
SEXUALITY, GENDER, AND THE LAW

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to proper precept." D.C. Code § 22-3508. If the defendant was charged with a crime then he must face criminal proceedings upon discharge. If he was not charged with a crime then his release may be complete or he may be subject to parole.

What constitutional challenges can plausibly be made to this law on its face? Are they likely to have persuaded a typical judge in the 1950s? See *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). Today, such laws are used to incarcerate accused "child molesters" for indeterminate sentences. What constitutional protections should be available for that class of persons? See *Matter of Care and Treatment of Leroy Hendricks*, 912 P.2d 129 (Kan.1996), *petition for cert. granted*, 116 S.Ct. 2522 (1996).

2. THE POST-WORLD WAR II ANTI-HOMOSEXUAL CAMPAIGN

In addition to the sexual psychopath laws, state action in the postwar era sought to erase the existence of homosexuals in America; one of us has set forth the legal mechanisms of this terror elsewhere,¹ and Chapter 4 recounts the evolution of the military exclusion of lesbians, gay men, and bisexuals. The phenomenon we are calling "medicalization" worked in complicated ways.

On the one hand, medical personnel provided neutral reasons for ferreting out homosexuals "for their own good," and the anti-homosexual hysteria used the medical ideas as secular justifications for what seem in retrospect extreme measures. Representative was the Senate Investigating Committee's December 1950 report on "Employment of Homosexuals and Other Sex Perverts in Government." The report made out the case against having "homosexuals and other sex perverts" in the government. "The social stigma attached to sex perversion is so great that many perverts go to great lengths to conceal their perverted tendencies," making them easy prey for "gangs of blackmailers" (p. 3). Also, "those who engage in overt acts of perversion lack the emotional stability of normal persons," and "indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility." Finally, "perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. * * * One homosexual can pollute an entire office. Another point to be considered * * * is his tendency to gather other perverts about him." These reasons, a jumble of medical and moral judgments, were the basis for thousands of suspected homosexuals to be cashiered out of the federal civil service during the 1950s.²

n. William N. Eskridge, Jr., "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," *Fla. St. U.L. Rev.* (forthcoming 1997).

o. In 1951, for example, the State Department fired 119 employees as homosexu-

als, and only 35 as security risks; the figures were 134 (homosexuals) and 70 (security risks) in 1952. The Eisenhower Administration was prepared to be even more aggressive than the Truman Administration. In April 1953, Eisenhower issued Executive Order

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The publicity given the federal witch hunt beginning in 1950 stimulated many more state witch hunts. In light of the homosexual's perceived preying on children, it is hardly surprising that the most intense attention was focused on school teachers. Beginning in 1956, Florida state Senator Charley Johns chaired a series of interim committees investigating suspected homosexuals and other subversives, with a focus on teachers. Between 1959 and 1964, when the final investigating committee issued its report, 54 Floridians lost their teaching certificates on grounds of alleged immorality, with 83 still being processed through the system when the report was issued. Florida Legislative Investigating Committee, *Homosexuality and Citizenship in Florida* 12-13 (1964). The *in terrorem* effect of the investigations was even greater. Teachers and other state employees fell under suspicion when they were spotted at places investigators considered homosexual hangouts or when they were named by other suspected homosexuals. Once suspected, teachers and other employees were subjected to closed-door questioning about their sexuality. The committee justified its wide-ranging investigations because of the aggressive homosexual menace. "The homosexual's goal and part of the satisfaction is to 'bring over' the young person, to hook him for homosexuality. Whether it be with youth or older individuals, homosexuality is unique among the sexual assaults considered by our laws in that the person affected by the practicing homosexual is first a victim, then an accomplice, and finally himself a perpetrator of homosexual acts" (p. 10).

On the other hand, the medical approach to homosexuality was rehabilitative, and many psychiatrists vigorously opposed the punitive measures of the McCarthy period. Medical experts were the leading critics of sexual psychopath laws, of the application of sodomy laws to consensual conduct, and of employment discriminations against homosexuals. Even doctors who considered homosexuals mentally ill believed, with Krafft-Ebing and Ellis from the turn of the century, that mental illness could be dealt with medically and should not be the object of penal sanctions. Dr. Alfred Kinsey relentlessly criticized any law that penalized homosexuals, and he did so at a time when the ACLU endorsed criminal and civil penalties against homosexuals; he also paid a price, as his Institute lost funding in retaliation against his prohomosexual stands. Dr. Evelyn Hooker spoke against such laws, and also befriended homophile groups, encouraging them to resist public disapproval. Dr. Charles Bowman was the chief force behind Illinois' repeal of its sodomy law in 1961. Numerous others spoke out as well.

