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Mental Illness Exclusions in United States Immigration Procedure

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NOTES

Mental Illness Exclusions in United States Immigration Procedure

> *The immigration law is a yardstick of our approval of fair play. It is a challenge to the tradition that American law and its administration must be reasonable, fair, and humane.* PRESIDENT'S COMMISSION ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME XIII (1953).

MENTAL TESTING, as part of the medical examination of aliens, constitutes a critical step in the legal procedure which determines whether an alien may be admitted into the United States.[1] While the actual decision is made by consular and immigration authorities, the report of the results of the medical examination becomes part of the official record.[2] To undertake these examinations, medical officers of the United States Public Health Service who have had special training in the diagnosis of mental illness are selected for duty at ports of entry designated by the Attorney General.[3] In addition, these medical officers are provided with suitable facilities for the detention and examination of arriving aliens who are suspected as possibly excludable and the services of interpreters are provided to facilitate examination.[4] Whenever a medical officer is uncertain about the mental health of an alien, completion of the examination may be deferred for further observation, at the initial station or another more suitable place, as may be reasonably necessary to determine the mental condition of the alien.[5] Whether an alien is found to have or to have had a history of mental illness or not, the medical examiner must report his findings to the Immigration Service by medical certificate or to the consular authority by medical notification.[6]

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[1] 8 U.S.C. § 1222 (1964) (detention of aliens for observation and examination upon arrival); 8 U.S.C. § 1223 (1964) (examination of aliens upon arrival).

[2] 8 U.S.C. § 1226 (1964) (proceedings for exclusion of aliens).

[3] 8 U.S.C. § 1224 (1964) (physical and mental examinations).

[4] *Id.* Naturally, the alien's reaction to instructions in connection with the medical examination is of considerable importance in determining mental alertness and intelligence. This places a substantial burden on the interpreter or, preferably, the examiner to give clear instructions. Along with the potential confusion arising from the language barrier, the examining physician may encounter different norms of behavior, areas of common knowledge, and relative standards of intelligence among aliens from various countries and urban or rural backgrounds.

[5] 42 C.F.R. § 34.11 (1970).

[6] 42 C.F.R. §§ 34.5-.6 (1970). The importance of the medical certificate or noti-

An alien is not totally at the mercy of the judgment of one medical examiner, however, since several procedural safeguards are available.[7] First of all, an alien certified as excludable may appeal to a board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States for the purpose of reexamining the alien.[8] Second,

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fication is illustrated in that, for the purpose of an exclusion proceeding against an alien, the only evidence upon which a finding of insanity can be made is certification either by a medical officer of the Public Health Service, specially designated civil surgeons, or a board of Public Health Service officers. *In re* Hollinger, 211 F. Supp. 203, 206 (E.D. Mich. 1962); 8 U.S.C. § 1224 (1964).

[7] When discussing an alien's procedural protections it should be noted that Congress has established both an exclusion procedure, 8 U.S.C. § 1226 (1964), and a deportation procedure, 8 U.S.C. § 1252 (1964).

An exclusion proceeding is that process by which an alien who seeks to enter the United States is evaluated. Any person applying for admission is presumed an alien unless there is a showing to the contrary with the burden of establishing eligibility for admission resting on the person claiming the right to entry. 8 U.S.C. § 1361 (1964). *See also* Pan American World Airways, Inc. v. United States, 122 F. Supp. 682 (Ct. Cl. 1954). Further, an alien has no constitutional guarantees. In *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950), the Court noted that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

A deportation proceeding is that process by which the right of an alien to remain in the United States after he has gained admission is evaluated. In deportation proceedings the burden of establishing lawful entry into the United States is on the alien. 8 U.S.C. § 1361 (1964). Once this is established, the burden of establishing alienage rests on the government. United States *ex. rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923). So, too, with the question of deportability. Palmer v. Ultimo, 69 F.2d 1 (7th Cir.), *cert. denied*, 293 U.S. 570 (1934). In *In re A___*, 8 I. & N. Dec. 12, 13 (1958), the Immigration and Nationality Board pointed out an important distinction between exclusion and deportation procedures:

> In an exclusion case where the cause of exclusion is one of certain grounds relating to mental condition, no appeal can be taken from the order of the special inquiry officer requiring exclusion. In the deportation proceeding, on the other hand, even though the identical ground is used to order the alien's deportation, there is an appeal.

In deportation proceedings, unlike exclusion, an alien has constitutional rights. Kimm v. Rosenberg, 363 U.S. 405 (1960) (right not to incriminate self); Abel v. United States, 362 U.S. 217, 229 (1960) (protection against unreasonable search and seizure); Marcello v. Bonds, 349 U.S. 302 (1955) (applicability of constitutional provisions against *ex post facto* laws, bills of attainder, and cruel and unusual punishment); Carlson v. Landon, 342 U.S. 524, 540 (1952) (right to bail); Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950) (right to procedural due process); Handlovitz v. Adcock, 80 F. Supp. 425 (E.D. Mich. 1948) (right to counsel) (codified at 8 U.S.C. § 1252(b)(2) (1964)); *Ex parte* Woo Wah Ning, 67 F. Supp. 56 (W.D. Wash. 1964) (right to notice of charges and hearing) (codified at 8 U.S.C. § 1252(b)(1) (1964)); 8 U.S.C. § 1252(b) (3) (1964) (right to cross examine). *See* Wasserman, *Deportation Cases*, in PRACTISING LAW INSTITUTE, IMMIGRATION & NATURALIZATION 125 (1968).

