THE DEMISE OF THE HOMOSEXUAL EXCLUSION: NEW POSSIBILITIES FOR GAY AND LESBIAN IMMIGRATION

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The passage of the Immigration Act of 1990 and its subsequent signature by President Bush represent the closing of a shameful chapter in United States history. The new law repealed many of the exclusionary provisions of the Immigration and Nationality Act (INA),[1] among them, the exclusion[2] of homosexuals.[3] The quiet and unspectacular passage of the bill stands in sharp contrast to the private pain and suffering the provisions of the former law caused in the lives of many people.

This Article is an obituary for the homosexual exclusion. Part I examines the history of immigration law through the paradigm of insurrectionist history, to show that xenophobia has underlain American immigration policy since the earliest days of the republic.[4] Part II, in examining

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[1] 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1525 (West 1993)). The I.N.A. is the basic immigration law statute.

[2] "Exclusion" is a term of art in immigration law with more than one meaning. It is often used as shorthand for "ground of exclusion," meaning one of the categories, listed at 8 U.S.C. § 1182(a)(1)–(9), membership in which renders a noncitizen ineligible for a visa. "Exclusion" also refers to the process by which someone is found excludable and denied entry to the United States. "Entry" is defined at I.N.A. § 101(a)(13) [8 U.S.C. § 1101(a)(13)] as "any coming of an alien into the United States." The federal official at the border acts on behalf of the United States by allowing the "entry" of a person. If entry is denied, that person is "excluded." Even if the person is physically present in the United States for a hearing, until she is "admitted" by the judge, that person is not legally present in the United States and is not considered to have made an entry. In contrast to exclusion, "deportation" is the official act of removing a person from the United States when that person has already made an "entry," whether legal or illegal.

[3] In this Article I use the terms "lesbian," "gay," "homosexual," and "queer" to refer to women and men who are in some way conscious of their capacity for same-sex relationships. This usage is more wide-ranging than some, and I mean to affirm the richness of the language, not to offend anyone who gives different meanings to those words than I do. Other possible terms include invert, homophile, and pervert. As a gay man, I ask myself which words I will use to describe myself and which I will leave unredeemed in the mouths of my oppressors. The answer in part rests upon the acceptance of the community, and in part on my own linguistic choice.

[4] The postmodern philosophy of Michel Foucault provides an interpretive paradigm for understanding this law and its historical development. In sharp contrast to the "meta-narrative" of assimilation, which characterizes most discourse about immigration history, an insurrectionist history attempts to bring to the surface what Foucault calls "subjugated knowledge," so that history may be "emancipated." MICHEL FOUCAULT, POWER/KNOWLEDGE 78–133 (1980). Liberation for lesbians and gays includes the recovery of our history, and the seizure of the interpretive power that has relegated us to the margins of history:

the enactment of the exclusion, considers the legislative history of the language that excluded homosexuals and discusses socio-political factors such as the perceived communist-homosexual nexus. Part III considers the enforcement history of the exclusion and its repeal in 1990. Finally, Part IV looks to the future from a practitioner's perspective, reviewing possible problems in lesbian and gay immigration, and celebrating the progress made toward making asylum available to persecuted gays and lesbians.

I. The Shadow Side of Immigration History

The history of immigration to the United States and the history of American racism, bigotry, and hatred are deeply intertwined. Much of the grade-school piety of the melting pot is pure nonsense: immigration policy has always been the shadow side of the American Dream. The original thirteen colonies resented the dumping of paupers and convicts by the English courts, and excluded those who would become "public charges."[5] Reaction to the social upheaval of the French Revolution produced the first national regulation of aliens, the Alien and Sedition Acts of 1798.[6] Federalists were worried about the subversive influences of foreigners, and saw the Jeffersonian party as the internal counterpart to the radical redistributive movements of Europe.[7] The Acts gave the president the

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> Rules are empty in themselves, violent and unfinalized; they are impersonal and can be bent to any purpose. The successes of history belong to those who are capable of seizing these rules, to replace those who have used them, to disguise themselves so as to pervert them, invert their meaning, and redirect them against those who had initially imposed them; controlling this complex mechanism, they will make it function so as to overcome the rulers through their own rules.

MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE 151 (1977).

[5] The Supreme Court referred to this history in the *Passenger Cases*:

> Such legislation commenced in Massachusetts early after our ancestors arrived at Plymouth. It first empowered the removal of foreign paupers . . . . It extended next to the requisition of indemnity from the [ship's] master, as early as the year 1701 . . . [and] it embraced removals of paupers not settled in the Colony . . . .

Smith v. Turner, 48 U.S. 283, 519 (1849) (Woodbury, J., dissenting). Though this case is usually cited in reference to congressional powers under the commerce clause, its political importance in 1849 had much to do with the slavery controversy—specifically, the question whether the movement of slaves could be regulated by Congress or the states in the same way as the movement of foreigners. This is one place where the thread of intolerance connects the experience of African-Americans and immigrants: both are excluded from and objectified by the societal centers of power and meaning.

[6] Act of June 18, 1798, 1 Stat. 566 (repealed); Act of June 25, 1798, 1 Stat. 570 (expired); Act of July 6, 1798, 1 Stat. 577 (expired); Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired).

[7] *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 8 (1988).

power to deport any alien considered dangerous to the welfare of the nation.[8]

With that exception, however, immigration was almost unrestricted in the first quarter of the nineteenth century, as the new nation quickly expanded westward. The early immigrants were Protestant Germans, Presbyterian Scotch-Irish, and French Protestants. After 1820, this changed dramatically to Irish and German Catholics,[9] and from 1830 to 1860, more than eighty percent of all immigrants came from these two countries.[10] This trend provoked a resurgence of intolerance in the form of nativism. Groups such as the Know-Nothing Party sought to halt immigration of Catholics and deny naturalized citizens the right to vote.[11] The xenophobia of this period did not survive the Civil War, in which the native-born and the immigrant fought and died together. Their experience of fighting side by side led to greater acceptance of immigrants.[12]

After the Civil War, the newly industrializing economy of the North needed migrants as cheap labor.[13] Federal policy continued to favor unrestricted immigration, and states, particularly in the West, promoted immigration in order to develop their economies and occupy "vacant" land.[14]

Large-scale Chinese immigration to California began when the Anglo-Americans occupied Mexico's northernmost departments in 1846,[15] creating a demand for labor to extend the transcontinental railroad throughout the newly annexed region.[16] Almost immediately, state and local governments began to pass discriminatory laws and taxes aimed at the Chinese.[17] "The Chinese were accused of being criminals, prostitutes and opium addicts, while at the same time they were assailed for their willingness to perform hard work at low wages."[18] They were branded as racially inferior

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[8] THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 42 (interim 2d ed. 1991).

[9] CONGRESSIONAL RESEARCH SERVICE, BRIEF HISTORY OF UNITED STATES IMMIGRATION POLICY [hereinafter BRIEF HISTORY] 552 (1991).

[10] *Id.*

[11] *See* ALEINIKOFF & MARTIN, *supra* note 8, at 44–50.

[12] HIGHAM, *supra* note 7, at 12.

[13] *Id.* at 16–17.

[14] *Id.* at 17.

[15] Although substantial Mexican *immigration* did not begin until the early 20th century, the U.S. *expansion into Mexico* exposed an enormous Mexican population to the racism of their occupiers and fueled the anti-Mexican prejudice that pervades the United States to this day. *See generally* RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION (1972); FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS (David J. Weber ed., 1973).

[16] This region comprises what is now the states of California, Nevada, Utah, Arizona, New Mexico, Texas, and part of Colorado.

[17] *See* Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to American Law*, *in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA 4 (Sucheng Chan ed., 1991).

[18] ALEINIKOFF & MARTIN, *supra* note 8, at 2.

and unable to assimilate into American culture.[19] Contrary to this stereotyped image, however, the Chinese community fought back:

> From an early date the Chinese recognized the pivotal importance of courts and lawyers in the American system and saw how the courts could be used to frustrate the impulses of the Sinophobic white majority. They began to resort to the courts whenever their interests were threatened by hostile state or local legislation, and in this forum they accumulated a remarkable record. They succeeded, in fact, in voiding, over the course of time, many of the discriminatory measures that were enacted by California and its municipalities. The tide did not begin to turn against them until the national government itself chose to side with the forces of Sinophobia and began to enact its own anti-Chinese measures.[20]

Due to a surge of racism, the depression of 1873, and these unresolved cross-cultural issues, Congress passed a national immigration law in 1875 excluding "criminals and prostitutes."[21] Although the language of the statute seems designed to protect the public order and morals, its real object was racial exclusion.[22] Any doubt as to the true intentions of the statute should be dispelled by the subsequent amendment of its terms. The relatively mild restrictions of 1875 became an explicit ban on Chinese entry in 1882, the first so-called Chinese Exclusion Act.[23] The irony of the 1875 statute is that it was passed by a reconstructionist Congress that supposedly rejected racism[24] and had protected Chinese aliens in the past.[25]

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[19] RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN-AMERICANS 100–12 (1989).

[20] McClain & McClain, *supra* note 17, at 5.

[21] Act of March 3, 1875, Ch. 141, 18 Stat. 477.

[22] Note this quote from the Manifesto of the Workingmen's Party of California in 1876: "To an American death is preferable to a life on a par with the Chinaman . . . Treason is better than to labor beside a Chinese Slave . . . The people are about to take their own affairs into their own hands . . . ." *Quoted in* ALEINIKOFF & MARTIN, *supra* note 8, at 2.

[23] The Act was followed by even more restrictive laws in 1882, 1884, 1888, and 1892. 22 Stat. 58–60, 214 (1882); 23 Stat. 115 (1884); 25 Stat. 504 (1888); 27 Stat. 25 (1892).

[24] *See, e.g.*, the Reconstruction-era amendments to the U.S. Constitution, prohibiting slavery, extending citizenship to all persons without regard to race, and guaranteeing the equal protection of the laws by the states and the right to vote regardless of race. U.S. CONST., amend. XIII, § 1; amend. XIV, § 1; and amend. XV, § 1.

[25] *See* Civil Rights Act of May 13, 1870, §16, 16 Stat. 144., 42 U.S.C. § 1981 (1993). Section 16 guarantees the right of "all persons" the "same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." McClain & McClain, *supra* note 17, at 8 (arguing that this guarantee was intended to include Chinese aliens). HIGHAM, *supra* note 7, at 28, discusses the Radical Republicans' political disarray of the mid-1870s, attributing it to a decline in the popularity of

In the next decade, the Supreme Court foreclosed the possibility of constitutional challenges to racist immigration legislation and paved the way for another century of increasingly discriminatory exclusions. The landmark *Chinese Exclusion Case*[26] established the plenary power of Congress and of the federal government over immigration.[27] The source of this power had been a matter of scholarly debate[28]—early cases located it in the foreign commerce clause.[29] In the *Chinese Exclusion Case*, Justice Field for the first time finds the unrestricted power to control the nation's borders to be inherent in national sovereignty, both because that sovereignty would be diminished to the extent the government lacked exclusive jurisdiction over its own territory, and because such a power is necessary to guarantee the nation's security.[30] The idea of an "inherent" power as opposed to an "implied" power is a troubling one. It means that the power does not derive from the Constitution, and that the constitutional text does not limit it.[31] Moreover, the premise that the purpose of immigration law is to allow the nation to define its character is uncomfortably close to xenophobic nationalism.[32] Yet this remains the prevailing attitude of the courts.[33]

Reconstructionist policies and concern over corruption in the Grant Administration. Based on this, I conclude that the 1875 enactment was part of a desperate effort to recapture disaffected Northern working class voters who felt threatened by Chinese immigration.