3. CASE STUDY: THE PSYCHOPATHIC PERSONALITY EXCLUSION IN U.S. IMMIGRATION LAW, 1952-1990

Long before World War II, doctors were important players in national immigration policy. The Act of March 3, 1891, 26 Stat. 1084, excluded

10405, which added "sexual perversion" as a ground for investigation and exclusion under the federal loyalty-security program, designed in the Truman Administration to weed out subversives from government. In the next

two years, more than 800 federal employees resigned or were terminated because they had "files contain[ing] information indicating sex perversion."

aliens who were "idiots, insane persons, * * * persons suffering from a loathsome or a dangerous contagious disease." Section 8 of the Act required a medical examination of each entering alien by "surgeons of a Marine Hospital Service" or other competent civil surgeon to assure exclusion of such unwelcome aliens. From that point onward, the immigration laws always included important roles for medics. The Immigration Act of 1917, 39 Stat. 874, excluded all medical categories created by earlier statutes as well as "persons of constitutional psychopathic inferiority," a catch-all provision that was sometimes used to exclude sexual inverts. Enforcement of that and the other medical exclusions was vested in the recently established United States Public Health Service (PHS).

The 1917 Act remained the keystone immigration law until its massive overhaul in the early 1950's. Policymakers drew on the experiences of the military during World War II in refining a medical model of the psychopathic homosexual.^p Section 212(a) of the Immigration and Nationality (McCarran-Walter) Act of 1952 contained a grab bag of exclusions to prevent "undesirable" people from entering the United States. The statute excluded every category of individual excluded by the 1917 Act, and many others besides. Among the categories of people excluded were paupers, stowaways, Communists, and persons convicted of crimes involving "moral turpitude."

The first seven exclusions (§ 212(a)(1)-(7)) were "medical" exclusions to be enforced by the PHS in coordination with the Immigration and Naturalization Service (INS); the function of the medical exclusions was to prevent people from coming into the United States who had severe medical problems. The deliberating committees of Congress were generally happy with the categories of excluded people found in the 1917 Act, with these exceptions:

The subcommittee [of the Senate Judiciary Committee] believes * * * that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality," and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. (Senate Report No. 1515, 31st Congress, 2d Session 345 [1950].)

Senator Patrick McCarran, the chair of the Senate Judiciary Committee, sponsored an immigration reform bill that added these two new categories (plus much more). The House bill, sponsored by Representative Walter, had the same provision. Hence, the original version of § 212(a)(4) excluded both "persons afflicted with psychopathic personality" and "sex perverts and homosexuals," the latter being precisely the category of people who in

p. For an excellent description of the evolution of the military's policy, see Allan Bérubé, *Coming Out Under Fire: The History*

of Gay Men and Women in World War Two (1990).

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1947-52 were being hounded out of the U.S. civil service. Nonetheless, the PHS suggested that § 212(a)(4) be revised to exclude people "afflicted with psychopathic personality" alone. The following memorandum summarizes the PHS position, which the Judiciary Committees followed when they revised the bill. Congress adopted the bill as revised.

REPORT OF THE PUBLIC HEALTH SERVICE ON THE MEDICAL ASPECTS OF H.R. 2379, A BILL TO REVISE THE LAWS RELATING TO IMMIGRATION, NATURALIZATION, AND NATIONALITY, AND FOR OTHER PURPOSES^q

It is recommended that the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

1. Aliens who are idiots, imbeciles, or morons.
2. Aliens who are insane.
3. Aliens who have had one or more attacks of insanity.
4. Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.
5. Aliens who are narcotic drug addicts or chronic alcoholics.
6. Aliens who are afflicted with tuberculosis in any form, or with leprosy or any other dangerous contagious disease.
7. Aliens certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living. * * *

Psychopathic personality.—Some comments should be expressed regarding the term "psychopathic personality." Although the term "psychopathic personality," used in classifying certain types of mental disorders, is vague and indefinite no more appropriate expression can be suggested at this time. The conditions classified within the group of psychopathic personalities are in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symp-

q. This Report was submitted to the appended to House Report No. 1365, 82d House Committee on the Judiciary and is Cong., 2d Sess. 46-47 (1952).

tomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation. Until a more definitive expression can be devised, the term "psychopathic personality" should be retained. * * *

Sexual perverts.—The language of the [McCarran] bill lists sexual perverts or homosexual persons as among those aliens to be excluded from admission to the United States. In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis. The detection of persons with more obvious sexual perversion is relatively simple. Considerably more difficulty may be encountered in uncovering the homosexual person. Ordinarily, persons suffering from disturbances in sexuality are included within the classification of "psychopathic personality with pathologic sexuality." This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc. In those instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect.