[8] *See* note 3 *supra*. The procedure to be followed by the board in reexamining an alien is fully set out in the regulations. 42 C.F.R. § 34.14 (1970).

See also United States *ex rel.* Johnson v. Shaughnessy, 336 U.S. 806, 815 (1949). The Court held that a certificate of the medical board and additional record data were inadequate to support an order of a medical appeal board excluding an alien as mentally defective where the findings and conclusion of the medical appeal board were not based on its own independent medical reexamination of the alien.

an alien may introduce, before this board, one expert medical witness at his own cost and expense.[9] Finally, an alien may have a reasonable opportunity to examine medical certificates and other records involved in the reexamination.[10]

I. The Haphazard History of Mental Illness Exclusions

Proper selection of current and meaningful psychiatric terms is certainly important, as illustrated by the haphazard history of mental illness exclusions in immigration legislation up to the present, if easy understanding and clear definition of exclusions is to become a reality.

The first immigration legislation to deal with mental illness was the Act of March 3, 1882, which excluded "all idiots" and "lunatics" from entrance into the United States.[11] The class of aliens ineligible to receive visas and excluded from admission due to mental defects was expanded by the Act of March 3, 1903, which added "epileptics, persons who have been insane within 5 years previous, and persons who have had two or more attacks of insanity at any time previously."[12] Three new groups of mentally defective persons were added on February 20, 1907: "Imbeciles," "feeble-minded," and persons afflicted with a "mental or physical defect being of a nature which may affect the ability of such alien to earn a living."[13] The Act of March 26, 1910, left unchanged the medical exclusion section of the 1907 Act, which was a patchwork of provisions from prior legislation.[14]

In 1917, however, the first legislative attempt to redraft and draw together all mental illness exclusions into one bill was made.[15] The Act of February 5, 1917, was also noteworthy for some substantial changes in mental health exclusions which included for the first time "persons of constitutional psychopathic inferiority" and "persons with chronic alcoholism." The wording of the 1903 Act, "persons who have been insane within 5 years previous, and per-

[9] 42 C.F.R. § 34.14(e) (1970).

[10] 42 C.F.R. § 34.14(f) (1970). While the alien may not understand the medical documents, they could be of considerable help to his attorney or expert medical witness.

[11] Act of Mar. 3, 1882, ch. 376, § 2, 22 Stat. 214.

[12] Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1214.

[13] Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898.

[14] Act of Mar. 26, 1910, ch. 128, § 2, 36 Stat. 263.

[15] Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875.

sons who have had two or more attacks of insanity at any time previously," was broadened to include all "persons who have had more than one attack of insanity at any time."

A major difficulty in the administration of the exclusion clauses of the 1917 Act revolved around the definition and diagnosis of "constitutional psychopathic inferiority."[16] While the legislative intent behind this term seems to have been to preclude aliens with a likelihood of becoming mentally disabled, arguments were raised that it not only placed arbitrary power in the hands of officials but it also was vague and undefined.[17]

"Constitutional psychopathic inferiority" and other mental health definitional problems were ignored, rather than solved, by the Immigration Act of 1924[18] and by the many amendments to the immigration laws from 1925 to 1952.[19] While there was no outstanding reason for the lack of reform, several contributing factors were present. Congress was occupied with a depression, world war, cold war and domestic needs, which left little time to keep pace with a fast changing medical technology. In addition, the integration of law and medicine at a high level of expertise was simply not considered. Nevertheless, the lack of sophistication in the use of psychiatric terms in immigration law was appalling. For example, an official of the Immigration Service testified before a Senate subcommittee that the purpose of "constitutional psychopathic inferiority" was to "keep out aliens with tainted blood," that is,

> . . . persons who have medical traits which would harm the people of the United States if those traits were introduced in this country, or if those possessing those traits were added to those in the country who unfortunately are so afflicted.[20]

A good deal of confusion over the definition of the term existed simply because it was a legislative misnomer at its inception. *In the Matter of S————*, the Board of Public Health Examiners decided that the Congress actually meant "hereditary" when it used "constitutional."[21] Thus, "hereditary psychopathic inferiority" might have been defined in psychiatric circles to be "mental defects or pathological trends in the personality structure manifest by lifelong

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[16] S. REP. NO. 1515, 81st Cong., 2d Sess. 343 (1950).

[17] *Id.* If "constitutional" was meant to be "inborn," then "inborn psychopathic inferiority" would clearly be inaccurate.

[18] Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153.

[19] F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 11-16 (2d ed. 1961).

[20] S. REP. NO. 1515, 81st Cong., 2d Sess. 343 (1950).

