessary ‘to embark . . . on an amateur’s voyage on the fog-enshrouded sea of psychiatry.’ . . . The legislative history is clear as to the meaning to be given to [the phrase ‘psychopathic personality’]. . . . Whatever the phrase . . . may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here.¹¹⁰

Shortly thereafter, however, the Court of Appeals for the Ninth Circuit found Congressional intent much less discernible. Judge Hamley wrote:

The conclusion is inescapable that the statutory term ‘psychopathic personality,’ when measured by common understanding and practices,

109. T. Aleinikoff & D. Martin, *supra* note 1, at 231.

110. *Quiroz v. Neelly*, 291 F.2d 906, 907 (5th Cir. 1961) (citing *United States v. Flores-Rodriguez*, 237 F.2d 405, 412 (2nd Cir. 1956)).

does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein. Since the statutory term thus fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense, we hold that the statute is void for vagueness.¹¹¹

In addressing this issue in *Boutilier*, the Supreme Court adopted the Fifth Circuit view that Congress intended "psychopathic personality" to include homosexuality.¹¹² The Court also rejected the Ninth Circuit's void for vagueness argument, asserting that with regard to behavior engaged in prior to entry into the United States, Congress's plenary power to make rules for the admission of aliens was not subject to any constitutional requirement of fair warning.¹¹³

There was no indirection in the *Boutilier* decision. It candidly and cogently affirmed what it considered to be the legislative intent of section 212(a)(4) of the INA. Precisely because the Court avoided niceties and technicalities in its opinion, the ruling has weathered two decades of revolutionary change in this nation's perception of homosexuality. Nonetheless, social values and psychiatric theories have rendered the *Boutilier* interpretation of the INA obsolete.

While it appears that Congress clearly intended to place homosexuals in the category of persons afflicted with psychopathic conditions and subject them to the exclusions set out in section 212(a)(4), the notion that "psychopathic personality" encompasses homosexuality has become outdated. The medical profession has repudiated the belief that homosexuality is a mental disorder; therefore, the interpretation that homosexuals should be excluded on the ground of their "psychopathic personality" is obsolete and must be reexamined by the courts.

This cannot be done, however, without concluding that the congressional purpose effectuated in section 212(a)(4) is to exclude only those aliens with mental disorders. The courts must decide that the controlling question for an INS officer when admitting an alien is whether the alien is afflicted with any of the numerous mental conditions set out in section 212(a)(4), not whether he or she is a homosexual. In other words, the courts must decide whether the terms "psychopathic personality" and "sexual

111. *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963).

112. The Court relied on legislative history, especially S. Rep. No. 1137, 82d Cong., 2d Sess. 9 (1952), in finding that "the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals. . . ." *Boutilier*, 387 U.S. at 120.

113. *Boutilier*, 387 U.S. at 123.

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deviation” describe excludable medical conditions that require certification by medical personnel.

This was precisely the issue confronting the courts in *Hill* and *Longstaff*. An examination of the legislative history of section 212(a)(4) indicates that the Ninth Circuit’s interpretation is more accurate than that of the Fifth Circuit. Congress explicitly relied on the PHS to define “psychopathic personality” when it adopted the term in 1952.¹¹⁴ Congress again relied on the medical knowledge of the PHS when it added the term “sexual deviation” to section 212(a)(4) in 1965.¹¹⁵

At the time *Boutilier* was decided, the PHS still considered homosexuality a mental disorder. Accordingly, the Supreme Court correctly inferred that Congress intended to exclude homosexuals as “psychopathic personalities.” Congressional intent, however, was premised on existing medical knowledge; nothing indicates that Congress sought to exclude homosexuals on grounds of moral or religious principles. Therefore, “[i]t seems somewhat inconsistent . . . [to maintain] that when Congress included homosexuality within the term ‘psychopathic personality’ in explicit reliance on PHS medical advice, it intended to preclude the PHS from redefining that term in light of new medical knowledge.”¹¹⁶ When the PHS decided in 1979 that it would no longer classify homosexuality as a mental disorder, it could no longer logically be said that Congress intended to exclude homosexuals.¹¹⁷ Congress specifically delegated the responsibility of determining the medical fitness of aliens seeking to enter the United States to the medical authorities, not to untrained and unlicensed INS agents.¹¹⁸ From this grant of authority to the PHS to exercise its expert discretion, it is logical to infer that the PHS also has the authority to determine as a matter of medical opinion to whom the statutorily excludable conditions apply. Therefore, the Ninth Circuit correctly held that medical certification