PROBLEM 2-4

APPLICATION OF THE PSYCHOPATHIC PERSONALITY EXCLUSION

(A) You are the PHS General Counsel in 1965 and are confronted with the case of Clive Michael Boutilier, a Canadian national, first admitted to this country in 1955. In 1963 he applied for citizenship and submitted to the Naturalization Examiner an affidavit in which he admitted that he was arrested in New York in October 1959 on a charge of sodomy, which was later reduced to simple assault and thereafter dismissed on default of the complainant. In 1964, Boutilier submitted another affidavit. It described both homosexual and heterosexual experiences before his entry into the United States. During the eight and one-half years immediately subsequent to his entry, and up to the time of his second statement, Boutilier had homosexual relations on an average of three or four times a year. Since 1959, he has shared an apartment with a man who is his lover. Boutilier's personal affidavit says that since 1950 he has engaged in homosexual sodomy an average of three to four times per year but that he considers himself a "bisexual." An affidavit from Professor of Psychiatry Montague Ullman states that the doctor examined Boutilier and his records and

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Clive Michael Boutilier Naturalization

United States Supreme Court, 387 U.S. 118, 87 S.Ct. 1000

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[Part I states] Problem 2-4(A) was not "afflicted" so, not consist

concludes: "The patient has sexual interest in girls and has intercourse with them on a number of occasions. * * * His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility." Your agency (PHS) must decide whether to certify Mr. Boutilier as "afflicted with psychopathic personality." Does it sound like he qualifies?

(B) How would you weigh the evidence offered by Alfred Kinsey's studies of sexuality in men and women? Evelyn Hooker's empirical studies which found no correlation between pathology and homosexuality? Assume there are affidavits from both Hooker and the Kinsey Institute (Kinsey died in 1956) attesting that there is no intrinsic connection between homosexuality and psychopathic personality. On the other side of the ledger, critics have complained that the Kinsey study relied on unrepresentative (not statistically random) samples of Americans. Irving Bieber and an impressive list of colleagues have just (1962) published their book on homosexuality. It argues from the authors' clinical experience that homosexuality does have a connection with mental defect.

(C) Consider also the law and PHS practice. Since the early 1950s, your agency has routinely issued a Class "A" certificate to exclude anyone who admits to being a homosexual or to committing acts of homosexual sodomy. The Ninth Circuit in *Fleuti v. Rosenberg*, 302 F.2d 652, 657-658 (9th Cir.1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963), held that the term "psychopathic personality" was too vague to be constitutionally applied to "homosexuals" generally. The court explicitly relied on medical studies and experts skeptical of the precision or usefulness of the old term "psychopathic personality." At the urging of the PHS and INS, Congress has just amended § 212(a)(4) to override *Fleuti*, rewriting that part of the statute to exclude aliens "afflicted with psychopathic personality, or *sexual deviation*, or a mental defect." Act of Oct. 3, 1965, Public Law No. 89-236, § 15(b), 79 Stat. 911, 919 (new language emphasized). This amendment cannot apply retroactively to Boutilier, however. Considering all this information, what is your professional opinion as to Boutilier's certification?

Clive Michael Boutilier v. Immigration & Naturalization Service

United States Supreme Court, 1967.
387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed.2d 661.

■ MR. JUSTICE CLARK delivered the opinion of the Court.

[Part I states the facts of the case, which are the same as those in Problem 2-4(A). Justice Clark then turned to Boutilier's argument that he was not "afflicted with psychopathic personality" under the statute and, if so, not consistently with the Constitution.]

The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase "psychopathic personality" to include homosexuals such as petitioner.

Prior to the 1952 Act the immigration law excluded "persons of constitutional psychopathic inferiority." 39 Stat. 875, as amended, 8 U.S.C. § 136(a) (1946 ed.). Beginning in 1950, a subcommittee of the Senate Committee on the Judiciary conducted a comprehensive study of the immigration laws and in its report found "that the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts." S. Rep. No. 1515, 81st Cong., 2d Sess., p. 345. The resulting legislation was first introduced as S. 3455 and used the new phrase "psychopathic personality." The bill, however, contained an additional clause providing for the exclusion of aliens "who are homosexuals or sex perverts." As the legislation progressed (now S. 2550 in the 82d Congress), however, it omitted the latter clause "who are homosexuals or sex perverts" and used only the phrase "psychopathic personality." The omission is explained by the Judiciary Committee Report on the bill:

"The provisio(n) of S. 716 [one of the earlier bills not enacted] which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.*" (Emphasis supplied.) S.Rep. No. 1137, 82d Cong., 2d Sess., p. 9.

Likewise a House bill, H.R. 5678, adopted the position of the Public Health Service that the phrase "psychopathic personality" excluded from entry homosexuals and sex perverts. The report that accompanied the bill 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. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 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 or sexual perversion." We, therefore, conclude that the Congress used the phrase "psychopathic personality" not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts.