[21] 8 I. & N. Dec. 646 (1954).

patterns of action or behavior, rather than by mental or emotional symptoms."[22] Unfortunately this clarification of what "constitutional psychopathic inferiority" actually meant was not made until the period of its application, 1917 to 1952, was already over.[23]

The Immigration and Nationality Act of 1952, popularly known as the McCarran-Walter Act, represents the second major modification of the many provisions on immigration contained in prior independent acts and forms the basis for the present immigration law.[24] Similar to the Immigration Act of 1917, the McCarran-Walter Act merely reshuffled provisions of earlier acts and made little effort to improve the quality of mental illness exclusion terminology. "Aliens who are narcotic drug addicts," sec. 212(a)(5), was added to the classes of aliens excluded from admission and the outmoded term "imbeciles" was dropped from sec. 212(a)(1). The McCarran-Walter Act did attempt to solve the "constitutional psychopathic personality" problem by changing the phraseology to "psychopathic personality," an accepted term in psychiatry. However, interpretation disputes immediately arose over the new term, because it had a two fold meaning:

> Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns exaggerated, personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation.[25]

The original bill specifically provided for the exclusion of "aliens who are homosexuals and sex perverts" in sec. 212(a)(7).[26] After many conferences with governmental and nongovernmental agencies, however, sec. 212(a)(7) was dropped and "psychopathic personality" became a rather broadly construed term to express Congress' intent to exclude all aliens who are sexual deviates.[27] While psychiatrists might recognize that "psychopathic personality" includes sexual deviation, Congress again failed to consider whether an attorney or average person, upon reading the law, would be able to fully understand the term.[28]

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[22] H.R. REP. NO. 1365, 82d Cong., 2d Sess. 46 (1952).

[23] *In re* P ___, 7 I. & N. Dec. 258 (1956).

[24] Act of June 27, 1952, ch. 447, § 212, 66 Stat. 163.

[25] *In re* P ___, 7 I. & N. Dec. 258, 262 (1956).

[26] S. 3455, 81st Cong., 2d Sess. § 212(a)(7)(1950).

[27] *In re* P ___, 7 I. & N. Dec. 258, 262 (1956).

[28] *See* S. REP. NO. 1137, 82d Cong., 2d Sess. 47 (1952).

The original McCarran-Walter Act also failed to limit the term "epilepsy" which "does not indicate a specific disease entity, but is applied to brain diseases of unknown causes which are characterized by seizures, with or without loss of consciousness, and convulsions."[29] In addition, Congress did not consider that medical science had developed treatments to control seizures and that seizures could be controlled to varying degrees depending on the individual case.[30]

Another anachronism which the McCarran-Walter Act allowed to continue was the designation of "feeble-mindedness." In 1907, when medical science was still in its infancy, Congress first used this term to exclude aliens. By the time the McCarran bill was being considered, "feeble-mindedness" had become a legal term which was a poor substitute for the current medical term "mental retardation."[31] Despite this obvious inaccuracy, Congress allowed this confusion to remain when the McCarran-Walter Act was passed.

On October 3, 1965, a series of amendments were made to the Immigration and Nationality Act of 1952, which have helped considerably to modernize and eliminate confusing provisions.

In sec. 212(a)(1), "feeble-minded" was deleted and "mentally retarded" was inserted in its place.[32] This represents a long overdue updating of psychiatric exclusion terminology, since "mental retardation" is not only based upon intelligence quotient, but also includes an individual's developmental history and adaptive behavioral capacity.[33]

The term "epilepsy" was deleted from sec. 212(a)(4) and is no longer considered an absolute ground for exclusion.[34] The addition of "epilepsy" to the list of mental illness exclusions was a misnomer to begin with, since "epilepsy" is not a mental disability, but a neurological illness.[35]

Section 212(a)(4) was further changed when "or sexual devia-

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[29] PUBLIC HEALTH SERVICE, MANUAL FOR MEDICAL EXAMINATION OF ALIENS ch. 6, ¶ 7a (1963) [hereinafter cited as PUBLIC HEALTH SERVICE MANUAL].

[30] *See* R. BARROW & H. FABING, EPILEPSY AND THE LAW (1956).

[31] S. REP. NO. 748, 89th Cong., 1st Sess. 25 (1965). "Mental retardation" may be said to be present when "general mental reactions are severally and distinctively below those normally exhibited by the average of the same age and race living under similar environment." PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 3a.

[32] 8 U.S.C. § 1182(a)(1) (Supp. IV, 1969). *See* S. REP. NO. 748, 89th Cong., 1st Sess. 25 (1965).

[33] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 14 (2d ed. 1968) [hereinafter cited as DIAGNOSTIC AND STATISTICAL MANUAL].

[34] 8 U.S.C. § 1182(a)(4) (Supp. IV, 1969).

[35] H.R. REP. NO. 745, 89th Cong., 1st Sess. 16 (1965).

tion" was inserted between "psychopathic personality" and "or a mental defect."[36] Medical notifications and certificates for sexual deviation will no longer contain the confusing term "psychopathic personality."[37] While it is true that a person with a "psychopathic personality" may also be a "sexual deviate," in psychiatric classification the two are different types of character disorders.[38]

In sec. 212(g), a major breakthrough was made with a possibility of waiver of excludability for certain aliens with "mental retardation" or a "previous attack of insanity" given for the first time in the history of our immigration law.[39]

Despite the 1965 amendments to the Immigration and Nationality Act, the selection of terms to designate mental illness exclusions is still deplorably poor.[40]

"Insanity"[41] and "previous attack of insanity"[42] are very general

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[36] 8 U.S.C. § 1182(a)(4) (Supp. IV, 1969).