[26] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[27] *Id.* at 609.

[28] ALEINIKOFF & MARTIN, *supra* note 8, at 7–18. *See also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261–69; James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM.J. INT'L L. 804 (1983).

[29] The Passenger Cases (1849), *supra* note 5.

[30] 130 U.S. at 603–04, 609. *See also* Fong Yue Ting v. United States, 149 U.S. 698, 707–11.

[31] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–18 (1936) ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."). *Id.* at 318; Jean v. Nelson, 727 F.2d 957, 964 n.5 (11th Cir. 1984):

> Because this "undefined and undefinable" sovereign power does not depend on any constitutional grant of authority, there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility . . . . Aliens may therefore be denied admission on grounds that would be constitutionally impermissible or suspect in the context of domestic legislation.

[32] What is the difference, anyway, between saying, "We are a Christian nation," "We are a Protestant nation," "We are a White nation" and "We are an Aryan nation"? I believe that the national self-definition theory (we have the right, inherent in sovereignty, to decide who we are as a nation by immigration laws), tends toward fascism. It posits that the only persons with rights are citizens, and that aliens have no human rights. In any case, the theory portrays our society and our history inaccurately. Pluralism has always existed here. The struggle has been to achieve equality for the oppressed who are not, in fact, invisible, however much the power structure chooses not to see them.

[33] For instance, in Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993), the

In the last quarter of the nineteenth century, the source of immigration to the United States shifted to Southern and Eastern Europe.[34] By the turn of the century, American xenophobia had focused on new targets. The new immigrants were Italians, Slavs, Jews, and Latins. Once more, immigrants were charged with being slow to assimilate and racially inferior. In 1903, "insane persons, beggars, . . . and anarchists," among others, were excluded.[35] Although this was the first time a political category was excluded, it would not be the last, as immigrants increasingly came to be perceived as politically subversive as well as a biological threat.[36] In 1907, all "feebleminded persons . . . persons afflicted with tuberculosis . . . [and those with] a mental or physical defect . . . which may affect their ability to earn a living" were excluded.[37] Although these provisions did not actually lead to massive exclusion of Southern and Eastern European immigrants, they reflected the popular conviction that the excluded characteristics abounded in those populations.[38]

Following World War I and the consequent backlash against foreigners, Congress passed a series of anti-immigrant measures. After failed attempts in 1900, 1912, and 1915, Congress passed a literacy test for new immigrants in the Immigration Act of 1917, overriding President Wilson's veto.[39] In 1921, Congress imposed a quota system designed to freeze in place the racial make-up of the United States as of the 1910 Census.[40] A still more restrictive quota system, based on the 1890 Census, was imposed in 1924, sharply reducing immigration for the remainder of the 1920s, and resulting in a net emigration from the United States during the Great Depression.[41] These strict laws were still in place during the rise of

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Supreme Court, ignoring the blatantly racist character of U.S. refugee policy as a whole, upheld on technical grounds the interdiction of Haitian refugee boats in Haitian waters and their return to Haiti; *see also* Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972) (holding that alien attempting to enter U.S. has no First Amendment rights that would support a challenge to law excluding communists, in light of Congress's plenary power over admission of aliens).

[34] BRIEF HISTORY, *supra* note 9, at 553.

[35] Act of March 3, 1903, 32 Stat. 1213.

[36] *See infra* notes 59–64 and accompanying text.

[37] Immigration Act of February 20, 1907, 34 Stat. 898 (1907). One can almost re-create the attitude of the times by transforming the list of exclusions into a litany of stereotypes: "The immigrants are poor, they are sick, they are crazy, they can't read, they are subversive, they are immoral . . . ." This kind of linguistic transformation reveals a great deal about the fears and projections underlying the attitude of bigotry.

[38] *See generally*, HIGHAM, *supra* note 7, at 131–57.

[39] Act of February 5, 1917, 39 Stat. 874–89. The coincidence of this new barrier with the political upheaval in Russia foreshadows the future connection of communists and homosexuals in the xenophobic mind. *See infra* notes 69–79 and accompanying text. The war brought a new fervor to the nativist movement, which began to accuse anarchist and socialist opponents of the war of disloyalty. *See* HIGHAM, *supra* note 7, at 108.

[40] Act of May 19, 1921. 42 Stat. 5. This period also saw a "red scare" brought on by the Bolshevik Revolution. HIGHAM, *supra* note 7, at 233.

[41] The "National Origins Quota System," as it came to be known, restricted immigra-

Nazi Germany, leading to tragic consequences for thousands of Jews and other refugees of the Nazi terror.[42] This callous treatment of refugees was unconscionable, and has been widely condemned, but it is important to see the legal structure of U.S. immigration law in 1939 in its historical context. It was no mere accident that the United States had such a restrictive policy. Enacted in a climate of overtly anti-Semitic and racist rhetoric championing eugenics, these laws were discriminatory in their purpose and their operation.[43]

Why is this history important, and what does it have to do with the exclusion of homosexuals? Immigration law casebooks have traditionally analyzed the exclusions as medical, moral, and political. This analysis separates them into different categories and ignores the kindred socio-political roots of each exclusion. Nearly all exclusions have been enacted at times of a high degree of nativism, racism, or anti-communism. Furthermore, the enactments often coincide with economic depressions and serve the domestic political needs of elected officials. The exclusions say more about the fears of the native-born than they do about the immigrant groups targeted. The explicit inclusion of homosexuals in the legislative history of the 1952 Act,[44] at the height of McCarthy-era anti-communism, ought to be viewed as one more manifestation of this consistent thread of intolerance and xenophobia in the history of U.S. immigration law.

II. The Exclusion of Homosexuals

A. Pre-History

The curious thing about the statutory exclusion[45] of homosexuals is that the statute itself never actually mentioned homosexuality. This was undoubtedly an example of the *crimen innominatum* mentality.[46] Another

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tion from each country to a maximum of two percent of the number of American citizens tracing their ancestry to that country in the 1890 census. Immigration Act of 1924, § 11, 43 Stat. 153, 159. *See* HIGHAM, *supra* note 7, at 300–30.

[42] ALEINIKOFF & MARTIN, *supra* note 8, at 54.

[43] *See* HIGHAM, *supra* note 7, at 314.

[44] 66 Stat. 214.

[45] *See supra* note 2.

[46] "The nameless crime," also commonly translated as the "crime against nature." In this view, the homosexual act is so horrible that it is not to be mentioned, at least not in English. But then, many of the best things in life are in Latin—consider this learned description of fellation: *penem in orem alii immittere, vel penem alii in orem recipere.* BLACK'S LAW DICTIONARY 1563 (rev. 4th ed. 1968). The Bible is an even more ancient source of this notion: "The things they do in secret it would be shameful even to mention." *Ephesians* 5:12 (New English). *But see* Judith C. Brown, *Lesbian Sexuality in Medieval and Early Modern Europe, in* HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 67, 69–71 (Martin Duberman et al. eds., 1989) (suggesting that lesbian sexuality was rarely mentioned because it was regarded either as nonexistent or as harmless rehearsal for heterosexual lovemaking).

anomaly was the classification of the exclusion—though passed in an era when the immorality of homosexuality was not even publicly debatable and homosexuality was considered indicative of communist leanings,[47] it was not included among the "moral exclusions" like prostitution, but rather among the medical exclusions.[48] The language that would in 1952 become the basis of the homosexual exclusion first appeared in the Immigration Act of 1917 (1917 Act):

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; . *persons of constitutional psychopathic inferiority*, persons with chronic alcoholism; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living.[49]

Neither the act nor the legislative history makes any mention of homosexuality. In 1952, the INA would modify the phrase to read "aliens afflicted with psychopathic personality, epilepsy or a mental defect."[50] The legislative history of the INA would explain that this language was broad enough to exclude "homosexuals and sex perverts."[51] Thus, although it did not apply to homosexuals, the quoted language from the 1917 Act was the immediate precursor of the actual exclusion, and what it *did* mean is instructive for the interpretation of later law. Consider this excerpt from the Senate report for the 1917 Act:

> [T]he object [is] to make the factor that determines rejection of the mentally defective the mere existence of the defect, not as with the physically defective [where] the question [is] whether the defect affects earning capacity. The reasons for excluding a physically defective alien are likelihood of his becoming a public charge and inability by his own exertions to care for himself and those dependent upon him, while the real object of excluding the

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[47] *See infra* notes 69–79 and accompanying text.

[48] This is a prime example of the medicalization of homosexuality. *See* DAVID F. GREENBURG, THE CONSTRUCTION OF HOMOSEXUALITY 397 (1988).

[49] 39 Stat. 875 (1917) (emphasis added).

[50] 66 Stat. 182 (1952), I.N.A. § 212(a)(4), 8 U.S.C. § 1182(a)(4).

[51] S. REP. No. 1137, 82d Cong., 2d Sess. 9 (1952).

> mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations, irrespective of the immediate effect thereof on earning capacity. This change was made only after consultation with persons of knowledge and experience, and is in line with the well-established public policy of rigidly excluding the mentally deficient.[52]

In short, the reason for the exclusion was eugenics.[53] Although this policy justification would prove insufficient to sustain the constitutionality of forced sterilization of U.S.-citizen felons,[54] it continued to lurk behind the nation's immigration laws.[55]

The administrative history of the 1917 Act also suggests that its concern was primarily with medical issues and mental illness. Officials complained that the phrase "constitutional psychopathic inferiority" was vague and difficult to apply, and that mental defects were difficult to detect in a physical examination.[56] An officer of the Public Health Service (PHS) stated: "We have certain mechanical aids in evaluating intelligence, and we are attempting to get definite yardsticks for establishing the diagnosis of constitutional psychopathic inferiority which is the first step, we might say, below normal. That is the most controversial diagnosis we could make, naturally."[57] The official indicated that few cases were rejected on this ground.[58]

B. The Enactment of the Homosexual Exclusion: Socio-Political Background

The political climate of the immediate post-World War II period was a major factor in the enactment of discriminatory immigration laws. In

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[52] S. REP. No. 352, 64th Cong., 1st Sess. 5 (1916).

[53] HIGHAM, *supra* note 7, at 150–53.

[54] *See* Skinner v. Oklahoma, 316 U.S. 535, 541–43 (1942).

[55] To this day, the extent to which genetics are a factor in mental illness (and in sexual orientation) remains the subject of considerable debate in the scientific community. *See, e.g.*, Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47.

[56] S. REP. No. 1515, 81st Cong., 2d Sess. 341 (1950).

[57] *Id.*

[58] *Id.* Statistics for the years 1939 to 1948 show the exclusion of 8 persons as "idiots and imbeciles," 52 persons as "feeble-minded," and 197 as "insane or suffering one or more attacks of insanity." Also, 59 epileptics and 117 persons of "constitutional psychopathic inferiority" were excluded. Eighty-nine others were excluded as "mental defects." *Id.* at 194. The Senate committee report assumes that the majority of these 522 excluded persons were Canadian and Mexican nationals seeking to enter the United States temporarily for medical treatment. *Id.* at 195. For all the passion and hatred expended in creating these discriminatory laws, the net result in a 10-year period is the exclusion of approximately 50 people a year seeking medical treatment.