Petitioner stresses that only persons *afflicted* with psychopathic personality are excludable. This, he says, is "a condition, physical or psychiatric, which may be manifested in different ways, including sexual behavior." Petitioner's contention must fall by his own admissions. For over six years

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prior to his entry petitioner admittedly followed a continued course of homosexual conduct. The Public Health Service doctors found and certified that at the time of his entry petitioner "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate..." * * * Having substantial support in the record, we do not now disturb that finding, especially since petitioner admitted being a homosexual at the time of his entry. The existence of this condition over a continuous and uninterrupted period prior to and at the time of petitioner's entry clearly supports the ultimate finding upon which the order of deportation was based.

[Justice Clark rejected Boutilier's due process arguments, that the exclusion was vague and provided him with "no [sufficient] warning" when he entered the United States in 1955.] Therefore, he argues, he was unaware of the fact that homosexual conduct engaged in after entry could lead to his deportation. We do not believe that petitioner's post-entry conduct is the basis for his deportation order. At the time of his first entry he had continuously been afflicted with homosexuality for over six years. To us the statute is clear. It fixes "the time of entry" as the crucial date and the record shows that the findings of the Public Health Service doctors and the Special Inquiry Officer all were based on that date. We find no indication that the post-entry evidence was of any consequence in the ultimate decision of the doctors, the hearing officer or the court. Indeed, the proof was uncontradicted as to petitioner's characteristic at the time of entry and this brought him within the excludable class. A standard applicable solely to time of entry could hardly be vague as to post-entry conduct.

* * *

■ MR. JUSTICE BRENNAN dissents for the reasons stated by Judge Moore of the Court of Appeals, 363 F.2d 488, 496-499.

■ MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FORTAS concurs, dissenting.

The term "psychopathic personality" is a treacherous one like "communist" or in an earlier day "Bolshevik." A label of this kind when freely used may mean only an unpopular person. It is much too vague by constitutional standards for the imposition of penalties or punishment.

* * *

Many experts think that it is a meaningless designation. "Not yet is there any common agreement * * * as to classification or * * * etiology." Noyes, *Modern Clinical Psychiatry* 410 (3d ed. 1948). "The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran & Mallinson, *Psychopathic Personality*, 90 *J. Mental Sci.* 266, 278. See also Guttmacher, *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time*, in *Current Problems in Psychiatric Diagnosis* 139, 154 (Hoch & Zubin ed. 1953); Tappan, *Sexual Offences and the Treatment of Sexual Offenders in the United States*, in *Sexual Offences* 500, 507 (Radzinowicz ed. 1957). It is much too treacherously vague a term to allow the high penalty of deportation to turn on it.

When it comes to sex, the problem is complex. Those "who fail to reach sexual maturity (hetero-sexuality), and who remain at a narcissistic or homosexual stage" are the products "of heredity, of glandular dysfunction, (or) of environmental circumstances." Henderson, *Psychopathic Constitution and Criminal Behaviour*, in *Mental Abnormality and Crime* 105, 114 (Radzinowicz & Turner ed. 1949).

The homosexual is one, who by some freak, is the product of an arrested development:

"All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being. It is present in the adolescent stage, where there is a considerable amount of undifferentiated sexuality." Abrahamsen, *Crime and the Human Mind* 117 (1944).

Many homosexuals become involved in violations of laws; many do not. Kinsey reported: * * *

"It is unwarranted to believe that particular types of sexual behavior are always expressions of psychoses or neuroses. In actuality, they are more often expressions of what is biologically basic in mammalian and anthropoid behavior, and of a deliberate disregard for social convention. Many of the socially and intellectually most significant persons in our histories, successful scientists, educators, physicians, clergymen, business men, and persons of high position in governmental affairs, have socially taboo items in their sexual histories, and among them they have accepted nearly the whole range of so-called sexual abnormalities. Among the socially most successful and personally best adjusted persons who have contributed to the present study, there are some whose rates of outlet are as high as those in any case labelled nymphomania or satyriasis in the literature, or recognized as such in the clinic." Kinsey, *Sexual Behavior in the Human Male* 201-202 (1948).