114. “The report that accompanied [H.R. 5678] shows clearly that the House Judiciary Committee adopted the recommendation of the Public Health Service that ‘psychopathic personality’ should be used in the Act as a phrase that would exclude from admission homosexuals and sex perverts. . . . It quoted at length, and specifically adopted, the Public Health Service report which recommended that the term ‘psychopathic personality’ be used to ‘specify such types of pathologic behavior as homosexuality and sexual perversion.’” *Boutilier*, 387 U.S. at 122.

115. Act of Oct. 3, 1965, 8 U.S.C. § 1182(a)(4).

116. Note, *The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service’s Authority Over Medical Exclusions*, 17 U. Mich. J.L. Ref. 331, 357 (1984).

117. *Id.* at 355-57.

118. “The physical and mental examination of arriving aliens . . . shall be made by medical officers of the United States Public Health Service. . . .” 8 U.S.C. § 1224 (1982).

is needed to exclude homosexual aliens. Judge Tate in his *Longstaff* dissent provided a cogent rationale that supports the Ninth Circuit's conclusion in *Hill*:

[INA § 134] provides that either medical officers of the Public Health Service or civil surgeons employed by the United States 'shall' conduct the physical and mental examination of all aliens suspected of being medically excludable under [INA § 212(a)(1)-(5)] (thus including the grounds of psychopathic personality and sexual deviation). These medical personnel and surgeons are the only persons authorized by the Act to certify the existence of 'any' medical condition permitting exclusion. . . . Nonetheless, the majority concludes that Congress did not intend for a medical certificate attesting to an individual's homosexuality to be the only competent evidence for exclusion on the basis of 'psychopathic personality' or 'sexual deviation.' To the contrary, however, I do not believe that it is overly formalistic to find that Congress did intend in its statutory scheme to *require* medical certification, and only medical certification, of any 'medical' cause for exclusion.¹¹⁹

The *Hill/Longstaff* conflict should be resolved in favor of the Ninth Circuit's interpretation that Congress enacted the terms "psychopathic personality" and "sexual deviation" to ban aliens on the basis of medical exclusion, and not on the basis of sexual orientation. This interpretation can be derived from Congress's reliance on government health authorities in writing the provisions, the specific delegation to the PHS of the broad authority to determine an alien's health status for purposes of section 212(a)(4) exclusion, and the express requirement of section 234 that aliens excludable under section 212(a) be examined by PHS health officials. Having concluded that the excludable conditions named in section 212(a) are medically based, the Court should announce that terms such as "psychopathic personality" and "sexual deviation" no longer apply to homosexuals per se. If Congress intended that *all* homosexual aliens be denied entry into the United States, as the Justice Department insists, then under its current practice of interrogating or examining only aliens who make unsolicited, unambiguous admissions of homosexuality, the INS is failing to effectuate the will of Congress.¹²⁰

D. *The Role of Congress*

In 1984, the Supreme Court denied a petition for certiorari in the *Longstaff* case. It is uncertain whether and when the Court will have

119. *In re Longstaff*, 716 F.2d at 1452 (5th Cir. 1983) (Tate, J., dissenting).

120. Fowler & Graff, *Gay Aliens and Immigration: Resolving the Conflict Between Hill and Longstaff*, 10 U. Dayton L. Rev. 621, 631 n.74 (1985).

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another opportunity to reconcile the split between the circuits. In the meantime, Congress must confront the issue, and should perhaps be guided by the words of an administrative law judge in the *Hill* case who stated:

the homosexual *per se*, is neither a socially dangerous psychopath nor a sick person afflicted with a dread disease. The conclusion to be reached therefore is that some 28 years ago Congress mislabeled homosexuality as a psychiatric condition by means of a statute.¹²¹

Changes in attitudes and medical developments in the past two decades warrant a reexamination of the statute. The medical community no longer considers homosexuality to be a mental disorder. Some religions are relaxing their condemnations of homosexuality.¹²² Gay political leaders, athletes, entertainers, and clergymen are openly admitting their lifestyles without shame.¹²³ Whether Congress intended to exclude homosexuals on medical or moral grounds, the basis and rationale of the statute must be reexamined in light of these recent developments. Inferring congressional intent to incorporate a *per se* exclusion of homosexuals into the current immigration statute ignores the changes in societal mores and threatens to reverse the trend of civil rights advancement achieved by other minority groups.