1947, the continuing escalation of the Cold War coincided with the Senate authorization of a study of immigration policy. Partly because of the shameful exclusion of European Jews fleeing the Holocaust and partly out of Cold War political posturing, the United States accepted over 200,000 refugees after the war.[59] With the exception of the Chinese exclusion, repealed in 1943 because of the wartime alliance with Nationalist China,[60] the racially discriminatory national origins quota system[61] remained in place. New emergency laws, passed at President Truman's urging to deal with refugees and displaced persons, included additional exclusions for ex-Nazis, war criminals, members of totalitarian parties and those who worked for collaborationist governments in Nazi-occupied areas.[62] In rapid succession, the installation of satellite governments in Eastern Europe, the 1947 insurgencies in Greece and Turkey, the Alger Hiss affair, and U.S. shock at the rapid development of Soviet atomic capability led to a red scare. In 1949, eleven leaders of the U.S. Communist Party were tried in New York and convicted of advocating the violent overthrow of the U.S. government.[63] In less than four years, the Soviet Union had gone from war-time ally to bitter enemy. The Chinese revolution of the same year, the beginning of the Korean War in 1950, and the trial of Julius and Ethel Rosenberg accelerated the anti-communist hysteria. Finally, Congress's investigations of Hollywood epitomized the national paranoia. This was the context in which the 1952 Immigration and Nationality Act was adopted.[64]

As Cold War America turned accusingly on its own, homosexuality, long associated with communist tendencies in the popular mind, came out of the closet. In 1948, the Kinsey Report was published, detailing male sexuality and provoking public discussion of its astonishing findings.[65] The Report's claim that ten percent of American men were exclusively homosexual for at least three years of their adult lives broke the isolation of many gay people and provoked a leap of consciousness by Harry Hay, considered by many the progenitor of the modern gay movement.[66] The founding of the Mattachine Society in 1950 crystallized Hay's new conception of gays and lesbians as an oppressed minority culture.[67] The

[59] ALEINIKOFF & MARTIN, *supra* note 8, at 55.

[60] ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 304 (1990).

[61] *See supra* note 41.

[62] Immigration Act of May 25, 1948, § 1, 62 Stat. 268; Subversive Activities Control Act (Title I of Internal Security Act of 1950), 64 Stat. 987, 1006; Act of March 28, 1951, 65 Stat. 28; all superseded in 1952 by I.N.A. § 212(a)(3)(D)–(E), 8 U.S.C. § 1182(a)(3)(D)–(E) (1993).

[63] The Supreme Court upheld the conviction on appeal. Dennis v. United States, 341 U.S. 494 (1951).

[64] 66 Stat. 163 (1952).

[65] ALFRED C. KINSEY, WARDELL B. POMEROY, & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

[66] *Id.* at 651.

[67] Stuart Timmons, *The Trouble with Harry Hay*, L.A. TIMES MAGAZINE, Nov. 25, 1990, at 21. *See also* STUART TIMMONS, THE TROUBLE WITH HARRY HAY 149 (1990).

fledgling Society first challenged the system by fighting the Los Angeles Police Department over the entrapment arrest of a society member. The trial ended in a hung jury, and the charges were dropped. Considering the tenor of the times, this was a victory for the embryonic homosexual rights movement, but, ironically, it came only days before Congress passed the homosexual exclusion.[68]

The Federal Government made the link between homosexuals and communism at this time. Documents released years later revealed that the FBI had compiled extensive lists of homosexuals and had spied on the Mattachine Society and the Daughters of Bilitis[69] in the 1950s, 1960s, and 1970s.[70] The "Commie-pinko-fag" thinking that linked homosexuals with communism had a certain grounding in reality.[71] Certainly, gays and lesbians were oppressed and alienated from society, and for many, the Communist Party provided the social critique that made hope for change possible. In the 1930s, human rights for homosexuals as such were inconceivable, and gay sex was outlawed. In California, for example, repeat gay offenders were sent to Atascadero State Prison and subjected to electroshock "therapy" or even castration.[72] Above all, the homosexual person of the 1930s did not have a positive gay identity. Harry Hay joined the Communist Party during that era, as did many disillusioned Americans.[73] Hay remembered this time:

> As far as society is concerned, I am a hetero who performs nasty acts with men! This is what I'm told. This is all I know. I have a predilection to love men and this is dirty, this is awful, this is terrible and nowhere in the world is this accepted, nowhere! So I am fighting oppression as a Communist, recognizing that I am an oppressed person. I know it and feel it, but I don't have the words for it at that [sic] moment.[74]

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[68] *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1559 (1993).

[69] The nation's first lesbian organization, founded in San Francisco in 1955. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 124 (1983).

[70] *Data Said to Show U.S. Spied on Homosexual Rights Units*, N.Y. TIMES, Sept. 9, 1982, at D26. *See also* FROM THE SECRET FILES OF J. EDGAR HOOVER (Athan Theoharis, ed., 1991).

[71] Right-wing hate groups, like the Ku Klux Klan, continue to make a connection between communism and homosexuality. Joe Bogart, a former Marine who ran a KKK camp for Boy Scouts and Civil Air Patrol Cadets in Texas, told the *New York Times*, "I am proud to be a member of the Klan. There are only two groups I'll battle with, communists and homosexuals. That's the basic reason I joined the Klan." *Boys Reported Learning to Shoot and Kill at a Klan Camp in Texas*, N.Y. TIMES, Nov. 24, 1980, at A21.

[72] *See* TIMMONS, *supra* note 67, at 147.

[73] *Id.* at 101.

[74] Robin Abcarian, *The Gospel of Gay According to Harry Hay*, L.A. TIMES, Dec. 13, 1990, at E-1.

Unfortunately, the Communist Party, like the mainstream of American society, rejected homosexuality. In 1951, his new-found consciousness cost him his membership in the Communist Party.

In Britain in the 1930s, many self-acknowledged homosexuals became Communists as well. Perhaps the most famous example was Sir Anthony Blunt, a member of the so-called Cambridge spy ring, which included Kim Philby, Guy Burgess, and others.[75] Among the most bizarre, pathetic, and perhaps tragic casualties of the widespread perception of an affinity between homosexuality and communism were two men, J. Edgar Hoover and Roy Cohn. Their fierce persecution of actual and alleged communists was likely a result of their tortured relationship to their own homosexuality. Hoover was obsessed with the connection between communism and homosexuality. Ironically, he began placing gays under surveillance just as Harry Hay was breaking with the Communist Party.[76] In at least one instance, Hoover and Senator McCarthy exchanged information about the possible homosexuality of a presidential appointee.[77] McCarthy and his right-wing cohort, Senator Kenneth Wherry, obsessed with the communist menace, expanded their purges to include homosexuals, allegedly because of the risk to national security.[78] Cohn, who prosecuted the Rosenbergs and served as counsel to Senator Joseph McCarthy, was a promiscuous, though closeted, homosexual who eventually died of AIDS. Up to the very end of his life, he refused to admit that he was gay.[79]

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[75] *See The Spy Whose Number Came Up*, SUNDAY TIMES (LONDON), Oct. 21, 1990, at Features. Novelist Graham Greene, a friend of Philby's and the others, hints at this connection between communists and homosexuality in some of his novels. See GRAHAM GREENE, THE HUMAN FACTOR 333 (1978) for a humorous description of the homosexual defector Bellamy: "I have a very nice friend. It's against the law, of course, but they do make exceptions in the service, and he's an officer in the KGB."

[76] *See* D'EMILIO, *supra* note 69, at 124.

[77] A 1983 article in the *Milwaukee Journal* quotes Dr. Athan Theoharis of Marquette University, who obtained a memo Hoover wrote about a phone conversation with Sen. McCarthy on March 18, 1953. Hoover wrote: "Senator McCarthy asked whether he was a homosexual, and I told him I did not know; that that was a very hard thing to prove . . . but it is a fact, and I believed very well known, that he is associating with individuals of that type . . . . He did associate with such individuals and certainly normally a person did not associate with individuals of that type." *FBI Collected Data on Sex Deviates*, MILWAUKEE J., Dec. 21, 1983, at 1.

[78] MICHELANGELO SIGNORILE, QUEER IN AMERICA 197–99 (1993). Signorile argues persuasively that it is the politics of the closet that are dangerous, both to national security and to other gays. The revelations about J. Edgar Hoover are but another example of the destructiveness of the closet.

[79] His anti-Semitism was also notorious: "Not all Jews are communists, but most communists are Jews," he once said. NICHOLAS VON HOFFMAN, CITIZEN COHN 108 (1988). One has only to contrast the self-loathing of Cohn with the self-affirmation of Harry Hay to get some sense of the transformation of gay consciousness in the 1950s.

C. Legislative History of the Homosexual Exclusion

In 1947, the Senate authorized the Judiciary Committee to undertake a study of United States immigration policy, which was issued on April 20, 1950.[80] Somehow, during the Committee's hearings and research the following paragraph found its way into the report:

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States without being unduly harsh or restrictive. The subcommittee believes, however, 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.*[81]

The record indicates that the change in the wording of the statute was instigated by the PHS, whose directors were anxious to have language that more or less fit current medical diagnostic categories. The report notes the past confusion about the vague wording but concludes that nothing better is available. The specific mention of homosexuals is not in any way explained or justified. Nor is it apparent anywhere in the hearings or the work of the Committee where this idea originated. The historical context and the association of homosexuals with communism and threats to national security in the minds of Senator McCarthy and his allies provide a sufficient explanation for this language.

The Committee prepared a proposed bill, which went through several versions. In the version introduced as S. 716 by Committee Chair Senator Pat McCarran (D-Nev.) in the Eighty-Second Congress, homosexuals and sex perverts were explicitly excluded in the statutory language. During the hearings on the bill and its House companion, the PHS was asked to comment on the bill's provisions. The House Report includes the reaction of J. Masur, Acting Surgeon General, to the explicit language of the bill:

> The language of the 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 be-

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[80] S. REP. No. 1515, 80th Cong., 1st Sess. (1947).
[81] *Id.* at 345.

> havior 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.[82]

The letter does not carry a specific recommendation. It is not exactly clear what point the Acting Surgeon General was trying to make. In other portions of his testimony, Masur recommends that specific language be adopted or changed. Here, he merely says that it is difficult to spot homosexuals. One theory is that the PHS wanted to avoid the enactment of a specific statutory exclusion that would make them responsible for trying to figure out who was homosexual and who was not. Following this theory, the PHS preferred the task of spotting more obvious "mental defects" or at least those conditions for which there was an objective diagnostic test. It is possible that this is merely another example of the "crime unfit to be mentioned" mindset and reflects the extreme homophobia of the time, such that the statute had to avoid even the mention of homosexuality.

The Senate Committee took the hint. Perhaps because the PHS did not want the diagnostic responsibility, and the Senators did not want any mention of homosexuality, the deed was done in the Senate Report:[83]

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[82] H.R. REP. No. 1365, 82d Cong., 2d Sess. at 47 (1952).

[83] Professor William Eskridge writes, "I still wonder why the Senate dropped Senator McCarran's original reference to 'homosexuals and sex perverts' and am not persuaded that the committee did not share my reservations against excluding whole categories of people for irrational reasons." William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 652 (1990). Shannon Minter concludes that the reason for the change was congressional deference to the medical expertise of the Public Health Service.

> Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 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.[84]

But a careful reading of Masur's comments reveals that while homosexuals were "ordinarily . . . included within the classification of psychopathic personality," this evidence was "ordinarily . . . obtained from the individual." He further explained that "[in these cases] a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect." Thus, the PHS thought that this "more obvious disturbance in personality," and not homosexuality per se, would become the basis for the exclusion.