It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction. It is therefore not credible that Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society. I agree with Judge Moore, dissenting below, that the legislative history should not be read as imputing to Congress a purpose to classify under the heading 'psychopathic personality' every person who had ever had a homosexual experience:

"Professor Kinsey estimated that 'at least 37 per cent' of the American male population has at least one homosexual experience, defined in terms of physical contact to the point of orgasm, between the beginning of adolescence and old age. Kinsey, Pomeroy & Martin, *Sexual Behavior in the Human Male* 623 (1948). Earlier estimates had ranged

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from one per cent to 100 per cent. *Id.*, at 616-622. The sponsors of Britain's current reform bill on homosexuality have indicated that one male in 25 is a homosexual in Britain. To label a group so large 'excludable aliens' would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores. Indeed, so broad a definition might well comprise more than a few members of legislative bodies." 2 Cir., 363 F.2d 488, 497-498 [Moore, J., dissenting]. * * *

If we are to hold, as the Court apparently does, that any acts of homosexuality suffice to deport the alien, whether or not they are part of a fabric of antisocial behavior, then we face a serious question of due process. By that construction a person is judged by a standard that is almost incapable of definition. I have already quoted from clinical experts to show what a wide range the term "psychopathic personality" has. * * *

Deportation is the equivalent to banishment or exile. Though technically not criminal, it practically may be. The penalty is so severe that we have extended to the resident alien the protection of due process. Even apart from deportation cases, we look with suspicion at those delegations of power so broad as to allow the administrative staff the power to formulate the fundamental policy. * * * We deal here also with an aspect of "liberty" and the requirements of due process. They demand that the standard be sufficiently clear as to forewarn those who may otherwise be entrapped and to provide full opportunity to conform. "Psychopathic personality" is so broad and vague as to be hardly more than an epithet. * * *

[Even if the statute were not unconstitutionally vague, it could not properly be applied to Boutilier, in light of the record before the Court, Justice Douglas argued in conclusion. Occasional acts, even if considered "perverted," did not meet the statutory requirement that Boutilier be "afflicted" with psychopathy.]

NOTES ON *BOUTILIER* AND EVOLVING PSYCHIATRIC OPINION ABOUT HOMOSEXUALITY AS A MENTAL DISORDER

1. *The Legal Arguments, pro and con.* The main legal argument for Boutilier is the one accepted by the Ninth Circuit in *Fleuti* and elaborated by Justice Douglas: § 212(a)(4) should be interpreted to avoid the due process (notice, vagueness) problems with relying on the term "psychopathic personality" to reach "homosexuals." But consider: (a) The legislative history makes clear that "psychopathic personality" was a code word for "homosexual," and the psychiatric community in post-World War II America used the term similarly (see *DSM-I*). (b) If the legislative history was not clear, wasn't the PHS sufficiently clear? As the agency to which Congress had delegated statutory authority, the PHS had substantial discretion, which it exercised to exclude homosexual immigrants. (c) Congress had cleared up this sort of vagueness with the 1965 amendment adding "sexual deviation" to § 212(a)(4) (overriding *Fleuti*). Although the

1965 amendment did not apply to Boutilier, for post-1965 aliens the statute would appear sufficiently clear, yes?

On the other hand, what about the following responses: (a) The legislative history establishes that Congress *rejected* McCarran's proposed language flatly excluding "sex perverts and homosexuals." The PHS's position was that "psychopathic personality" would soak up *most* homosexuals—but not *all* of them, and none of them unless they met a profile of pathology. The only evidence in the Boutilier record was the medical affidavits submitted by Boutilier; those doctors all testified that he was not psychopathic. (b) Whatever medical support there was in 1952 for the view that most homosexuals are psychopathic was being overtaken by subsequent medical evidence, especially Hooker's studies. The *Boutilier* majority reads like pages out of Krafft-Ebing, who was sorely outdated by 1967, while the dissent resonates well with the reputable authorities: Freud, Kinsey, Hooker. (c) Was Boutilier a "homosexual" or, in Krafft-Ebing's terminology, a "true invert"? Wasn't he more like a "bisexual" (an "untrue invert"?), someone attracted to people of both sexes? Was the McCarran-Walter Act aimed at excluding bisexuals? If not, why should the PHS and the Court go out of their way to drag bisexuals into the statutory exclusion?

Notice, finally, Justice Douglas' scholarly use of then-current science. The majority gave no answers to any of his science-based arguments. Did Justice Clark have any answers to give? Was Justice Douglas' science relevant to the case?

2. *The Warren Court and Sexuality.* An irony of *Boutilier* is that the "liberal" Warren Court went out of its way to interpret the spongier statutory term in the most broadly anti-homosexual way. Note that liberal Chief Justice Earl Warren and Justice Hugo Black voted with the majority, and future liberal Justice Thurgood Marshall was the Solicitor General who defended the position taken by the liberal administration of President Lyndon Johnson.