[37] With respect to the addition of the phrase "sexual deviation," the House Committee on the Judiciary commented:

> In view of the representations made by the United States Public Health Service that the term "psychopathic personality" would encompass homosexuals and sex perverts, the Congress in enacting the Immigration and Nationality Act omitted from the law any specific provision relating to the ineligibility of such persons (note Sen. Rep. 1137, 82d Cong.).
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> However, the United States Court of Appeals for the Ninth Circuit on April 17, 1962, set aside a deportation order and enjoined its enforcement holding that Section 212(a)(4) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term "psychopathic personality." (Fleuti v. Rosenberg, 302 F.2d 642.)
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> To resolve any doubt the committee has specifically included the term "sexual deviation" as a ground of exclusion in this bill.

H.R. REP. NO. 745, 89th Cong., 1st Sess. 16 (1965).

[38] DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 33, at 42.

[39] 8 U.S.C. § 1182(g) (Supp. IV, 1969).

[40] *E.g.*, some of the present excludable classes of aliens include:

1. Aliens who are mentally retarded;
2. Aliens who are insane;
3. Aliens who have had one or more attacks of insanity;
4. Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect;
5. Aliens who are narcotic drug addicts or chronic alcoholics;
6. Aliens who are afflicted with a dangerous contagious disease;
7. Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living . . . .

8 U.S.C. § 1182(a)(1)-(7) (Supp. IV, 1969).

[41] "Insanity" is a legal term rather than a medical diagnosis. It has various meanings in different contexts. In criminal law the term is generally used to denote a person's inability, because of a mental disorder, to comprehend the nature and quality of his acts or to know that an act was morally wrong. In

legal terms which vaguely parallel the general psychiatric term of "psychoses."[43] Since "psychoses" covers two major divisions of mental illness, organic and functional, the term does not come close to the preciseness necessary to adequately administer the law.[44]

"Psychopathic personality"[45] is a legal term which is equivalent

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some jurisdictions the concept is extended to encompass all those who, because of a mental disorder, are incapable of being deterred by the threat of punishment. In civil procedures providing for compulsory hospitalization in mental institutions, the term usually connotes a degree of mental illness that makes the person dangerous to himself or others, or that makes him incapable of caring for himself and managing his affairs, or that deprives him of sufficient insight or capacity to make responsible decisions with respect to his hospitalization although he is in need of custody, care, or treatment.

PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 4.

Care must be exercised so that an alien having mental inadequacies due to lack of education or a mental condition attributable to remedial physical causes or temporary in nature and caused by a toxin, drug, or disease is not excluded. 42 C.F.R. § 34.7 (1970).

Applicants above age 60 should also be carefully evaluated to differentiate between mild senility and serious mental impairment. *See* AGING IN MODERN SOCIETY (A. Simon & L. Epstein ed. 1968).

[42] If, in taking a medical history, an examiner should discover that an alien has been hospitalized in a psychiatric institution, a medical report is usually requested from that institution. PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 5a. In a like manner, any information suggesting a previous attack of insanity is normally investigated further. When an alien has a history of what he terms a "nervous breakdown," then an examiner will try to seek more data and weigh all the evidence. "Nervous breakdown" is not a diagnostic term; rather, it means "that there has been a mental disturbance." When the term is mentioned, the problem is to determine whether it constituted a previous attack of insanity. *Id.*, comment following ¶ 10g.

[43] Patients are described as psychotic when their mental functioning is sufficiently impaired to interfere grossly with their capacity to meet the ordinary demands of life. The impairment may result from a serious distortion in their capacity to recognize reality. Hallucinations and delusions, for example, may distort their perceptions. Alterations of mood may be so profound that the patient's capacity to respond appropriately is grossly impaired. Defects in perception, language, and memory may be so severe that the patient's capacity for mental grasp of his situation is effectively lost.

Some confusion results from the different meanings which have become attached to the word "psychosis." Some non-organic disorders, in the well-developed form in which they were first recognized, typically rendered patients psychotic. For historical reasons these disorders are still classified as psychoses, even though it now is generally recognized that many patients for whom these diagnoses are clinically justified are not in fact psychotic.

DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 33, at 23.

[44] R. MEZER, DYNAMIC PSYCHIATRY IN SIMPLE TERMS (1956), *cited in* W. CURRAN, LAW & MEDICINE 560 (1960).

[45] The general phrase "psychopathic personality" is used in three different senses. . . . [P]sychiatrists generally mean . . . that the psychopath is a sane person of adequate intelligence who is, by ordinary standards, rebellious, dishonest, or nonconformist, who gets into trouble because of this character trait. However, the term is also used as synonymous with pathologic personality — a much broader concept, which embraces the entire field of character disorders. . . . Finally there is the lay concept that a psychopath is someone who belongs in a psychopathic ward.

to the medical designation "personality disorder."[46] The lack of specificity is obviously quite large when "psychopathic personality" is equated with "personality disorder," as the proper corresponding psychiatric term.[47]

The "mental defect" exclusion is a catch-all term for any mental disease, not specifically covered in the previous sections, which seriously impairs the mental processes of an alien and interferes with his total behavior and interpersonal relations.[48] Thus, "mental defect" may be the equivalent of the psychiatric term "neurosis" or the "maladaptation of an individual in a particular environment at a particular time."[49] As in the "psychopathic personality" exclusion, the impreciseness which results when "mental defect" is compared with its corresponding psychiatric term is shockingly large.[50]

If the basic tenet that exclusion grounds should be definite in their meaning and application is to be upheld, then our immigration law in the area of mental illness should be revised.[51]

II. THE HIATUS BETWEEN PSYCHIATRY AND IMMIGRATION LAW

After a physician performs a medical examination to establish whether or not an alien falls within one of the categories excludable under immigration law, he is required to fill out a medical noti-

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H. DAVIDSON, FORENSIC PSYCHIATRY 267 (2d ed. 1965). *See In re* Lavoie, 11 I. & N. Dec. 224 (1965).