In spite of this, Congress might enact a new statute that would exclude homosexual aliens as an attempt to limit the spread of AIDS. The following section discusses AIDS and the impact it has had upon our immigration policy. It offers some suggestions about how Congress and the courts can establish a coherent policy regarding homosexual immigration in light of the serious and legitimate fears surrounding the AIDS epidemic.

IV. AIDS and Immigration Law

“When a society is threatened by an outbreak of a contagious disease, a conflict arises between the interests of the sick and the well.

121. National Lawyers Guild, *Sexual Orientation and the Law* 7-7 n.27 (1987) (citing *Hill v. I.N.S.*, A.L.J. Decision of Nov. 7, 1980).

122. “Although slower to respond to the new libertarian movement, some church groups have eased their condemnation of homosexuals as persons. The Episcopal Church has ordained homosexual ministers, both male and female; Presbyterians, Unitarians and Methodists have allowed gay ministers; and organizations of homosexuals have been functioning within the Roman Catholic, Greek Orthodox, Anglican, Protestant and Jewish religions.” 2 *Encyclopedia of Crime and Justice, Homosexuality and Crime* 870-72 (1983).

123. *Id.* at 872.

The ill seek care and a cure; the healthy want protection from exposure to the disease."¹²⁴ Because of the AIDS epidemic, Americans are torn between the fear for the safety, health, and welfare of the unafflicted and sympathy for those who have contracted the disease. The result has been a self-protective policy to exclude any immigrant afflicted with AIDS.¹²⁵

A. Excluding Aliens with Contagious Diseases

Congress first barred immigrants for medical reasons in 1879 pursuant to the statute entitled "An Act to prevent the introduction of infectious or contagious diseases into the United States and to establish a National Board of Health."¹²⁶ This congressional action had two objectives: first, to prevent immigrants with severe ailments from economically burdening American citizens; and second, to protect the health and welfare of United States citizens from disease carriers.

Several months after its enactment, the 1879 Act was refined to address issues of scope and procedure. Primarily, the revision defined contagious or infectious diseases to include Asiatic cholera, yellow fever, plague, small pox, typhus fever, and relapsing fever.¹²⁷ Furthermore, the Act authorized the President to appoint a medical officer at various foreign ports to inspect all vessels and crew bound for the United States. Shore leave was denied to anyone found infected with one of the enumerated diseases.¹²⁸

On March 3, 1891, Congress passed a new law denying entry to those suffering from "loathsome or dangerous" contagious diseases.¹²⁹ This statute raised the level of physical ailment that constituted a barrier to entry from infectiousness to dangerousness.¹³⁰ The change could be attributed to the advancement in medical technology and the ability of the medical profession to cope with the

124. Note, Characterization and Disease: Homosexuals and the Threat of AIDS, 66 N.C.L. Rev. 226, 226-27 (1987).

125. 42 C.F.R. § 34.4 (1987); Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6) (1987).

126. Ch. 202, 20 Stat. 484 (1879).

127. Druhot, Immigration Laws Excluding Aliens on the Basis of Health: A Reassessment After AIDS, 7 J. Legal Med. 85, 88 (1986).

128. *Id.* at 88 nn.23-24 (citing T. Turner, Some Remarks Upon National and International Sanctuary Jurisprudence 35 app. X (1881)).

129. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084. Other aliens excluded were idiots, the insane, and persons likely to become public charges. *Id.*

130. Additionally, the Act of 1891 prohibited transportation companies from attempting to bring aliens to this country if the immigrants had statutorily excludable diseases. 22 Op. Att'y Gen. 122 (1898).