This much is apparent: liberals as well as conservatives agreed that homosexuals were mentally ill. The Krafft-Ebing, Rado understanding of homosexuality trumped the Kinsey, Hooker understanding. Consider why this might be, a theme renewed in Chapter 3. Note, further, that the Warren Court was not friendly to women's equality, either. Its only major sex discrimination decision upheld Florida's practice of allowing women but not men to escape jury service. *Hoyt v. Florida*, 368 U.S. 57 (1961). On the other hand, two important lines of Warren Court decisions contributed to liberty in the realm of sexuality: its privacy decisions (Chapter 1), its first amendment obscenity cases (Chapter 6), and perhaps most important its criminal procedure decisions. See generally William N. Eskridge, Jr., *Gay-law: Challenging the Apartheid of the Closet* ch. 3 (forthcoming 1998).

3. *It All Changes with Stonewall (1969): Homosexuals Declare War on the Psychiatrists.* When the Supreme Court decided *Boutilier* in 1967, few people in the United States were openly gay or lesbian. With the McCarthy terror still fresh and state policies still openly discriminatory, homosexuals

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resided in their respective closets and retained a collective anonymity. This changed, literally overnight, on the night of June 26, 1969. On that date, New York City police raiding the Stonewall Inn in Greenwich Village triggered physical, indeed violent, resistance by drag queens, fags, and dykes. The following two evenings of rioting, breathlessly reported in *The Village Voice*, touched thousands of gay people. In the next several months, thousands of people "came out" of their closets, formed scores of gay liberation groups, and proclaimed their own civil rights movement. Permanent organizations took shape over the next year, and the gay rights movement developed an agenda. Prominent on the agenda was demedicalization of homosexuality—removal of its classification as a disease.

In 1970, the first spring after Stonewall, gay activists confronted their tormenters at the American Psychiatric Association's (APA) annual convention in San Francisco.^r They wanted to remove the characterization of homosexuality as a psychiatric disorder from the APA's diagnostic manual, the *DSM-II*. Irving Bieber, then the leading anti-gay psychiatrist, was laughed off the stage by gay protesters. "I've read your book, Dr. Bieber," yelled one protester, "and if that book talked about black people the way it talks about homosexuals, you'd be drawn and quartered and you'd deserve it." A paper on electroshock treatment for sexual deviation met with shouts of "torture" and "Where did you take your residency, Auschwitz?" The crowd erupted in pandemonium at the conclusion of the paper, with much carrying on by the audience.

Dr. Kent Robinson, a psychiatrist, believed that the protesters' claims had possible merit and negotiated a panel at the 1971 APA convention which would include gay representatives. Robinson contacted gay activist Frank Kameny to organize the panel. Despite securing an official panel at the 1971 convention in Washington D.C., the activists did not want to appear mollified by the limited participation, and continued to organize street protests. On May 3, 1971, gay activists stormed the stately Convocation of Fellows at the APA Convention, and Kameny seized the microphone to deliver a diatribe against the profession: "Psychiatry is the enemy incarnate. Psychiatry has waged a relentless war of extermination against us. You may take this as a declaration of war against you." Gay activists later went on to conduct their panel. At the end of the convention, Kameny and his fellow panelists demanded that the APA revise its diagnostic manual to delete references to homosexuality as a psychiatric disorder.

Two years later, after continued pressure from gay activists as well as from inside the profession, including declarations by gay psychiatrists, and after a thorough review of the medical literature (including the work of Kinsey, Hooker, and Marmor), the APA's Nomenclature Committee was poised to accept the change. Bieber and Charles Socarides organized an Ad Hoc Committee Against the Deletion of Homosexuality and mobilized

^r. The following account is drawn from Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (1987); Gary Alinder, "Gay Liberation Meets the Shrinks," in *Out of the Closets: Voices of Gay Liberation* 141 (Karla Jay & Allen Young eds., 1972).

psychoanalysts to protest any caving in to gay pressure (as they would understand the matter). The proposal to delete homosexuality as a psychiatric disorder was presented and discussed at the 1973 APA Convention, where it received strong support. On December 15, 1973, the Committee voted to drop homosexuality's classification as a disease in *DSM-II*. Even the stuffy *New York Times* recognized the significance of this move; its headline read, "Psychiatrists in a Shift, Declare Homosexuality No Mental Illness."

The Nomenclature Committee's decision survived an unprecedented "referendum" (a vote among APA members) instigated by the Ad Hoc Committee. When the new *DSM-III* was issued later in the 1970s, homosexuality as an illness was a nonissue, but the manual did include the category "ego-dystonic homosexuality" as a diagnostic category. It was defined as "[a] desire to acquire or increase heterosexual arousal so that heterosexual relations can be initiated or maintained and a sustained pattern of overt homosexual arousal that the individual explicitly complains is unwanted as a source of distress." Although the category was undoubtedly strange, gay activists were mum, lest any protest trigger renewed debate over the 1973 deletion.