[46] A "personality disorder"

> is characterized by deeply ingrained maladaptive patterns of behavior that are distinctly different in quality from psychotic and neurotic symptoms. Generally, these are lifelong patterns, often recognizable by the time of adolescence or earlier. Sometimes the pattern is determined primarily by malfunctioning of the brain, but such cases should be classified under one of the non-psychotic organic brain syndromes rather than here.

DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 33, at 41-42. *See* note 22 *supra*.

[47] The American Psychiatric Association recognizes 12 diagnoses under "personality disorder." AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 39, at 42-44.

[48] PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 10b.

[49] Ginsberg, *The Neurosis*, 286 ANNALS 55, 60 (1953).

[50] *Id.*

[51] PRESIDENT'S COMMISSION ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME xv (1953).

The task of defining mental illness terms is difficult for any person, especially those involved in immigration law. The criteria that will aid an examiner, or any other person, in determining the appropriate classification of mental conditions according to the Immigration and Nationality Act of 1952 are found in the *Manual for Medical Examination of Aliens*. PUBLIC HEALTH SERVICE MANUAL, *supra* note 29. It is noteworthy that neither the *Manual* nor the criteria provided therein are mentioned in the section *Medical Examination of Aliens* of the *Code of Federal Regulations*. *See* 42 C.F.R. § 34 (1970).

fication or certificate.[52] Each notification or certificate contains a series of three factors on three different levels of applicability. First, mental illnesses are classified A or B as a means of indicating the significance of diagnosed conditions with respect to the Immigration and Nationality Act.[53] Class A is issued with respect to aliens who fall under any one of the mental illness exclusions,[54] except when covered by Regulation 34.7.[55] Class B is issued for other physical conditions that may be excluded, depending on whether they are "serious in degree or permanent in nature amounting to a substantial departure from normal physical well-being."[56] Class B conditions, as opposed to class A, are not mandatorily excludable.[57] Secondly, the notification or certificate must apply the appropriate legal exclusion and last of all the applicable psychiatric term must be provided.[58]

There are several difficulties with this classification system, not the least of which is the lack of discretion afforded an examining physician. All mental illness exclusions are class A and mandatorily excludable. Since the exclusions are all encompassing, any mental illness no matter how long ago, how mild or how remediable will result in exclusion. The examiner must therefore exclude anyone who has been institutionalized, even though treated and rehabilitated, unless they come under the Regulation 34.7 exception and become class B.[59] Even if the person's condition may be certi-

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[52] 8 U.S.C. § 1224 (1964). Medical notifications (Foreign Service Form 398) issued to consular officials provide the results of medical examinations of visa applicants. Medical certificates (Public Health Service Form 124(FQ)) are issued to the Immigration Service to report any physical or mental defect, disease, disability, or previous attack of insanity in an alien. 42 C.F.R. § 34.2c, d (1970).

[53] 42 C.F.R. § 34.7-.9 (1970).

[54] 8 U.S.C. § 1182(a) (Supp. IV, 1969); 42 C.F.R. § 34.7 (1970).

[55] 42 C.F.R. § 34.7 (1970). The Regulation provides "That a Class A certificate or Class A notification of a mental defect, disease, or disability shall in no case be issued with respect to an alien having only mental shortcomings due to ignorance, or suffering only from a mental condition (i) attributable to remediable physical causes or (ii) of a temporary nature, caused by a toxin, drug, or disease." *See* note 36 *supra* & text accompanying.

[56] 42 C.F.R. § 34.8 (1970). "The certificate, or notification, shall state the nature and extent of the defect; the degree to which the alien is incapable of normal physical activity; and the extent to which the condition is remediable."

[57] 42 C.F.R. § 34.7 (1970). *See* note 51 *supra.*

[58] *E.g.*, class A: Insanity, chronic brain syndrome associated with cerebral arteriosclerosis with psychotic reaction. If the impairment is physical in nature, class B: Osteoarthritis of the spine, senility, chronic brain syndrome associated with senile brain disease. *See* PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 4d.

[59] This exception is to be construed to apply to "acute brain syndromes resulting from poison, systemic infection, exhaustion, or malnutrition." PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 4d.

fied class B, the examiner still does not make the crucial decision of whether the person's mental condition will affect his ability to earn a living. "Determination of whether a condition may affect the alien's ability to earn a living is a function of consular and immigration officials."[60] Thus, the person most acquainted with the alien's mental processes is not permitted to make this rudimentary determination. Secondly, while the examiner has very little latitude between class A and B, he cannot even consider class C, or conditions of minor significance which should be described in any medical report but do not affect admissibility.[61]

The classification system, therefore, has no provision for certifying mild mental conditions, but instead opts for an all or nothing approach.[62] This seems entirely unrealistic, because practically everyone exhibits varying degrees of neurotic symptoms, which may come under one of the broad mental illness exclusions.[63] Since class C is supposedly used for noting conditions which are connected with class A or B conditions in a minor way,[64] an examiner should be permitted to utilize it when diagnosing an alien's mental health.[65] This proposal for greater discretion, of course, is contingent upon permitting a full evaluation of neurotic behavior, including whether it might "dominate or seriously interfere with an individual's social adjustment."[66]

Another difficulty with this classification system is that the correlation between psychiatric and legal terminology, while admittedly nebulous, is too inflexible. Section B of the Mental Diseases and Defects Chapter of the Manual sets out the "types of certificates

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[60] PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 2e.