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simpler infectious diseases. More than 50 years then passed without another significant revision of this portion of United States immigration law.¹³¹

On June 27, 1952, Congress passed the Immigration and Nationality Act (INA) over a presidential veto.¹³² The pertinent provisions of this act mandated that aliens afflicted with tuberculosis or any dangerous contagious disease be excluded.¹³³ In 1961, Congress streamlined this category by providing for the exclusion of aliens "afflicted with any dangerous contagious disease."¹³⁴ This phrase was redefined to include only the more severe forms of leprosy and tuberculosis.¹³⁵ That revision demonstrated awareness of medical advancements by leaving as excludable only those forms of diseases that were incurable or too costly to be cured. Since 1961, Congress has added more ailments to section 212(a). They are chancroid, gonorrhea, granuloma inguinale, human immunodeficiency virus, lymphogranuloma venereum, infectious syphilis, infectious leprosy, and active tuberculosis.¹³⁶ Thus, Congress has consistently advanced the viewpoint that aliens will be permitted entry, provided they do not financially burden or endanger the health and welfare of the American public.

B. AIDS as a Contagious Disease

Acquired Immunodeficiency Syndrome (AIDS) is a disease caused by the Human Immunodeficiency Virus (HIV).¹³⁷ HIV infects and destroys the white blood cells, a central component of the body's immune system, resulting in a lowered immunity to diseases and infections that do not normally affect healthy people.¹³⁸ Although

131. Between 1891 and 1952 additional changes in immigration laws based on medical reasons occurred, including in 1903 the addition of epileptics to the class of excludable aliens. See Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214.

132. McCarran-Walter Act, ch. 477, tit. 1, § 101, 66 Stat. 166 (1952) (codified as amended at 8 U.S.C. § 1101 (1982)).

133. 8 U.S.C. § 1182(a)(6), (g) (1952). Medical exclusions also existed for individuals who were categorized as feeble-minded; insane; suffering from one or more attacks of insanity; suffering from a physical defect that would affect their ability to earn a living; being afflicted with a psychopathic personality, epilepsy, or mental defect; and being narcotic drug addicts or chronic alcoholics. 8 U.S.C. § 1182(a)(1)-(7), (23) (1952).

134. Pub. L. No. 87-301, § 11, 75 Stat. 650, 654 (1961) (codified at 8 U.S.C. § 1182(a)(6) (1964)).

135. 42 C.F.R. § 34.2(b)(5) (1986) (listing infectious leprosy); 42 C.F.R. § 34.2(b)(8) (1986) (listing active tuberculosis).

136. 42 C.F.R. § 34.2(b) (1987).

137. U.S. Dep't of Health and Human Servs., *Understanding AIDS: A Message from the Surgeon General* (1988).

138. Comment, *supra* note 41, at 126-27. A diagnosis of AIDS is made when an individual is infected with HIV, has a damaged immune system, and either has particular

individuals infected with HIV may have none of the symptoms typically associated with AIDS victims, they are still capable of transmitting the virus.

HIV is a deadly virus, but it is difficult to spread. It can only be transmitted by the introduction of certain bodily fluids of an infected individual into the bloodstream of another; modes of transmission include unprotected sexual intercourse with an infected individual, sharing hypodermic needles with an individual infected with HIV, transfusion of blood contaminated with HIV, and transmission from an infected mother to her fetus.¹³⁹ Because of the modes of transmission, the epidemiological pattern in the United States shows that certain groups of individuals have a higher incidence of HIV infection. Those groups are gay and bisexual men, intravenous drug users, hemophiliacs, and recipients of blood transfusions between the years of approximately 1981-1985.¹⁴⁰ However, individuals of every race, age, gender, and sexual orientation are susceptible to the virus.

In 1986, five years after the identification of AIDS, Dr. Otis Bowen, Secretary of Health and Human Services, submitted the first proposal to list AIDS as a dangerous contagious disease.¹⁴¹ On June 5, 1987, the PHS revised this proposal by deleting AIDS from the list of dangerous contagious diseases and adding HIV infection.¹⁴² The purpose of this revision was to effect a broader exclusion by barring any alien who is infected with HIV, and therefore is capable of transmitting the AIDS virus, whether or not that person has the clinical manifestations of AIDS. On August 28, 1987, HIV was added to the list of dangerous contagious diseases.¹⁴³

The inclusion of HIV as a dangerous contagious disease presents a justifiable basis for excluding an alien afflicted with the virus. Since HIV is the cause of AIDS, the virus is dangerous by its very nature. The Center for Disease Control (CDC) estimates that over 1,500,000 Americans have already been exposed to the virus, and of those, 270,000 will develop the disease by 1991.¹⁴⁴ Furthermore, an estimated two to three million Americans will become infected

opportunistic diseases, suffers from a "wasting syndrome," or has a certain nervous system infection.