The Senate Report contains a vigorous minority report that objects to the more obviously racist and discriminatory features of the bill. The homosexual exclusion is not mentioned, but the minority report in many ways confronts the racism and hatred that form the backdrop of this law:

> Many of its new provisions run counter to our democratic traditions of justice and equity. Specifically, the bill would inject new racial discriminations into our law, establish many new vague, and highly abusable requirements for admission, impede the admission of refugees from totalitarian oppression . . . and fail to establish administrative procedures consonant with our democratic tradition of fair play . . . .
>
> Our democratic heritage requires that we limit government to essentials, and that every human being, however humble, who stands under the American flag shall be free from unreasonable burdens, restrictions or disabilities. Yet many provisions of S.

Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 776 (1993). I agree with Minter that the change was because of the concerns expressed by the PHS. The PHS did not have an objective medical way to spot queers. I conclude that the suggested change, in light of the hysteria of the time, represents a bureaucratic act of self preservation. The PHS wanted to be insulated from charges of being "soft on homosexuals."

[84] S. REP. No. 1137, 82d Cong., 2d Sess., at 9 (1952).

> 2550, even where American security is not involved, would subject aliens and citizens alike to unnecessary harassment and police-state controls.[85]

Sadly, the criticisms raised are every bit as valid today as when they were written. The minority report was signed by Senator Estes Kefauver and three other New Deal Democrats. Jewish and Catholic organizations in particular resented the racist quotas, which severely affected their co-religionists who were then fleeing Eastern Europe as refugees.[86] Ultimately, the INA was passed over President Truman's veto.

III. Enforcement and Repeal of the Homosexual Exclusion

A. Case Law and Amendments

During the 1950s, three cases reached the Board of Immigration Appeals (BIA)[87] on the issue of whether "homosexuality" was part of the definition of "psychopathic personality."[88] *Quiroz v. Neely*,[89] decided on the basis of the legislative history, held that Congress had intended to exclude homosexuals and that the medical profession's understanding of the term "psychopathic personality" would not control.[90]

The next case, *Rosenberg v. Fleuti*,[91] had a major impact on immigration law as a whole because of its effect on the Re-entry Doctrine.[92] Mr. Fleuti, a Swiss national, was granted lawful permanent resident ("LPR") status on October 9, 1952. The INA took effect on December 24, 1952. Fleuti made an excursion of about three hours to Ensenada, Mexico in August 1956, his only trip outside of the United States. In April of 1959, the INS sought to deport him. Fleuti had apparently applied for citizen-

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[85] S. REP. No. 1137, 82d Cong., 2d Sess., pt. 2, at 1–2, 10 (1952).

[86] *Id.* at 2–3. Some examples of the organizations the Minority Report lists as opposing the legislation are the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, the National Catholic Welfare Conference, the National Council of Jewish Women, the National Catholic Rural Life Conference, and the Order of the Sons of Italy.

[87] I.N.A. § 236(b), 8 U.S.C. § 1226(b) grants aliens in exclusion a right of appeal to the Attorney General. The BIA, appointed by the Attorney General, acts as a review body for appeals from Immigration Judges (Special Inquiry Offices pursuant to I.N.A. § 103).

[88] Matter of P_____, 7 I. & N. Dec. 258 (1956). Matter of S_____, 8 I. & N. Dec. 409 (1959).

[89] 291 F.2d 906 (5th Cir. 1961).

[90] *Id.* at 907.

[91] 374 U.S. 449 (1963).

[92] The Re-entry Doctrine holds that any departure of an alien from the United States, even an LPR, subjects that alien to exclusion. Thus, an alien who returned from a short vacation abroad would be subjected to exclusion, even if the alien could not have been deported absent the trip abroad. I.N.A. § 101(a)(13), 8 U.S.C. § 1101(a)(13). For the application of this doctrine to deportation, see United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933).

ship, reporting both his visit to Mexico and his pre-1956 conviction for lewd conduct. The INS pursued him with unusual vigor, charging him with deportability under INA section 241(a)(1) as being "excludable at the time of entry." The entry in question was his 1956 entry, and the underlying ground of exclusion was INA section 212(a)(9), conviction of a crime involving moral turpitude. We do not know exactly what it was that Mr. Fleuti did, but if the practice of the LAPD reflected the sexual mores of the early 1950s, it was probably not much.[93] A deportation order was issued and overturned a few months later when the conviction was found to be a petty offense, that is, an infraction not constituting moral turpitude under California law. Next, the INS initiated a new deportation proceeding based once again on his entry in 1956, this time contending that Fleuti was excludable for psychopathic personality by reason of the fact that he was a homosexual at the time of entry.[94] The Immigration Judge (IJ) ordered deportation, and the BIA dismissed Fleuti's appeal.[95] He then filed suit in federal district court seeking a declaratory judgment and review of the administrative action.[96] The trial court granted summary judgment for the government and the Ninth Circuit accepted the case for an initial review because of a change in the jurisdictional statute.[97] The Ninth Circuit set aside the deportation order and held that section 212(a)(4) was unconstitutional for vagueness as applied to Fleuti, and that the statutory term "psychopathic personality," when measured by common understanding and practices, does not convey a sufficiently definite warning that homosexuality and sex perversion are included.[98]

The Supreme Court granted certiorari[99] and decided the case in Fleuti's favor without reaching the merits of the vagueness claim.[100] Carving out

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[93] Fleuti was convicted in the Municipal Court of Los Angeles under section 647(5) of the Penal Code of California, an infraction relating to "lewd and dissolute persons." 302 F.2d 652, 655 n.9. Police entrapment was a common practice in the Los Angeles of the period: "Often the officer had engaged in no more than a glance; sometimes he encouraged advances to the point of full participation. A joke from the time went, 'It's been wonderful, but you're under arrest.'" TIMMONS, *supra* note 67, at 164.

[94] I.N.A. § 241, 8 U.S.C. § 1251(a), and I.N.A. § 212(a)(4), 8 U.S.C. § 1182(a)(4), *amended by* the Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 5072.

[95] *See* 374 U.S. at 451.

[96] *See id.*

[97] 302 F.2d. 652 (9th Cir. 1962). A new section 5(a) of the Act of September 26, 1961 ("1961 Act"), 75 Stat. 651 added a new section 106(a) to the I.N.A., which provided that the procedure prescribed for the review of federal agency orders, 5 U.S.C. §§ 1031–1040, 1042 (recodified at 28 U.S.C. §§ 2341–2351 (1988)), shall be the sole procedure for judicial review of deportation orders. The Ninth Circuit noted that it would have remanded the case to the District Court for a three-judge hearing pursuant to 28 U.S.C. § 2282, but the 1961 Act would then have returned it to the circuit court. In order to avoid this circuitous procedure, the Ninth Circuit decided simply to hear the case. 302 F.2d at 653.

[98] *Id.* at 658.

[99] 371 U.S. 859 (1962).

[100] Rosenberg v. Fleuti, 374 U.S. 449 (1963).

an exception to the Re-entry Doctrine, the Court held that Fleuti's 1956 trip to Ensenada had been "innocent, casual, and brief" and had not meaningfully interrupted his permanent residency.[101] Since Fleuti had not made a (re-)entry, he was not subject to the exclusion.[102]

In response to the *Fleuti* decision, Congress added the term "sexual deviation" to section 212(a)(4) and cited the Senate report from 1952[103] to re-affirm the homosexual exclusion.[104] The Court, consistent with prior decisions, extended extreme deference to the will of Congress in the area of immigration in the next case, *Boutilier v. INS*.[105] *Boutilier* affirmed *Quiroz* (which had been in doubt since *Fleuti*) holding that the language "psychopathic personality" means what Congress says it means, and not what the medical community says it means.[106] *Fleuti*, while not overruled, was for all practical purposes limited to its facts. Another decade would elapse before the issue would again be argued before the Supreme Court, but it was an eventful ten years in the development of the gay community, and the next set of cases would arise in a very different political context.

Since the exclusion of INA section 212(a)(4) was a part of the medical exclusions,[107] any attempt to exclude an individual had to be done through an established procedure. If an inspector felt that an alien at a port of entry might be excludable under a medical category, the person would be referred to a PHS physician for the issuance of a medical certificate. If the PHS determined that the person was excludable as a homosexual, then the official would issue a Class A certificate. This certificate was considered conclusive evidence of excludability, and a judge or other administrative hearing officer was required to consider only the certificate in determining eligibility for entry. Naturally, the problem remained that the determination of a person's sexual orientation was not possible through a *medical* procedure. Absent some statement from the alien, no decision was possible.

The examining INS official also had no objective nonmedical criteria to follow, except the official's own "feelings" or perception. In the absence of an admission by the would-be entrant, only the bigotry of the official entered into the determination of who should be subjected to PHS

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[101] *Id.* at 462.

[102] *Id.* While this protected him from deportation, unless his citizenship were approved, Fleuti would remain subject to the exclusion and would thus be unable to travel outside of the United States.

[103] *See supra* note 84.

[104] Pub. L. No. 89-236, §§ 10, 15, 79 Stat. 917, 919 (1965) (repealed 1990).

[105] 387 U.S. 118 (1967).

[106] "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." *Id.* at 122.

[107] I.N.A. § 212(a)(1)–(7), 8 U.S.C. 1182(a)(1)–(7); H.R. REP. No. 2096/1577, 82d Cong., 2d Sess., 1922–2083 (1952).

scrutiny. Since an alien at the border had no constitutional rights and no due process rights (except those granted by the statute),[108] admissions of homosexuality could be coerced. A Fifth Amendment challenge to a coerced admission would never have been heard because Congress has never endowed exclusion proceedings with the protections provided by the Constitution for criminal proceedings.[109]

Public Health Service physicians, most likely for professional reasons, had never been comfortable performing the medical enforcement role assigned to them. In 1979, their discomfort led to an interesting policy decision. On August 2, the Surgeon General announced that the PHS would no longer issue Class A certificates solely because an alien was suspected of being homosexual.[110] This decision was based on the 1973 decision by the American Psychiatric Association to drop homosexuality per se as a psychiatric disorder. The subsequent endorsement of the APA's decision by nearly the entire medical community contributed to the PHS's decision.[111]

At first, the INS paroled suspected homosexuals until the dispute was resolved.[112] The Attorney General suggested that the intent of Congress to exclude homosexuals was still controlling and that the INS by-pass the

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[108] "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). *See also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). For returning residents who have significant ties to the United States, this harsh doctrine may have been modified by Landon v. Plasencia, 459 U.S. 21, 32–37 (1982) (courts must look at surrounding circumstances to determine constitutional sufficiency of procedures), *on remand to* Plasencia v. District Director, Immigration and Naturalization Service, 719 F.2d 1425 (9th Cir. 1983) (remanded to circuit court for application of three-part due process test outlined by the Court in Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976), requiring balancing of private interest that will be affected by the official action against risk of erroneous deprivation of such interest through the procedures used and governmental interest in procedural efficiency).

[109] Jean v. Nelson, 727 F.2d 957, 968 (1984), *aff'd*, 472 U.S. 846 (1985). Likewise, when a Fourth Amendment challenge to the seizure of evidence was finally brought, Justice O'Connor, writing for the Court, felt that it would be too inefficient to protect due process rights for such individuals; she also felt that the procedures of the INS itself were sufficient to prevent abuse. Lopez-Mendoza v. INS, 468 U.S. 1032, 1044–50 (1984). The majority opinion is unpersuasive because the INS' repeated infringement of entrants' Fourth Amendment rights shows that the Service's internal procedures do not prevent violations. I agree with Justice White's dissent, which notes that the burden on law enforcement imposed by requiring respect for individual rights is no greater where aliens are involved than it is for police officers making domestic arrests. *Id.* at 1053–54 (White, J., dissenting). The rights of human beings should not be "balanced" away for reasons of alleged efficiency. Although the exclusionary rule does not apply in immigration proceedings, Justice O'Connor nevertheless leaves the door open for the exclusion of evidence where there has been "egregious violation of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050–51.