[61] *Id.*, ch. 10, ¶ 1.

[62] *E.g.*, "[i]f the psychoneurosis is not certifiable in class A, *it is not certifiable at all.*" PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 10e (emphasis added).

[63] M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 29 (1952).

[64] PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 10, ¶ 1c.

[65] Minor mental conditions ought to be reported under class C, despite the lack of effect on admissability, since they may have some relationship to class A or B conditions which might develop after an alien has been admitted or naturalized. A medical record of the mild condition at time of entry could aid in treatment and rehabilitation. This is not meant to raise the *in terrorem* argument that a mild neurosis or personality disorder may lead to more serious mental illness, thus justifying exclusion of all such people to avoid the possibility. Society should not view minor deviations from the norms of mental health with blind fear. Instead, by certifying mild mental conditions which seemingly do not affect one's daily life, we might be able to measure mental health in a dynamic segment of our society on the basis of those who develop more serious mental problems and are later institutionalized.

The benefits of such a statistical survey would be significant, as well as possible isolation of important symptoms in the development of mental illness.

[66] M. GUTTMACHER & H. WEIHOFEN, *supra* note 59, at 30.

that should be considered in each diagnostic condition."[67] The "should be" is somewhat misleading, since there is flat correlation of either certifying under one of the mental illness exclusions and thus class A or certifying as class B for physical causes or not certifying at all.[68] Since the decision as to admissibility under class B is made by either consular or immigration authorities, the medical examiner is only given the power to reject by certifying class A or to permit all minor mental conditions to slip by, perhaps noting them in the applicant's medical record and perhaps not, through non-certification. Because of his expertise in mental health, the

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[67] PUBLIC HEALTH SERVICE MANUAL, *supra* note 29, ch. 6, ¶ 11.

[68] *Id.* at 10.

Correlation scheme by alphabetical letter:

A — When narcotics are used, certify as narcotic drug addiction. When drugs other than narcotics are used, certify only for any excludable underlying mental disorder.

B — Certify as mental defect unless criteria for insanity . . . are present.

C — Certify as [mental retardation].

D — Do not certify unless condition becomes chronic, in which case certify as mental defect, insanity, or chronic alcoholism, as appropriate.

E — When chronic alcoholism is present, certify as such unless severe enough to be certified as insanity.

F — Certify as mental defect or insanity, if criteria are present; otherwise class B.

G — Certify as epilepsy if idiopathic, as insanity or mental defect if criteria are present.

H — Certify as psychopathic personality.

I — Certify as mental defect if condition meets criteria for severity outlined in paragraph 10 of this chapter; otherwise consider as a noncertifiable condition.

J — Certify as epilepsy if idiopathic. If due to some organic changes in the brain, certify for any mental disorder if severe enough; otherwise certify class B for the physical causes.

K — Do not certify.

L — These conditions are certifiable as class B. They usually severely impair a person's ability to earn a living. They should be judged independently for criteria for mental defect or insanity.

EXAMPLES OF SPECIFIC MENTAL ILLNESSES AND THEIR CORRESPONDING ALPHABETICAL SYMBOL:

B — Schizophrenic reaction, hebephrenic type.

C — Chronic Brain Syndrome associated with Mongolism.

D — Acute Brain Syndrome associated with systemic infection. Specify infection.

F — Chronic Brain Syndrome associated with central nervous system syphilis. Meningoencephalitic.

G — Acute Brain Syndrome associated with convulsive disorder. (Indicate manifestation by supplementary term.)

H — Sociopathic personality disturbance: antisocial reaction.

I — Psychoneurotic reaction: obsessive compulsion reaction.

J — Chronic Brain Syndrome associated with congenital spastic paraplegia.

K — Transient situational personality disturbance: neurotic traits.

L — Psychophysiologic respiratory reaction. (Indicate manifestation by supplementary term.)

medical examiner should be able to decide whether to certify under class A or B or class B or C.[69]

While medical examiners should be given more discretion in the classification process, the antithetical argument that control of aliens who enter the United States should remain under the specific scope of immigration law and authorities is well taken.[70] Discretion should be limited, however, by adopting clear mental illness exclusions, not in legal language, but in psychiatric terms that can be readily utilized by the examiner.[71] Congress must decide the issue