139. *Id.*

140. *Id.* 90% of all AIDS cases in the United States are attributable to these categories of individuals.

141. *Id.* at 121.

142. 52 Fed. Reg. 21,532 (1987); 52 Fed. Reg. 21,607 (1987).

143. 52 Fed. Reg. 32,543 (1987) (to be codified at 42 C.F.R. § 34.2(b)(4) (1987)).

144. *See Note, supra* note 124, at 244.

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with AIDS by 1995; this figure represents approximately 1% of our nation's population.¹⁴⁵ Unless a cure for AIDS is found,¹⁴⁶ most of these individuals will die from it.¹⁴⁷

Moreover, the complexity of the AIDS problem stems from the fact that few AIDS victims realize they are infected with the disease during the virus's incubation period; nonetheless, they can transmit the virus during this stage. The victims' ignorance coupled with the fact that common manners of transmission are through sexual activity and drug usage, activities prevalent in our society, make it extremely difficult to control the spread of the disease.

The unfortunate impact of AIDS necessitates the exclusion of aliens infected with HIV. In response to the incorporation of HIV as a dangerous contagious disease, the Public Health Service established a formal set of guidelines regarding the medical examination of aliens. The examination focuses on the mental and physical condition of the alien.

First, a general physical exam is required for all aliens regardless of age. A body surface inspection is performed to uncover signs of overt diseases such as tuberculosis and leprosy. During the examination, the physician notes any observable mental or physical defects of the alien.¹⁴⁸ Second, all aliens 15 years of age and older receive a chest x-ray for tuberculosis and a serologic test for syphilis and HIV. Persons subject to chest x-ray and serologic exam include all applicants for immigration visas, students and exchange visitors and others applying for nonimmigration visas, and all aliens applying for conditional entry. For individuals under 15 years of age neither test will be required unless the INS officer has reason to suspect an infection of tuberculosis, syphilis, or HIV.¹⁴⁹

The entire medical examination is generally conducted in the country where the applicant's visa is processed rather than in the United States. In certain circumstances, refugees with proper approval from the Secretary of State, the Attorney General, and the

145. See Comment, *supra* note 41, at 120. Before an AIDS case is reported, as many as 50-100 people may have been infected. Heise, AIDS: New Threat to the Third World, *Worldwatch*, Jan./Feb. 1988, at 19.

146. U.S. Dep't of Health and Human Servs., *supra* note 137, at 5. Presently there is no cure for AIDS. Medicines such as AZT merely prolong the lives of some people with AIDS. *Id.*

147. See Comment, *supra* note 41, at 127.

148. See Druhot, *supra* note 127, at 95-96.

149. See 42 C.F.R. § 34.4(a)(2) (1987).

Secretary of Health and Human Services, may be serologically tested in the United States.¹⁵⁰

Absent HIV screening, the United States faces greater medical costs, more loss of life, and greater risk of contagion.¹⁵¹ However, this exclusion does not and should not in any way change present immigration policy that permits aliens afflicted with AIDS to come to the United States on a temporary basis for medical care and treatment.¹⁵² Such a policy is consistent with the humanitarian goals that our society attempts to further.

C. *Homosexuals and AIDS*

The fact that the first recorded cases of AIDS in the United States occurred in homosexual men has affected the entire public perception of the disease.¹⁵³ Because the public perceives AIDS as "the gay man's disease,"¹⁵⁴ the homosexual community has become the target of homophobic reactions.¹⁵⁵ Moreover, the fact that a majority of AIDS victims are homosexual men reinforces the public perception of AIDS as a homosexual affliction.¹⁵⁶

Unfortunately, characterizing AIDS as a gay man's disease confuses the issue of the legal rights of homosexuals with the separate but equally important question of the limits and restrictions that

150. See 42 C.F.R. § 34.4(a)(3) (1987); see also 65 Interpreter Releases 569 (1988) (cable sent to all U.S. diplomatic and consular offices overseas informing them of policy).