[110] 56 INTERPRETER RELEASES 387, 398 (1979).

[111] *Id.* at 398–99.

[112] *See* ALEINIKOFF & MARTIN, *supra* note 8, at 358.

PHS by developing its own procedure.[113] On September 9, 1980, INS adopted a new procedure that stated that an arriving alien would not be asked questions about sexual orientation.[114] In the event of a voluntary admission of homosexuality by the alien, or disclosure of the alien's homosexuality by a third party also being inspected, the alien would be examined privately and asked to sign a statement declaring that he or she was homosexual. This statement would then be used to exclude the alien. One can only imagine what those private interviews with INS examiners were like. The alien could be held in detention indefinitely for refusing to sign the statement, and no constitutional protections attached, as the alien had not technically "entered" the United States.[115]

The PHS's controversy with the INS gave rise to two conflicting circuit opinions. In *Hill v. INS*,[116] the Ninth Circuit held that INA section 212(a)(4) was a medical ground of exclusion requiring the issuance of a Class A medical certificate. The trial court had found the exclusion itself unconstitutional because its medical basis had vanished, but the appellate court declined to address that issue, stating only that the medical certificate (which could no longer be obtained) was required. In *Matter of Longstaff*,[117] the Fifth Circuit reached the opposite result. Longstaff, having first obtained a visa and passed a medical examination, had been admitted to the United States eighteen years earlier as an LPR. On his application for citizenship, which was at issue in the case, he admitted that he had always been gay. His admission, had it been made at the time of his initial entry, would have sufficed to exclude him even without a medical certificate. No one had asked him if he was homosexual, and apparently he never knew that he would have been excludable on that basis. Yet when he applied for citizenship, his application was denied because he was "excludable . . . at the time of his entry" in 1965. The Court relied on the intent of Congress in 1952 and 1965 to reach its decision in 1983, despite substantial changes in medical opinion.[118]

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[113] 56 INTERPRETER RELEASES 569–72 (1979).

[114] 57 INTERPRETER RELEASES 440 (1980).

[115] Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). In contrast, I.N.A. § 106(b), 8 U.S.C. § 1105a(b) grants a right to file a petition for a writ of habeas corpus from a final order of exclusion. Habeas corpus, an ancient common-law right, is pre-constitutional. It is one of the few ways to get into court in many immigration cases, and even were it not granted by statute, I would argue that it should represent a response to the asserted extra-constitutional "sovereign power" of the state over immigration.

[116] 714 F.2d 1470 (9th Cir. 1983).

[117] 716 F.2d 1439 (5th Cir. 1983).

[118] *Id.* at 1451. Another issue here is the question of outdated statutes and legislative inertia. Should the intent of a Congress long dead be enforced? *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 81–90 (1982) (discussing the reaction of various schools of legal thought to the problem of statutory obsolescence). My answer, from a realist perspective, is that the court is fully capable of reaching the result it wants. Adverting to dated Congressional intent is merely a technique for reaching the result the court wants to reach for ideological reasons.

B. Repeal of the Exclusion: The Immigration Act of 1990

President Carter created the Hesburgh Commission[119] in 1978 to study possible changes in immigration law, specifically the exclusion structure and the provisions relating to the status of undocumented persons. The commission, however, refused to consider any reform of the exclusion system. Representative Mazzoli (D-Ky.) blamed this refusal on the controversy surrounding the homosexual exclusion, saying, "I can think of nothing that will more quickly blow this really quality work product out of the water and breach it forever than to get too deeply into this subject."[120]

After three terms of ambivalence and inaction on immigration reform, Congress passed the Immigration Reform and Control Act of 1986 (IRCA), which dealt exclusively with undocumented immigration.[121] The House Judiciary Committee paid careful attention to how it expressed congressional intent in the legislative history, in light of the plenary power the courts confer on Congress. IRCA was in some respects a generous law, allowing amnesty, or "legalization" for the undocumented.[122] Many of the standard grounds of exclusion were automatically waived for amnesty applicants[123] while other grounds became waivable at the discretion of the Attorney General.[124] The Committee specifically noted that for such exclusions, waivers should be liberally granted:

> The Committee expects the Attorney General to examine the legalization applications in which there is a waivable ground of exclusion carefully, but sympathetically. The Committee's intent is that legalization should be implemented in a liberal and generous fashion, as has been the historical pattern with other forms of administrative relief granted by Congress.[125]

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[119] Officially titled the Select Committee on Immigration Policy and Reform, the commission was generally known by the name of its chair, Theodore Hesburgh, past president of the University of Notre Dame, whose report eventually led to the drafting and passage of the Immigration Reform and Control Act of 1986.

[120] Robert Pear, *No Changes Sought on Excluding Aliens*, N.Y. TIMES, Feb. 15, 1981, at 28.

[121] Pub. L. No. 99-603, 100 Stat. 3359 (1986), 8 U.S.C. § 1101 note.

[122] 100 Stat. 3394, 8 U.S.C. § 1255a. IRCA granted temporary residency for two years, followed by LPR status, to the majority of undocumented non-citizens who had been in the United States for five or more years, and to certain undocumented agricultural workers. In order to obtain this benefit, the undocumented person had to come forward and apply by May 1 (or October 30), 1988, a process referred to as "legalization."

[123] 100 Stat. 3398, 8 U.S.C. § 1255a(d)(2)(A) (amended 1990).

[124] 100 Stat. 3398, 8 U.S.C. § 1255a(d)(2)(B) (amended 1988, 1990, 1991).

[125] H.R. REP. No. 115, 98th Cong., 1st Sess., pt. 1, at 69 (1983). Many gays and lesbians legalized their status under IRCA, *see supra* note 122, without disclosing their sexual orientation. The application (Form I-687) asked if the alien was excludable under any of the numerous exclusions, but used the statutory language of "psychopathic personality

Halfway through the amnesty process, Congress added HIV to the list of excludable diseases, necessitating the testing or re-testing of every applicant as part of the medical examination.[126] Although waivers were available for HIV-positive aliens, those opposed to granting them argued that aliens infected with HIV would become public charges. As a result, the INS promulgated a regulation requiring HIV-positive waiver applicants to prove that they would not be a burden on the government, and would not be a public health risk.[127] To date, the INS has granted waivers of the HIV exclusion only to people with private health insurance.[128]

Towards the end of 1990, Congress turned its attention to reform of the provisions on legal immigration, ten years after the Hesburgh Commission report had refused to recommend changes in the grounds of exclusion. Proposed drastic revisions in the traditional family-based immigration system sparked contentious debate on Capitol Hill. The eruption of the Persian Gulf Crisis in August 1990, however, took the spotlight off immigration reform. As the nation focused its gaze on Iraq, Congress passed a bill that might never otherwise have passed. The Immigration Act of 1990 (Immact '90)[129] increased the world-wide quota of visas,[130] authorized Temporary Protected Status for Salvadoran and other refugees,[131] overturned a harsh provision of the Immigration Marriage Fraud Amendments of 1986,[132] and completely re-wrote the exclusion section of

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or sexual deviation." Most lesbians and gays who applied were probably not aware that those terms were defined by the 1952 and 1965 intent of Congress and not current popular usage, medical definition, or their own self-definition. *Longstaff*-like situations may arise in the future due to this anomaly.

[126] Pub. L. No. 100-71, 101 Stat. 391 (1987), 8 U.S.C § 1182(a)(1)(A)(i). Known as the Helms Amendment, after its sponsor Senator Jesse Helms (R-N.C.), it required the PHS to replace "AIDS" with "HIV" on its list of "dangerous contagious diseases." 42 C.F.R. § 34.2(b)(4) (1992). The significance of this change was that it mandated a blood test for the HIV antibody as part of the medical examination. 8 C.F.R. § 245a.4(b)(9)(ii) (1993). Previously, AIDS had been detected by examination, not by blood test. *See also* 64 INTERPRETER RELEASES 1197 (1987); 64 INTERPRETER RELEASES 1211–12 (1987).

[127] 8 C.F.R. § 245a.3(d)(4) (1993).

[128] For more discussion of the HIV exclusion and HIV waivers, see Juan P. Osuna, *The Exclusion from the United States of Aliens Infected with the AIDS Virus*, 16 HOUS. J. INT'L L. 1 (1993).

[129] Pub. L. No. 101-649, 104 Stat. 4978.

[130] Immact '90 § 101, 104 Stat. 4980–82 (1990), 8 U.S.C. § 1151.

[131] Immact '90 § 303, 104 Stat. 5036–38 (1990), 8 U.S.C. § 1254a note. Temporary Protected Status allows classes of people fleeing from certain violence-plagued countries (designated by statute or by the Attorney General) to remain in the United States temporarily while the conflicts in their home countries are resolved.

[132] Pub. L. No. 99-639, 100 Stat. 3537 (1986). The Immigration Marriage Fraud Amendments of 1986, at 8 U.S.C. § 1255(e), prohibited the granting of LPR status through her spouse to an alien who married a U.S. citizen or LPR after deportation proceedings against her had commenced. Section 702 of Immact '90 added an exception for good faith marriages, though it did place the burden of proof on the alien to establish "by clear and convincing evidence" the bona fides of her marriage. 8 U.S.C. § 1255(e)(3).

the INA.[133] In the process, Congress completely abandoned the provision excluding homosexuals. The Conference Committee report states:

> The House amendment repealed several outmoded grounds for exclusion based on health and replaced them with a general exclusion based on a mental or physical disorder which could endanger the alien or others and a second ground based on drug abuse or addiction.
>
> The Senate bill had no comparable provision.
>
> The conference substitute provides for a comprehensive revision of all the existing grounds of exclusion and deportation, including the repeal of outmoded grounds, the expansion of waivers for certain grounds, the substantial revision of security and foreign policy grounds, and the consolidation of related grounds in order to make the law more rational and easy to understand.[134]

The language of the new law struck all of the old grounds of exclusion and substituted, *inter alia*, the following:

> (1) Health-related grounds
> (A) In General, Any Alien
> (i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance,
> (ii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)
> (I) to have a physical or mental disorder and behavior associated with the disorder that may pose or has posed, a threat to the property, safety, or welfare of the alien or others, or
> (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others, and which behavior is likely to recur or to lead to other harmful behavior[.][135]

Immact '90 focused on dangerous behavior rather than on the existence of a disorder, *in se*, as the basis for the exclusion. It made no reference

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[133] Immact '90 § 601(a), 8 U.S.C. § 1182(a)(1)–(9).
[134] H.R. CONF. REP. No. 955, 101st Cong., 2d Sess. (1990).
[135] Pub. L. No. 101-649, 104 Stat. 4978 (1990), 8 U.S.C. § 1182(a)(1)(A)(i)–(ii).

at all to psychopathic personality or mental defect, words that in the past had been construed to include homosexuality. Furthermore, it authorized the Department of Health and Human Services to promulgate regulations, with a consultative role for the Attorney General, presumably to ensure that immigration law keep pace with advances in medical and behavioral science. The Act marked a move away from popular fear and prejudice, toward reliance on sound medical opinion.[136]

In this strange way, the exclusion of homosexuals, which had never been explicitly mentioned in the statute, was repealed, again without explicit recognition of what had transpired. In light of Representative Mazzoli's comment a decade earlier,[137] was the reason for this silence prejudice or political prudence?