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[69] Class B is intended to "be issued with respect to an alien who has a physical defect, disease, or disability." 42 C.F.R. § 34.8 (1970). Thus only organic mental illnesses such as brain syndromes, epilepsy, and psychopathic disorders are included in the *Public Health Service Manual*. *Supra* note 29. This classification is now outmoded since other forms of mental illness may be considered class B as a result of recent developments in psychiatry which have blurred the organic-functional distinction. By definition, "the functional subgroup is composed of those people who suffer from an emotional disorder for which no definite medical, biochemical, or neurological basis has as yet been found." Rubin, *Psychiatric Illness*, in READINGS IN LAW AND PSYCHIATRY 46 (1968). However, a growing number of psychiatrists feel "there is evidence for constitutional or organic factors in these illnesses, though the evidence as yet is inconclusive." *Id.* at 47. Class B, therefore, should be considered an open category in which a medical examiner could place most mental illnesses on the basis of recent evidence. *See, e.g.*, Rubin, *Id.* at 46-47 (mental retardation); MEDICAL ASPECTS OF RETARDATION (C. Carter ed. 1965) (mental retardation); BIOCHEMICAL FACTORS IN ALCOHOLISM (R. Maickel ed. 1967) (alcoholism); AMERICAN MEDICAL ASSOCIATION, MANUAL ON ALCOHOLISM (1967) (alcoholism); D. WOOLEY, THE BIOCHEMICAL BASES OF PSYCHOSES (1962) (psychoses); DRUG DEPENDENCE (R. Harris, W. McIsaac & C. Schuster ed. 1970); BROSTER, VINES, ET AL, THE ADRENAL CORTEX AND INTERSEXUALITY (1938) (physiological); Berlin & Gillide, *The XYY Chromosome Defense*, in THE RIGHT TO TREATMENT 199 (D. Burris ed. 1969) (genetic).

It would appear that there are sufficient "physical" or "organic" qualities about many mental illnesses that justify class B treatment and the medical examiner should have the discretion to do so.

[70] *See* S. REP. NO. 352, 64th Cong., 2d Sess. 5 (1933).

[71] Potential mental illness exclusions should be considered in terms of class A or B or class B or C with classification under the discretion of the medical examiner. Since class B may or may not be excluded, this gives the medical examiner some leeway.

A recommended breakdown of the various types of mental illnesses would be according to general psychiatric terms followed by specific clinical terms. *E.g.*,

GROUP I: CLASS A OR B

1. *Psychotic Disorders*

Involuntary melancholia reaction. Manic depressive reaction (manic, depressive, or circular type).

Psychotic depressive reaction.

Schizophrenic reaction (simple, hebephrenic, catatonic, paranoid, acute undifferentiated, chronic undifferentiated, schizo-affective, childhood, or residual type).

Paranoid reaction (paranoia or involutional paraphrenia).

[Further breakdown excluding clinical terminology would be as follows.]

2. *Sexual Deviations.*
3. *Narcotic Drug Addiction.*
4. *Chronic Alcoholism.*
5. *Brain Syndromes.*

of how specific psychiatric exclusion terms should be but hopefully new terms would be more detailed than psychoses, neuroses, and personality disorders, which would not improve existing law.[72]

Another major inconsistency with mental illness exclusions in United States immigration law is that recognition of the advances that psychiatry has made in treatment and rehabilitation has not been fully postulated. The first very limited acknowledgement was given in 1965 by the addition of sec. 1182(g).[73] This section granted the Attorney General authority to admit any alien who has one of the prescribed "family relationships"[74] and who is mentally retarded or has had a previous attack of insanity, after consultation with the Surgeon General of the United States Public Health Service and compliance with any conditions, including the posting of bond.[75] An alien who would otherwise be excludable because of a previous attack of insanity must be found by the Public Health Service to have been free of such illness for a "sufficient" time to "demonstrate recovery."[76] Obviously, the scope of these provisions is limited to alleviating the hardships of family separation. The tenor of the provision would seem to indicate that a "family relationship" can be relied on when a probable future relapse takes place. Thus, only the slightest support is given to the concept of treatment and rehabilitation.

A FINAL APPRAISAL

The manner of reporting mental illness exclusions under United States immigration procedure should be reconsidered and thoroughly revised.[77] Conclusions reported should be based on demon-

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6. *Mental Retardation.*
7. *Psychophysiologic Disorders.*

GROUP II: CLASS B OR C

1. *Neurotic Disorders.*
2. *Personality Disorders.*
3. *Transient Situational Disorders.*

For clinical terminology, see DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 33.

[72] The use of general psychiatric terms has already been widely criticized. *E.g.*, Bowman & Rose, *Criticism of the Terms Psychosis, Psychoneurosis, and Neurosis*, 108 AM. J. PSYCHIATRY 161 (1951); Deitholm, *The Fallacy of the Concept Psychosis*, in CURRENT PROBLEMS IN PSYCHIATRIC DISORDERS 24 (1953).

[73] 8 U.S.C. § 1182(g) (Supp. IV, 1969).

[74] *Id.* The alien must be either the spouse, unmarried son or daughter, minor adopted child, or parent of a citizen or lawful permanent resident.

[75] *Id.*

[76] *Id.*

[77] PRESIDENT'S COMMISSION ON IMMIGRATION & NATURALIZATION, *supra* note 51, at XV.

strable medical facts in accordance with standard psychiatric terms and practice.[78] General legal terms describing mental illness are as useless as general psychiatric terms and, in addition, tend to confuse any detailed diagnostic term.[79] Accordingly, the terms "insanity," "psychopatic personality," and "mental defect" should be replaced,[80] while "mentally retarded," "sexual deviation," "narcotic drug addicts," and "chronic alcoholics" should be retained as appropriate psychiatric terms. [81] If the medical examination of aliens is to constitute a proper step in a legal procedure which may be read and clearly understood by all, then mental illness exclusions should be specifically stated in the most accurate diagnostic terms which psychiatry presently possesses.