151. Between 1892 and 1983 over 82,500 aliens were excluded from the United States due to health-related defects, and an additional 219,418 were excluded as likely to become public charges. U.S. Dep't of Justice, Statistical Yearbook of the Immigration and Naturalization Service 193 (1983). Despite the efficiency of the INS in discovering medically excludable handicaps, difficulties in testing procedures exist, particularly in the context of AIDS. Since the incubation period for the HIV virus is six months to seven years, individuals may test negative for HIV even though they are infected with the virus. Also, the test does result in positive results for some people who do not have the HIV virus. Thus, the test for HIV is not completely reliable. See Comment, *supra* note 41, at 128.

152. See 52 Fed. Reg. 21,532 (1987). The final rule on AIDS will not interfere with the ability of an alien with AIDS who seeks medical care in the United States to receive a nonimmigrant (temporary) visa under the authority of the Immigration and Nationality Act. See 8 U.S.C. § 1182(d)(3) (1987).

153. See Note, *supra* note 124, at 231.

154. *Id.* at 237.

155. *Id.* at 237. A study of violence against homosexuals in eight cities showed that 20% of gay men had been the victim of physical assaults and that in at least 8% of the reported incidents, the assailants allegedly mentioned AIDS. *Id.* at 238. "According to gay-rights groups, hate-motivation assaults have tripled in recent years." As one group assesses the situation, "AIDS has provided a green light to the bashers and the bigots." Open Season on Gays: AIDS Sparks an Epidemic of Violence Against Homosexuals, *Time*, Mar. 7, 1988, at 24.

156. See Note, *supra* note 124.

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should be imposed on individuals infected with HIV. In creating and upholding restrictions to prevent further transmission of the disease, legislators and judges must be aware of the attempts to attack the gay community through restrictions cloaked as public health measures.¹⁵⁷ Indeed, gay rights activists are concerned that AIDS testing will be misused to discriminate against aliens who are members of groups with a high risk of contracting the disease, in addition to those aliens who actually test positive for HIV.¹⁵⁸

What does all this mean at the border? Current regulations make it clear that all immigrants, homosexual and heterosexual, are required to be serologically tested for HIV.¹⁵⁹ Given the existence of such universal testing, there is no danger of discriminatory AIDS testing of those whom the INS believes to be gay and no justifiable reason for excluding gay men based on the fact that they are in a high risk group.

Despite the fact that all aliens who apply for entry visas to the United States are tested for HIV, however, the grim reality for homosexual aliens is that AIDS provides an additional reason on which to base the exclusion of gay men. Despite the superficial appearance of nondiscrimination, fear of AIDS may lead to the failure to revise current INS policies regarding immigration of homosexuals to comport with current medical understandings. Despite opposition from their medical advisors, INS officials will be able to continue denying gay aliens entry at the southern border under the Fifth Circuit view, which upholds exclusions despite the absence of a medical certificate.¹⁶⁰ On the west coast, where the Ninth Circuit has developed a more rational approach in requiring the INS to obtain a medical certificate before the homosexual alien is barred,¹⁶¹ public opinion may force immigration officials to exclude homosexuals based on the fear that they are more likely to become infected with AIDS.

157. See Note, *supra* note 124, at 238.

158. See Comment, *supra* note 41, at 129.

159. See *supra* note 149 and accompanying text. Serology refers to the science that treats serums and their reactions and properties. Webster's Third New World Dictionary 2074 (1981).

160. *In re Longstaff*, 716 F.2d 1439.

161. *Hill*, 714 F.2d 1470.

D. Toward a Coherent Policy

Congress must act to devise a rational and coherent immigration policy regarding homosexual aliens. Laws and administrative practices that result in the exclusion of homosexual aliens as such must be reexamined.

Congress should adopt an immigration policy that considers two factors. First, the statute should dispense with all bigoted views regarding homosexuality. Homosexuals are not psychopaths or mental defectives; rather, homosexuals, like other American citizens, possess the talents and potential to make this nation great. Therefore, there is no place in our immigration law for a per se exclusion of homosexual aliens.

Second, the statute should take into consideration the AIDS problem. The law should provide for an exclusion of all immigrants affected with HIV. However, the law should ensure that homosexual aliens, once they have tested negative for HIV and have satisfied all the other medical requirements for entry, will not be excluded. Such a policy will strike a balance between the goals of diversity and nondiscrimination and the need to protect the American people from dangerous diseases.