The passage of the Helms Amendment only three years earlier demonstrated that the interests of the queer community were not entirely safe. The almost surreptitious passage of Immact '90, overshadowed as it was by an international crisis, is also a warning that the community's gains are far from secure. Still, the world in 1994 is vastly freer for gays and lesbians than it was in 1952. The emergence of the movement for gay and lesbian rights has transformed national politics. The advent of AIDS has further galvanized queers in our struggle for dignity and human rights. Finally, the demise of the socialist community of nations in 1989 greatly reduced the chances that the queer community could be red-baited as it had been in the 1950s. It is a new era, and we shall not return to our closets. We must still struggle, however, to remove the continuing indignity of discrimination, especially against those infected with HIV.

IV. Practitioner's Guide to Lesbian and Gay Immigration

The new law took effect on June 1, 1991.[138] Aliens who have entered since that date are not subject to the exclusion. Thus, visitors, immigrants, speakers at conferences, and non-U.S. citizens now have the legal right to enter the United States as gays and lesbians and need not hide their identity. If the inspector asks, "What is the purpose of your trip?" and the response is "I'm going to a Gay and Lesbian Conference," no problem arises, at least in theory. Under the old law, such an answer might well have triggered a review, or an attempt to extract a signed declaration.

Is it a good idea for gays and lesbians to be out to INS officials? I think so. Someone has to educate the Service about the new law, though bigotry persists and poses dangers for openly gay and lesbian entrants.[139]

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[136] The Helms Amendment, however, remains. *See* Osuna, *supra* note 128.

[137] *See supra* note 120 and accompanying text.

[138] Immact '90, § 601(e), 104 Stat. 5077 (1990), 8 U.S.C § 1101 note.

[139] In a conversation I had with an INS examiner regarding another kind of case, I

An immigration officer motivated by prejudice might find a way to delay the admission of or even exclude a gay or lesbian applicant, but she would have to advance grounds other than the applicant's homosexuality for such action. Ultimately, the decision as to whether to be out is a very personal one, but there is no longer any concrete legal reason to advise a lesbian or gay visitor to remain closeted.

A. Applicants Previously Excluded

In cases still pending on appeal or in adjudication, what is the effect of the exclusion's repeal?[140] If the alien has been detained, paroled or is otherwise constructively outside the United States,[141] she may re-apply for admission. Since the time of entry would be the present, she would no longer be subject to the exclusion. If an adjustment of status[142] or a legalization case is still pending, INS officials may issue a new decision, sua sponte, at the request of the alien or the alien's representative.[143] For appeals or waivers that are still pending at the BIA, applicants should file a supplemental brief introducing the new information—that is, the change in the law and Congress's clear intent to repeal the homosexual exclusion.

For those cases where there has not as yet been a final determination of excludability or denial of waiver by the immigration judge, it would be advisable to raise the issue of the exclusion's applicability *at the time of entry.*[144] Under IRCA a waiver is available at the discretion of the Attorney General "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[145] Applicants can plausibly argue that Congress's repeal of the exclusion is a clear pronouncement

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mentioned that she must have some studying to do to keep up with the new law. She replied, "Well, the exclusions have changed, but I still don't think we should let in any homosexuals." Interview with INS Examiner, Los Angeles, California (Mar. 1991). Hopefully, the Clinton Administration's new appointees at the INS will conduct more effective training on this issue than the previous administration did.

[140] According to the INS's statistics, during the years 1984 to 1988, a total of 172 applicants were excluded under § 212(a)(4). IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1988). There is no breakdown as to how many were suspected of homosexuality, nor is there any indication of how many others were turned away at the border, or allowed to withdraw their applications for admission in lieu of being formally excluded. These statistics also do not include any amnesty applicants who were served with notices of excludability.

[141] I.N.A. § 236, 8 U.S.C. § 1226 (definition of "constructively outside").

[142] "Adjustment of status" is the process by which an alien who meets certain criteria may convert her nonimmigrant visa to an immigrant visa without leaving the United States (ordinarily, visas are issued by U.S. consular officers abroad). I.N.A. § 245, 8 U.S.C. § 1255.

[143] I.N.A. §§ 245, 245A, 210, 8 U.S.C. §§ 1255, 1255A, 1160.

[144] I.N.A. § 241(a)(1)(A), 8 U.S.C. § 1251(a)(1)(A).

[145] I.N.A. § 245A(d)(2)(B)(i), 8 U.S.C. § 1255a(d)(2)(B)(i).

that having such an exclusion is not in the public interest. A refusal to waive here should be answered with an appeal on the issue of abuse of discretion.[146] Unfortunately, many applicants do not have sufficient resources or knowledge of the legal system to mount such a challenge.

For a case that has been denied outright, or where a final order of exclusion or deportation is entered, a Motion to Reopen or Motion to Reconsider must be filed with the IJ or the BIA.[147] These motions are discretionary, and the standard of review is again "abuse of discretion."[148] The Motion to Reconsider deals with the misapplication of the law to the case, or error in the interpretation of the facts. Now that the exclusion has been removed, cases that were decided under the Fifth Circuit's *Longstaff* rule can be challenged as having misapplied the law. Although the Supreme Court never resolved the conflict between *Longstaff* and *Hill*, Congress's action, which effectively reaches the same result as *Hill*, can arguably be read as a statement that *Longstaff* misapplied the exclusion.

A Motion to Reopen is appropriate for the introduction of new evidence[149] upon a showing that the new facts were not available at the time of the original proceeding.[150] Since a change in the law could not have been anticipated, it constitutes a new fact, and the clear congressional intent to repeal "outmoded exclusions" is another significant new fact, which should persuade the IJ or the BIA to grant the motion. Care must be taken, however, to prepare a prima facie case for the underlying relief sought (such as asylum or suspension of deportation) because under *Abudu*, the decision-maker can deny a Motion to Reopen if the prima facie case is not made out *or* if she determines that even were the threshold concerns of new evidence and prima facie case satisfied, the relief would not be granted on discretionary grounds.[151] This puts the applicant in the position of having to plead the entire case before the IJ or BIA agrees to hear it.

Another class of noncitizens who may benefit from the change are gay, lesbian, and HIV-positive aliens who were deterred from applying for immigration benefits after the repeal of the homosexual exclusion because they knew about the exclusion, or had been told by attorneys,

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[146] Appeal rights are provided on a limited basis under I.N.A. § 245A(f), 8 U.S.C. § 1255a(f). Judicial review is provided only in the context of an appeal from a final order of deportation pursuant to I.N.A. § 106, 8 U.S.C. § 1105a. Despite this limitation on judicial review, aspects of IRCA have been challenged in the federal courts. *See, e.g.*, Reno v. Catholic Social Services, 113 S. Ct. 2485 (1993) (holding that I.N.A. § 245A(f)(4)(A) does not preclude district court jurisdiction over an action challenging the legality of an INS regulation that does not refer to or rely on the denial of any individual application, and remanding on ripeness grounds).

[147] 8 C.F.R. §§ 3.2, 3.8, 103.5, 242.22 (1993).

[148] INS v. Abudu, 485 U.S. 94, 107 (1987).

[149] 8 C.F.R. §§ 3.2, 3.8.

[150] *Abudu*, 485 U.S. at 104–05 (applying 8 C.F.R. § 3.2 (1987)).

[151] 485 U.S. at 105.

private agencies, or the INS that they did not qualify. Some of these people may be able to make affirmative applications for immigrant status by relative petitions or labor certifications, both of which are lengthy and time-consuming processes.[152] Otherwise, this class of persons may need to sue for relief on the model of *Reno v. Catholic Social Services*, a class action that, among other things, overturned the INS's policy of rejecting late applications by people who were either misled or confused by changes in the regulations.[153] As an increasing number of these racist, homophobic and prejudicial exclusions are overturned, the class action may become a crucial tool in redressing the injury to those deterred from applying for immigration benefits for which they were in fact eligible.

B. Possible Future Problems with "Excludable at Time of Entry"

For aliens outside the United States, the removal of the exclusion means only that a new application for admission must be made. But section 602(a) of Immact '90 repeats the old provision that an alien is deportable if *excludable at the time of entry*:

> Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.[154]

Thus, there may be many people, similar to Longstaff, who will be found deportable under this section because at the time of their entry, they were excludable under the old section 212(a)(4)! Could this happen? The *Fleuti* and *Longstaff* cases exemplify this possibility. Suppose an LPR of many years applies for citizenship after June 1, 1991 and includes a letter of recommendation from a gay service organization stating "he has served our community as a proud gay man for many years." The application could be denied, and his permanent residence status revoked, not because he is gay, but because he was excludable at the time of entry.[155] He could apply for a waiver under INA section 212(c), which requires seven years of permanent residency, and enough equitable factors for a favorable

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[152] I.N.A. § 221, 8 U.S.C. § 1201. Some classes of immigrant visa applications, for example, a family-based petition by a U.S. citizen for a sister or brother from Mexico, can take up to 12 years to be issued.

[153] 113 S. Ct. 2485 (1993).

[154] Immact '90, § 602(a), amending I.N.A. § 241(a)(1)(A), codified at 8 U.S.C. § 1251(a)(1)(A).

[155] *Id.* INS would be forced to argue that the individual had been gay at the time of entry. When does a person become homosexual? Though I would argue that most homosexualities are "constitutional" in nature, and I suspect the characteristic is "immutable," I do not think we have heard the final word on the issue.

exercise of discretion.[156] The intent of Congress should at least be persuasive on this issue. Clearly, Congress repealed the exclusion, and did not mean to give the INS the authority to resurrect it through the "at the time of entry" clause, which is meant merely to preserve the integrity of exclusions currently in force. By authorizing the INS to deport excludable persons who successfully concealed their excludability at entry, the clause prevents an entrant from circumventing an exclusion by "sneaking in" with inspection.[157] That goal is not served by deporting someone whose failure to disclose their excludability probably resulted from ignorance of the law rather than subterfuge, and whom Congress has since decided there is no good reason to exclude.

Should the straightforward approach just described fail, suspension of deportation might be available under INA section 244(a)(1),[158] but the applicant would have to be able to show at least seven years of continuous residency, good moral character,[159] and favorable equities amounting to "extreme hardship."[160] Legal strategies further afield might be estoppel arguments, due process arguments, or assertion of a property interest in permanent residence. None of these possibilities have been addressed by the courts. Finally, one might argue that the following language from

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[156] 8 U.S.C. 1182(c).

[157] Entry without inspection is, of course, grounds for deportation. I.N.A. § 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B).

[158] 8 U.S.C. § 1254(a)(1). Suspension of deportation is an equitable discretionary remedy by means of which an immigration judge may grant LPR status to an alien who has lived in the United States for a considerable period of time and has put down roots in this country.

[159] With certain additions and exceptions, this means having committed no "crimes of moral turpitude." I.N.A. § 101(f)(3), 8 U.S.C. § 1101(f)(3).