Secondly, medical examiners should be given the discretion to decide whether a class B condition will affect an alien's ability to earn a living. The medical examiner would seem to be the logical authority to do this, since he can best evaluate the results of measures used in mental testing in relation to social adjustment. This should not infringe on the powers and duties of the State Department and the Immigration Service, respecting the admission of aliens to the United States, in view of the safeguards inherent in the procedure. An alien first undergoes medical examination when he files his visa application forms abroad at an American Consulate. At a United States port of entry, an alien encounters the Immigration Service and is again subject to medical examination.

> The visa which he has been granted by the Consul abroad has not conferred upon him the right to enter the United States; it has given him only the right to request admission from the inspection officers of the Immigration Service. [This procedure] thus reserves a double-check on the admission of aliens to permanent residence in the United States. The alien has not only the burden of proof

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78 The law cannot call on psychiatry for unscientific absolutes, for certainty rarely exists in human affairs. But it can be called on for knowledge, searching insights, and creative planning in the affairs of our society. The need of law and society is not for control by but for maximum contribution from this science, as well as from other natural and social sciences.
J. POLIER, THE RULE OF LAW AND THE ROLE OF PSYCHIATRY 9 (1968).

79 THE MENTALLY DISABLED AND THE LAW 3-4 (F. Lindman & D. McIntyre ed. 1961).

80 Senator Edward M. Kennedy introduced a bill to amend the Immigration and Nationality Act recommending deletion of the term "mental defect." S. 3202, 91st Cong., 1st Sess. (1969). *See Hearings on S. 3202 Before the Subcomm. of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

81 *See* note 71 *supra* & accompanying text.

> to establish his eligibiliy for a visa but also to prove his eligibility for admission when arriving in the United States.[82]

Third, a medical examiner should be able to decide whether to classify an alien's mental condition as class A or B or class B or C. Class A would remain mandatorily excludable. Class B would remain a gray area in which an alien may or may not be excluded. The examining physician would be able to make a recommendation as to whether an alien should be admissible, but the final decision would rest with consular or immigration authorities. This utilization of class B would provide the medical examiner with some quantum of discretion. Class C should also be utilized by the medical examiner to note mild mental conditions, that are not so serious as to possibly jeopardize admission, yet should be recorded for possible future reference.

Finally, the waiver of excludability of sec. 1182(g) of the Immigration and Nationality Act should be extended not only to those aliens with "family relationships," but to all those who can show that they have undergone treatment and are completely rehabilitated.[83]

> An alien's past . . . even if it be mental illness, should remain buried, if the alien is no longer afflicted by it. This would be in conformity with accepted notions of reasonableness, which would likewise eliminate ex post facto provisions, prescribe a fair statute of limitations, and remove arbitrary standards from our immigration statutes.[84]

Allowing a waiver of excludability to those who can show a medical history of treatment and complete rehabilitation would hardly be opening the flood gates, since the alien still must sustain the burden of proving recovery.[85] Great advances have been made in diagnosing and treating the mentally ill and United States immigration law should be updated to recognize this fact.[86] In view of our present

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82 Wildes, *Obtaining Permanent Residence for Aliens*, in PRACTISING LAW INSTITUTE, IMMIGRATION & NATURALIZATION 23, 28 (1968).

83 Wasserman, *The Universal Ideal of Justice and Our Immigration Laws*, 34 NOTRE DAME LAWYER 1, 10 (1959).

84 *Id.*

85 8 U.S.C. § 1182(g) (Supp. IV, 1969).

> Aliens "whom the Surgeon General finds to have been free of such mental illness for a period of time sufficient in light of such history to demonstrate recovery" would be eligible for a visa.

86 *See, e.g.*, L. KALINSKY & H. HIGGINS, PHARMACOLOGICAL, CONVULSIVE AND OTHER SOMATIC TREATMENTS IN PSYCHIATRY (1969); D. KLEIN & J. DAVIS, DIAGNOSIS AND DRUG TREATMENT OF PSYCHIATRIC DISORDERS (1969); R. KOEGLER & N. BRILL, TREATMENT OF PSYCHIATRIC OUTPATIENTS (1967); J. ONDER, THE MANUAL OF PSYCHIATRIC TELEVISION: THEORY, PRACTICE, AND IMAGINATION (1970); P. POLATIN, A GUIDE TO TREATMENT IN PSYCHIATRY (1966); PSYCHIATRIC

immigration law, in which entering aliens uniformly bear the burden of proof to establish their admissibility under the general qualitative restrictions,[87] plus their task of establishing eligibility for preferential treatment within numerical restrictions or their classification outside such situations,[88] it seems that aliens who have the desire to become United States citizens will cope with an already complicated procedure and that they should be given every opportunity to prove that they meet reasonable and clear conditions for admission.

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RESEARCH IN OUR CHANGING WORLD (1969); VIDEOTAPE TECHNIQUES IN PSYCHIATRIC TRAINING AND TREATMENT (M. Berger ed. 1970); L. WALBERG, THE TECHNIQUE OF PSYCHOTHERAPY (2d ed. 1967).

[87] Appleman, *The New Immigration Act*, 52 A.B.A.J. 717, 719 (1966).

[88] *Id.* at 717.