PROBLEM 2-5

WHAT TO MAKE OF THE NEW APA STANCE?

You are a lawyer for the National Gay Task Force (NGTF) formed in 1973 to lobby in Washington, D.C. on gay and lesbian rights' issues. After the dust settles on the APA's new stance regarding homosexuality, the NGTF decides to push for administrative change in the immigration exclusion described above. A meeting is arranged with officials of the INS and PHS. The announced goal of NGTF is to end the exclusion of gay, lesbian, and bisexual immigrants.

Devise a strategy for the NGTF to follow, including: What preliminary contacts should be made (perhaps even before the meeting is set up)? What legal arguments should NGTF make for the INS' or PHS' authority to end the exclusion? How do you deal with *Boutilier*, a binding Supreme Court precedent? What fall-back position, if any, should the NGTF be prepared to accept (perhaps down the road)? This exercise will be most useful if you write down your thoughts now, and then read the following Notes.

NOTES ON THE POST-BOUTILIER EVOLUTION OF THE IMMIGRATION EXCLUSION OF LESBIANS AND GAY MEN*

On July 17, 1974, Dr. John Spiegel, President of the American Psychiatric Association (APA), wrote the INS, informing the agency of the APA's official action "delisting" homosexuality as a sexual "deviance." Dr. Spiegel

s. This note is drawn from William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* ch. 3 (forthcoming 1998).

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further urged the INS to "use your statutory powers of discretion to refrain from the exclusion, deportation or refusal of citizenship to homosexual aliens." The INS General Counsel responded, first, with *Boutilier* as binding precedent on his agency and, second, with the assertion that "homosexuals" must in any event be denied citizenship on the ground that they lack the "good moral character" required by 8 U.S.C. § 1427(a). The Menninger Foundation wrote the INS "congratulating" it and criticizing the APA. "Soon homosexuals will want to 'marry,' have control of children, advocate their way of life as being normal to young people and so on." The matter was not reopened during the Nixon-Ford Administration.

At the beginning of the Carter Administration (in 1977), Department of Justice and White House officials met with ACLU and National Gay Task Force (NGTF) leaders to discuss the latter's petition for the INS to change its policy. We don't know exactly what went on at that meeting, but the upshot of pressure like this was that the PHS—not the INS—took the lead. There were rumblings of discontent at the PHS as early as November 1977, and in August 1979 the PHS announced that it would no longer carry out examinations or issue certificates to exclude gay men, bisexuals, and lesbians pursuant to § 212(a)(4). Memorandum from Surgeon General Julius Richmond to William H. Foege, Director Center for Disease Control (Aug. 2, 1979), reprinted in 56 *Interpreter Releases* 387 (1979). Invoking the 1974 edition of *DSM-II* and the forthcoming 1979 edition of *DSM-III*, the Surgeon General justified the change as reflecting "current and generally accepted canons of medical practice with respect to homosexuality. * * * [T]his change in the policy of the PHS with respect to the physical and mental examination of aliens has been made to reflect the most current judgments of health professionals on this subject."

Enforcement of § 212(a)(4) was built around the PHS, which was charged with examining immigrants for physical and mental defects, see 8 U.S.C. §§ 1222, 1224 (1988), and a PHS certificate was required for the INS to exclude an immigrant because of one of the "medical" exclusions. *Id.* § 1226(d) (if the PHS certifies that an immigrant "is afflicted with . . . any mental disease, defect, or disability" excludable under § 212(a)(1)-(5), the INS decision to exclude "shall be based *solely* upon such certification" (emphasis added)). Contrast *id.* § 1225(a) ("inspection, other than the physical or mental examination" shall be done by INS). When the PHS refused to participate in the exclusion, for professional reasons, the statutory scheme was thrown into turmoil. The INS immediately suspended exclusions of "homosexuals" and alerted Congress to its dilemma. It also sought a legal opinion from the Office of Legal Counsel of the Department of Justice (OLC). How should the OLC advise? See OLC Memorandum No. 79-85, December 10, 1979.

As it turned out, the OLC insisted that *Boutilier* was still binding on the INS. In response to the OLC memorandum, the INS in September 1980 rescinded its suspension order and instructed agents to follow these procedures:

Primary Inspection—An alien shall not be asked any questions concerning his or her sexual preference during primary inspection.