[160] Hardship to a spouse who is a U.S. citizen or LPR is also a legitimate factor supporting a suspension claim. A recent Ninth Circuit case on the issue of "extreme hardship" as an equity under I.N.A. § 212(c) (a provision allowing discretionary waiver of exclusion for LPR's re-entering the country, extended to deportation by case law) requires consideration of hardship to common law spouses as well. Kahn v. INS, 1994 WL 94159, at 2, 62 U.S.L.W. 2597 (9th Cir. 1994). Although not all states recognize common law marriages, the court held that Congress intended the I.N.A. to implement a uniform federal policy with regard to immigration, thus requiring the weighing of hardship to life partners in heterosexual relationships. The possibility therefore exists that extreme hardship to gay and lesbian partners may soon be accepted as a factor, either through the legalization of same-sex marriage or the inclusion of same-sex partners under the interpretation just discussed. Of course, the hardship experienced by the suspension applicant due to the loss of his or her same-sex partner is already a factor that must be considered. *See generally* Zamora v. INS, 737 F.2d 488 (5th. Cir. 1984) (holding that hardship may result from separation from nonstatutory family members); Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981) (holding that losing long-term friendships is a factor in determining extreme hardship); Matter of Anderson, 16 I. & N. Dec. 596, 597 (BIA 1978) (holding that extreme hardship results when ties to community are broken). The advocate who makes any such argument on behalf of a client should be on the watch for overt displays of homophobia by the immigration judge, since this may evidence abuse of discretion should appeal be necessary.

Landon v. Plasencia[161] should be read more broadly to permit a challenge to the old exclusion under the equal protection component of the Fifth Amendment's Due Process Clause: "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[162]

Suppose, in an ironic variation on the above hypothetical, that the applicant had left the United States to spend a few hours in Tijuana just after June 1, 1991, and just prior to his application for citizenship. In that case, the INS would presumably invoke *Fleuti*, arguing that the absence did not meaningfully interrupt his residence, and that therefore, he did not make a new entry under the new law and remains subject to the exclusion based on his original entry. A reply to that argument would be that his second entry was valid, since, (1) as of the time of entry, his permanent residence had not been revoked and was thus valid, and (2) he is no longer subject to the exclusion.[163]

Suppose an applicant for legalization under IRCA[164] is excluded for homosexuality (based on an old infraction of an anti-gay law, which is nonetheless part of the public record),[165] files a waiver, and is denied for lack of family ties.[166] Some time later she finds herself in deportation proceedings after a raid on her workplace. In deportation proceedings, she may defend herself by demonstrating her eligibility for IRCA legalization and waiver,[167] and also may apply for suspension of deportation.[168] Will the IJ consider her admissibility as of the date of the *de novo* application

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[161] 459 U.S. 21 (1982).

[162] *Id.* at 32.

[163] This assumes that his departure was "innocent, casual, and brief," with regard to citizenship residency requirements but interruptive of residence with regard to entry requirements. The distinction between the two types of interruptiveness would be analogous to the distinction between domicile (where one lives with the intention to remain permanently) and residence (where one currently resides). This also solves the potential problem of an INS determination that the new entry date would interrupt the applicant's residency for citizenship purposes, forcing him to wait longer before applying for citizenship.

[164] *See supra* note 122.

[165] Only an infraction evidencing a homosexual orientation that is part of the public record could provide the basis for a determination of excludability, because IRCA guarantees the confidentiality of all applicant information, even against the INS. I.N.A. § 245A(c)(5), 8 U.S.C. 1255a(c)(5).

[166] Legalization waivers require the demonstration of family unity equities, humanitarian equities, or a showing that the waiver is in the public interest. I.N.A. § 245A(d)(2)(B)(i), 8 U.S.C. § 1255a(d)(2)(B)(i).

[167] I.N.A. § 245A(e)(2)(A), 8 U.S.C. § 1255a(e)(2)(A), provides a stay of deportation if the legalization application is still pending. I.N.A. § 245A(f), 8 U.S.C. § 1255a(f) limits appeal rights to a single level of administrative review, presumably precluding the Immigration Judge from reviewing the administrative denial. Once a deportation order was issued, judicial review could be obtained pursuant to I.N.A. § 106, 8 U.S.C. § 1105a, but is also limited.

[168] *See supra* notes 158–160 and accompanying text.

under IRCA, or will he use the date of her original entry, thereby subjecting her to the old exclusion?[169] Neither the statute nor the regulations resolve which grounds of exclusion should apply at which point in time.

These hypotheticals show that section 602(a) of Immact '90[170] does not comprehend the situation where exclusions have been repealed. The solution is, by statute, regulation or judicial interpretation, to limit the applicability of section 602(a) to those exclusions in force both at the time of entry and at the time of enforcement.

C. Excludable Cubans in Detention

In 1980, approximately 125,000 Cubans abandoned revolutionary Cuba and came to south Florida, most of them leaving from the port of Mariel. At the time, Fidel Castro was accused of dumping his undesirables, including criminals and homosexuals, on the United States.[171] Most of these refugees were paroled into the United States under humanitarian parole provisions.[172] Lesbians and gays across the country reached out to help in the re-settlement effort. Many in the gay community were afraid that the INS would detain and exclude gay Cubans in large numbers, or, since many had been imprisoned in Cuba for other offenses, refuse to admit or parole them on those grounds with homosexuality being the underlying issue.

Eleven years later, gay Cubans remain among the few thousand still in detention. These people have no country in the world that will accept them, and no hope of admission or parole in the United States. Most of the Cubans who are now in detention have committed crimes here while on parole or after adjustment to lawful resident status,[173] and have had their parole revoked. None of those currently detained have been excluded solely on grounds of homosexuality without some criminal offense.[174]

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[169] *See* 8 C.F.R. § 245a.3(g)(2), which raises the possibility of excludability both at the time of application for temporary residency under IRCA and also at the time of adjustment of status to permanent residency.

[170] *See supra* note 154 and accompanying text.

[171] *See, e.g.*, Warren Brown, *Cuban Boatlift Drew Thousands of Homosexuals; Thousands of Refugees from Cuba are Homosexual*, WASH. POST, July 7, 1980, at A1. Homosexuals have in fact been brutally persecuted by the Castro government. *See* ALLEN YOUNG, GAYS UNDER THE CUBAN REVOLUTION (1981). *Cf.* Lourdes Arguelles & B. Ruby Rich, *Homosexuality, Homophobia, and Revolution: Notes Toward an Understanding of the Cuban Lesbian and Gay Male Experience, in* HIDDEN FROM HISTORY, *supra* note 46, at 441.

[172] I.N.A. § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

[173] Cuban refugees can obtain LPR status under the Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966), codified at 8 U.S.C. § 1255a note (1993).

[174] Nevertheless, I remain concerned about this issue. I suspect that sexual orientation discrimination is partly behind the continued detention of many Cubans. I base this suspicion on my many phone conversations with detainees who believe they haven't been

Suits challenging the legality of indefinite detention have proven fruitless. In *Jean v. Nelson*, the Eleventh Circuit held that excludable aliens have no constitutional due process rights and "must be content to accept whatever statutory rights and privileges they are granted by Congress."[175] Despite the appalling absence of constitutional protections, there may be another legal recourse for Cuban detainees. If a detainee excluded *solely* under the repealed homosexual exclusion were to petition for a new parole hearing,[176] submit a Motion to Reopen to the BIA,[177] or file a writ of habeas corpus in the District Court,[178] since he has technically made no entry, there is nothing to prevent the detainee from now being admitted as a parolee or refugee. Moreover, Immact '90 permits an alien whose name is listed as excludable in the INS's "lookout books" and automated visa lookout system to have her excludability reviewed upon request or upon application for entry after the effective date of the amended exclusions.[179] Though this scheme envisions a person *outside* the United States applying for a review of continued excludability, it must be remembered that a Cuban detainee, while physically present in a U.S. jail or detention facility, is technically *outside the United States*. His application for entry can be made in an exclusion hearing. Congress created this option to provide some avenue of relief for people, excluded in the past, who are no longer excludable because of the amendments to the INA or changes in their personal circumstances.

D. Homosexual Asylum

The repeal of the exclusion of homosexuals offers the novel and intriguing possibility of gays and lesbians applying for asylum under the Refugee Act of 1980[180] based on their "well-founded fear of persecution" if they are forced to return to their country of origin.[181] Asylees and refugees must be otherwise admissible as immigrants, and they are subject to the exclusions in the INA.[182] Applicants must establish a "well-founded fear of persecution," or have suffered significant past persecution,[183] based

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paroled because they are gay. In my anecdotal experience, it seems easier for heterosexuals with criminal records to obtain parole than for gays with equally serious records.

[175] 727 F.2d 957, 968 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

[176] 8 C.F.R. §§ 212.12, 212.13.

[177] *See supra* notes 149–151 and accompanying text.

[178] *See supra* note 115.

[179] Immact '90, § 601(c), 8 U.S.C. 1182 note (1993).

[180] Pub. L. No. 96-212, 94 Stat. 102 (1980).

[181] I.N.A. § 208, 8 U.S.C. § 1158; I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

[182] I.N.A. § 209(a)(2), 8 U.S.C. § 1159(a)(2).

[183] 8 C.F.R. § 208.13(b)(1)(ii) (1993); Matter of Chen, 1989 BIA LEXIS 10, at *8, 12–13 (Interim Decision No. 3104) (BIA 1989).

on one or more of five grounds: (1) political opinion, (2) race, (3) religion, (4) nationality, or (5) membership in a particular social group.[184]

It is unlikely that the INS will find that homosexuality is a political opinion, or that the courts will so construe it. Nevertheless, for some lesbians and gays who are persecuted in other countries, the political opinion option may be appropriate, especially if they were activists or public figures. Such "political opinion" would have to have been known to the persecuting government or other persecutor.[185] There may also be instances in which openly gay or lesbian people have an oppositional political opinion imputed to them, for which they are consequently persecuted. Here too, the political opinion ground would be the appropriate basis for an asylum application.[186]

As most persecution of lesbians and gays appears to be based simply upon their status, the social group category is generally the most promising ground to invoke in gay asylum applications. Are homosexuals a social group within the meaning of the Refugee Act? Two leading cases that are in a certain degree of tension with one another have interpreted "particular social group" under the statute.

In *Sanchez-Trujillo v. INS*,[187] the Ninth Circuit rejected the argument that "[y]oung, urban, working class, [Salvadoran] males who had never served in the military or otherwise expressed support for the government" were a particular social group. While generally sympathetic to asylum claims from Salvadorans, the circuit panel held:

> We may agree that the "social group" category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion. Still the scope of the term cannot be without some outer limit . . . *the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship* among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.[188]

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[184] I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

[185] Rivas-Martinez v. INS, 997 F.2d 1143, 1148 (5th Cir. 1993); Immigration and Naturalization Serv. v. Elias-Zacarias, 112 S.Ct. 812, 816–17 (1992).

[186] *See* Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987).

[187] 801 F.2d 1571 (9th Cir. 1986).

[188] *Id.* at 1576 (emphasis added). Examples of acceptable "particular social groups" include "a family," while a demographic group such as "males taller than six feet" would not qualify. The justification offered for this distinction, ironically, is that males taller than six feet could "manifest a plethora of different lifestyles [and] varying interests . . . ." *Id.* at 1577. To the extent the gay community shares a "lifestyle" and a "common interest,"

Although *Sanchez-Trujillo* was expressly concerned with defining "social group" narrowly so that it could not be applied to every line in a demographic report, gays and lesbians would appear to meet its criteria. Queer people have a "common impulse or interest" and a "voluntary associational relationship" with one another that defines them, their relationships, and to some degree the pattern of their lives. Clearly this would meet the test.

Matter of Acosta,[189] decided by the BIA, read the statutory phrase somewhat differently, holding that when the Board considers asylum claims based on alleged membership in a particular social group:

> the common characteristic that defines the group . . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[190]

Matter of Acosta makes the criteria for "social group" sound a little like suspect-class analysis under the Fourteenth Amendment's Equal Protection Clause.[191] The Ninth Circuit, in its first opinion in *Watkins v. US Army*, did find homosexuals to be a suspect class.[192] Although the same court sitting en banc withdrew that opinion, and the federal circuit courts have since held unambiguously that sexual orientation is not a suspect classification,[193] the criteria for membership in a social group are less stringent. One should be able to make the case that homosexuality satisfies the test in *Matter of Acosta*: it is immutable, or at least fundamental to individual identity.

There is at least one case precedent that would support a less favorable reading of social group. In *Matter of Chang*,[194] the BIA found that Chinese couples who disagreed with China's population policy, and wanted to have more than one child, were not a social group:

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such a framework might be serviceable. The court also states that the "persecutor's perception alone" is not conclusive, but should be considered relevant. *Id.* at 1576 n.7.

[189] 19 I. & N. Dec. 211 (Interim Decision No. 2986) (BIA 1985).

[190] *Id.* at 233.

[191] Compare this language with the famous footnote four of United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938), where Justice Stone writes, "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."

[192] 847 F.2d 1329 (9th Cir. 1988), *opinion withdrawn on reh'g by* 875 F.2d 699 (1989) (reaching same result by affirming district court order, 551 F. Supp. 212 (W.D. Wash. 1982), that army was equitably estopped from barring soldier's reenlistment solely because of his homosexuality, and refraining from 14th Amendment suspect-class analysis).

[193] *See* Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990).

[194] Matter of Chang, Interim Decision No. 3107 (BIA 1989).

> [A] showing cannot be made that there is a "particular social group" made up of those persons who "actually" oppose the policy of "one couple, one child," and that the evidence that this "group" is persecuted is simply the fact that the policy is applied to them despite their opposition to it.[195]

The Board also rejected the contention that the Chinese policy amounted to persecution because it burdened a fundamental interest enjoyed by U.S. citizens, smugly lamenting the fact that other countries do not have our constitutional protections. The Board failed to notice that at least some "fundamental" interests are basic, not solely to the U.S. Constitution, but to international human rights norms. In dismissing the argument that a deprivation of fundamental rights under the U.S. Constitution is *per se* persecution, the Board threw out the baby with the bathwater—it ignored even the possibility that some deprivations of human rights that coincide with American constitutional rights *are* necessarily persecution. In any case, *Matter of Chang* can be distinguished because it dealt with a facially neutral policy that was applied to all couples. Persecution of homosexuals is in many cases the explicit goal of the official acts in question, not just a discriminatory effect. Another way of expressing this idea would be to say that in most societies, gays and lesbians meet the *Acosta* and *Sanchez-Trujillo* social group criteria prior to the enactment of laws affecting them, whereas persons opposed to China's "one couple, one child" policy are constituted as a "social group" only by the existence of that policy.[196]

A recent decision by an IJ granted asylum to a Brazilian gay man based on this type of argument. In *Matter of Tenorio*,[197] the IJ determined that homosexuals constituted a "particular social group" under *Matter of Acosta*. Following *Sanchez-Trujillo*, the judge also found that homosexuals as a group have "a voluntary associational relationship among members, and a common characteristic that is fundamental to their identity as a member of the social group." The judge further found that "sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change."[198]

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[195] *Id.* at 12.

[196] Nevertheless, I have some fear that a test case would be doomed by *Matter of Chang* together with Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (holding that fundamental right of privacy does not include right to engage in "homosexual sodomy"). *See Watkins*, 847 F.2d at 1353 (Reinhardt, J., dissenting). I believe the real reason for the decision in *Matter of Chang* was political concern over U.S. relations with China, and concern about creating a flood of refugees escaping the population policy. *See, e.g.*, Nicholas D. Kristof, *Beijing Calls for a 'New Pattern' in Its Relations with Washington*, N.Y. TIMES, Mar. 27, 1989, at A12.

[197] Matter of Tenorio, No. A72-093-558 (Immigration Ct., S.F., CA, July 26, 1993).

[198] *Id.* at 14 (following the reasoning of a decision of the Immigration and Refugee Board of Canada (Refugee Division) granting asylum to a gay Salvadoran, T91-04459 (Apr. 9, 1992)).

After determining that homosexuals constitute a "particular social group" under U.S. refugee law, the *Tenorio* court required the respondent to establish that he was a member of that particular social group and that the group had in fact been targeted for persecution on account of the characteristics of the group members. The court found an individualized fear of persecution, which did not amount to past persecution but did establish a "well-founded fear of [future] persecution," and thus did not reach the question of whether mere membership in the group was enough to establish a well-founded fear for any claimant. A claim based on membership alone, without individual persecution, would require the establishment of a pattern or practice of the persecution of similarly situated persons in order to establish the "well-founded fear."[199]

Although it remains to be seen how the BIA will decide the government's appeal of *Matter of Tenorio*, an affirmance would extend the possibility of homosexual asylum to every jurisdiction in the United States. Once a BIA precedent is established defining gays and lesbians as a social group, the granting of asylum or refugee status to persecuted gays and lesbians will be a matter of establishing a "well-founded fear of persecution" in each individual case, or establishing past persecution of a serious nature.

There is plenty of evidence available to support claims from countries that officially and quasi-officially persecute gays. In a recent poll, 33.7% of Muscovites expressed the view that homosexuals should be "destroyed."[200] While homosexuality is not outlawed in Colombia, gays are among the *desechables* (disposables) routinely assassinated by off-duty military officers.[201] With names like "Committee of Social Cleansing" and "Death to Homosexuals" these groups kill as many as 100 people a night in the cities of Santafé de Bogotá, Cali, and Medellín. The walls of Santafé de Bogotá, for example, are spray-painted with far-right slogans, among them "GENOSIDA." SIDA is the Spanish acronym for AIDS and *genocida* is the word for genocide. This killing includes street people, prostitutes, orphans, vendors, and other social outcasts, but special ire is reserved for homosexuals, who are tortured and raped and whose bodies are dismembered in particularly gruesome ways. Enrique Santos Calderon, columnist for *El Tiempo*, points to the official tolerance of this killing: "One must ask how it is possible that none of the security forces, the police, the F-2, and the civil defense groups, has been able to detect these assassins as they move freely through the city?"[202] The expert wit-

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[199] 55 Fed. Reg. 30,674 (1990).

[200] FRONTIERS, May 10, 1991, at 18.

[201] *See* Juan Pablo Ordoñez, *Reflections of a Colombian in Exile*, COLOMBIA UPDATE (Colombia Human Rights Network, Washington, D.C.), July-Sept. 1993, at 1.

[202] LATIN AMERICA WEEKLY REPORT, Oct. 9, 1956, at 6. The late Penny Lernoux, Latin America correspondent for *Newsweek* and *The Nation*, told me that "Colombia is the next Central America, only it's already happening and no one has noticed." Personal conversa-

ness in *Matter of Tenorio* reported a frighteningly similar police/social cleansing nexus in Brazil, where anti-gay death squads operate with impunity.[203] In Cuba gays and lesbians are sent to re-education camps, killed, imprisoned, and exiled.[204] Finally, but not exhaustively, homosexuals in China have been routinely imprisoned or committed to mental institutions. Recent "reforms" have led the Chinese to attempt cures by herbs and electric shock.[205]

In the face of this fierce and widespread persecution of gays and lesbians, our access to asylum is beginning to expand. Sweden has considered granting asylum to Russian homosexuals.[206] Canada accepts asylum for homosexuals,[207] and the U.S. government is taking notice of sexual orientation persecution[208]—a recent report indicates that the Department of State is gathering information on gay and lesbian rights for their annual Country Reports. While the inclusion of oppression of queers in these reports is progress, the State Department is also seeking "information regarding progress toward protecting [gay] rights."[209] Country Reports are used to oppose asylum applications as well as to substantiate them, so it is possible that the State Department is anticipating homosexual asylum applications, and preparing to oppose them. Work should be done to assure that accurate statistics and reports on country conditions are submitted to the Bureau of Human Rights.

Ironically, the gains made by gays and lesbians in securing asylum may soon be stolen by the so-called "reform" of asylum laws. Driven by a recent wave of anti-immigrant sentiment and xenophobia, Congress is considering laws to deprive asylum seekers of their appeal rights. Under the proposed legislation, special immigration officers at U.S. ports of entry would use a "credible fear of persecution" standard to pre-screen applicants, summarily excluding and deporting those who could not show

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tion at her residence in Bogotá, Colombia, July, 1987. *See also* AMNESTY INTERNATIONAL, COLOMBIA BRIEFING 9 (1988); IMPUNITY IN COLOMBIA: A PUBLICATION OF PAX CHRISTI NETHERLANDS AND THE DUTCH COMMISSION JUSTITIA ET PAX, at 16–17 (1989).

[203] *Tenorio*, slip op. at 7–10.

[204] Although general country conditions do not in themselves determine asylum eligibility, such conditions, combined with a personalized fear do meet the appropriate standard. The Department of State Country Reports for 1992 include several discussions of persecution based on sexual orientation. DEPT. OF STATE, 103d Cong., 1st Sess., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992 (Comm. Print 1993).

[205] Louise Branson, *Shock 'Cure' for China's Homosexuals*, TIMES (London), Feb. 4, 1990, at Overseas News.

[206] FRONTIERS, May 10, 1991, at 18.

[207] *See, e.g.*, Immigration and Refugee Board of Canada (Refugee Division), C92-00568 (Calgary, Alberta, Apr. 28, 1993); Immigration and Refugee Board of Canada (Refugee Division), T91-04459 (Apr. 9, 1992).

[208] The San Francisco-based International Gay and Lesbian Human Rights Commission actively supported Mr. Tenorio.

[209] FRONTIERS, May 10, 1991, at 18.

the criterion level of fear.[210] A refugee from sexual orientation persecution would have to plead her entire case before only an INS officer without the benefits of an evidentiary hearing. No appeal from a denial would follow, leaving those persecuted at the mercy of potentially homophobic federal agents.

Conclusion

The Act of 1990 represents an important advance for human rights in the United States, but the struggle for human dignity continues. Might our gains be reversed? It is possible, in light of the periodic resurgence of hatred in U.S. history. The future holds both hope and fear. When our unions are finally sanctioned as legal marriages, we will no doubt have to struggle for the immigration rights of our spouses. The gains we have made as lesbians and gays ought to be defended and at the same time the queer community should more clearly express its solidarity with immigrants. Our struggle for human rights premised on the legal and social recognition of our personhood is the same struggle that immigrants face.

Now that lesbians and gays are no longer excluded by U.S. immigration law, people will no longer have to hide their identity to be able to visit the United States. It should be obvious that anti-gay laws do not eradicate homosexuality; they merely drive gays and lesbians into the closet and into the miserable existence it entails.

Ultimately, freedom for lesbians and gays is a healing for society. Why has so much hatred and energy been spent by our culture on the persecution of people for sexual orientation, race, religion, and national origin? Society is evidently terrified of diversity. Gays and lesbians have a special role in society, a special calling and message. If we did not, the forces of darkness and hatred would not spend so much time trying to oppress us. Often, of course, we are not very clear about what our calling is, but surely it has something to do with love, something to do with human freedom. I am often discouraged by the depth and intensity of homophobia, but I remember the words of Garcia Lorca, "*también se muere el mar*," even the sea dies.

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[210] Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993, S. 1333, 103d Cong., 1st Sess.; H.R. 2836, 103d Cong., 1st Sess. (1993).