Referral to Secondary Inspection—An alien shall be referred to secondary inspection for examination as to homosexuality only under the following circumstances: (1) When an alien makes an unsolicited, unambiguous oral or written admission of homosexuality. Buttons, literature or other materials referring to “gay rights” or describing or supporting homosexuality shall not be considered unambiguous admissions of homosexuality. (2) When a third party who presents him or herself for inspection voluntarily states, without prompting or prior questions, that an alien who arrived in the United States at the same time and is then being processed for admission is a homosexual. * * *

Secondary Inspection—An alien referred to secondary inspection for examination as to homosexuality shall be questioned privately. Inspectors must perform their duties in a professional manner and not allow personal beliefs to taint the inspection of the alien. An alien referred under paragraph 4 shall be asked *only* whether he or she is homosexual. If the answer is “no”, the alien shall not be detained for further examination as to homosexuality. If the answer is “yes”, the alien shall be asked to sign a statement to that effect. * * *

During the 1980s, the INS enforced the exclusion occasionally; more important, some gay immigrants made admissions in order to bring test cases. The big one was *Lesbian/Gay Freedom Day Committee, Inc. v. INS*, which challenged the INS’ exclusion of Carl Hill. The Ninth Circuit in *Hill v. INS*, 714 F.2d 1470 (9th Cir.1983), interpreted the immigration law not to permit the INS to exclude gay men and lesbians without the cooperation of the PHS. At about the same time, the Fifth Circuit permitted the INS to enforce the exclusion without the PHS’ cooperation, in *In re Longstaff*, 716 F.2d 1439 (5th Cir.1983), *cert. denied*, 467 U.S. 1219 (1984).

At this point, the government had many options. What ended up happening was the following: (1) The INS did not ask for an appeal of its loss in *Hill* and agreed to follow it, but only within the Ninth Circuit; it followed its earlier policy in all the other circuits. It is not unusual for agencies to “nonacquiesce” in a court decision and follow it only in the circuit where it is issued. (2) The PHS in June 1984 agreed to issue a certificate for “self-proclaimed homosexual aliens presented by the U.S. Immigration and Naturalization Service”—but only in the Ninth Circuit. Elsewhere in the country, the PHS would refuse to have anything to do with “homosexuals.” (3) The INS, in turn, adopted the policy of telling “self-proclaimed homosexual aliens” that they could apply for a “waiver of excludability” which would defer action excluding them for the duration of their stay in the United States. Moreover, the alien could apply for the waiver before the alien came to the United States, and the suggestion was that such waivers would be routinely granted. What happened to *Boutillier*?

When Congress turned to revising the 1952 Act’s exclusions, Representative Barney Frank was one of the main players. He and others insisted upon revamping the exclusions entirely (omitting the deviation/psychopath-

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PART C. MEI WOMEN’S SEXU

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ic personality exclusion altogether). Senator Alan Simpson specifically stated on the floor of the Senate that the revision would override *Longstaff* and revoke the historical policy of excluding "homosexuals." With very little controversy, the bill was enacted as the Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067.

POSTSCRIPT: IMMIGRATION EXCLUSION OF PEOPLE WITH HIV

Just as the exclusion of gay people was being polished off, a new exclusion was inserted. Senator Jesse Helms in 1987 sponsored an appropriations rider that directed Health and Human Services (HHS) to list AIDS (later, "HIV infection") as one of the infectious diseases for which noncitizens could be excluded from entering the United States. The 1990 Act, which repealed the gay exclusion, also appeared to reverse the Helms Amendment, for it gave HHS discretion to determine "communicable diseases of a public health significance" which would trigger the new shorter list of immigration exclusions. 8 U.S.C. § 1182(a)(1)(A)(1).

In 1993, HHS Secretary Donna Shalala proposed regulations that would have removed HIV infection from the list of "communicable diseases" requiring exclusion. Congressional reaction impelled Shalala to back away from the proposed regulations. The HIV infection ban remains in effect (as of 1997). To the extent HIV infection is associated with gay and bisexual men, the HIV infection exclusion becomes a partial replacement for the gay exclusion—a striking example of the medicalization of American anxieties about sexuality. Chapter 12, Section 1 contains a more thorough consideration of sexuality issues presented by HIV and AIDS.

PART C. MEDICALIZATION, ABORTION, AND THE CONTROL OF WOMEN'S SEXUALITY^t

In *Roe v. Wade* [Chapter 1, Section 2], the Supreme Court held that women have a qualified constitutional right to abortion; that constitutional right was justified in Justice Blackmun's opinion by reference to medical standards, and *Roe's* famous trimester regulatory framework was based upon then-current medical technology regarding viability of the fetus outside the womb. From the beginning, therefore, medicalization has been important for abortion law. Many feminists, such as Justice Ruth Bader Ginsburg and Professor Reva Siegel (Chapter 1, Section 2), have criticized *Roe's* approach for clouding the issue of women's choice and women's equality with a medicalized gloss. State regulators, on the other hand, maintain that *Roe* is too restrictive.

t. Mara Rosenthal, Georgetown University Law Center, Class of 1998, is the primary author (especially of the notes) and editor of the materials in this part.