Journal of Contemporary Health Law & Policy (1985-2015)

Volume 9 | Issue 1 Article 27

1993

Health Based Exclusion Grounds in United States Immigration Policy: Homosexuals, HIV Infection and the Medical Examination of Aliens

Lyn G. Shoop

HEALTH BASED EXCLUSION GROUNDS IN UNITED STATES IMMIGRATION POLICY: HOMOSEXUALS, HIV INFECTION AND THE MEDICAL EXAMINATION OF ALIENS

> "All of our people all over the country—except the pure blooded Indians—are immigrants or descendants of immigrants, including even those who came over here on the Mayflower."[1]

The 1990 Immigration Act[2] formally removed homosexuality from its longstanding position on the list of health-based exclusion grounds in United States immigration policy.[3] Since the early 1900s when health-based exclusion grounds were introduced, a long history of excluding homosexuals has persisted.[4] While the 1990 Congress clearly intended to remove the homosexual exclusion, public support for this controversial new policy is tenuous. As the HIV/AIDS pandemic[5] spreads out of control, prejudice against homosexuals runs deeper than ever in American society. Human Immunodeficiency Virus (HIV) is a recent addition to the list of dangerous contagious diseases for which aliens may be excluded from the United States.[6] Compelling social and economic grounds support its inclusion. The nexus between HIV and homosexuality, however, raises questions as to the immigration status of homosexuals and other persons seeking entry into the United States who, although not infected, are at a high risk of contracting HIV.[7] Although the exclusion of HIV-infected aliens may be a reasonable means of combating the spread of HIV within the United States, it must not be used as a rationale to exclude individuals who may be at risk of con-

1. JOHN BARTLETT, FAMILIAR QUOTATIONS 78 (Emily Morison Beck et al. eds., 15th ed. 1980)(quoting a 1944 campaign speech by Theodore Roosevelt).

2. Immigration Act of 1990 § 101, 8 U.S.C. § 1151 (1990).

3. *Id.* § 101(a)(13).

4. *See infra* notes 52-86 and accompanying text.

5. AIDS may be referred to as a "pandemic" because it is in fact a global disease. Nancy E. Allin, *The AIDS Pandemic: International Travel and Immigration Restrictions and the World Health Organization's Response*, 28 VA. J. INT'L L. 1043, 1043-44 (1987).

6. In 1987, HIV was added to the list of dangerous, contagious diseases for which an alien is excludable from the United States. 42 C.F.R. pt. 34. For a brief review of the events leading up to the addition of HIV to list of exclusionary diseases, *see infra* notes 91-93 and accompanying text.

7. For example, the erroneous categorization of Haitians as a community at high risk of contracting HIV fueled the public opposition to granting would-be Haitian immigrants asylum in the United States. *See infra* notes 167-74 and accompanying text.

tracting HIV. The medical examination of aliens must be tailored to meet the 1990 Immigration Act's objective of preventing the exclusion of homosexuals.

Section I of this Note examines the factors influencing United States immigration policy as it relates to homosexuals. Section II provides background information on United States immigration policy, including the origins of the power to exclude aliens from entry into the United States and the allocation of this power within the federal government. Section II also focuses on the procedures by which aliens are excluded for health-related reasons. Section III explores both the historic exclusion of homosexuals from entry into the United States and the repudiation of this discriminatory policy in the 1990 Immigration Act.[8] After the rational bases for this policy are discussed, this Note concludes that the policy is rational in light of the overburdened United States public health care system. Section IV criticizes, as unreasonably subjective, recent revisions to the medical examination procedure that grant examining physicians broad discretion to designate an alien excludable upon a finding of a "physical abnormality."[9]

I. UNITED STATES IMMIGRATION POLICY

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[10]

The United States Constitution does not expressly grant Congress the power to control immigration;[11] however, the Supreme Court has recognized and upheld Congress' implicit power to exclude foreigners from this country.[12] In *Chae Chan Ping v. United States*, infamously referred to as the *Chinese Exclusion Case*,[13] Justice Field, writing for a unanimous Supreme Court, stated, "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its

8. Immigration Act of 1990 § 101(a)(13).

9. Medical Examination of Aliens, 42 C.F.R. § 34.2(a)(4) (1991). The term "excludable" encompasses both the denial of entry into the United States and deportation from the United States at some time subsequent to lawful or unlawful entry. Immigration Act of 1990 § 241(a)(1)(A).

10. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

11. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 1 (2d ed. 1991).

12. Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889).

13. *Id.*

own territory to that extent is an incident of every independent nation."[14]

Congress first exercised the power to deny a person entry[15] into this country when it designated classes of aliens[16] to be excluded from the United States in the Act of March 3, 1875.[17] The Act prohibited the entry of certain convicted criminals and prostitutes.[18] Included in the historical list of aliens excluded on health-related grounds were "idiots," "imbeciles," "feeble-minded persons," "epileptics," "insane persons," persons afflicted with tuberculosis or a "loathsome or dangerous contagious disease," and persons who were diagnosed as "physically or mentally defective" by an examining physician.[19] Over the years, this list of ostensibly health-related exclusion grounds has been routinely modified to meet prevailing medical and moral doctrines.[20]

The three units of the federal government with principal authority over immigration matters are the Department of Justice, the Department of State, and the Department of Health and Human Services. The Attorney General

---

14. *Id.*

15. The term "entry" means the coming of an alien into the United States from a foreign place or from an outlying possession, whether voluntary or otherwise. Immigration Act of 1990 § 101(a)(13).

16. The term "alien" refers to any person who is not a United States citizen or national. *Id.*

17. Act of Mar. 3, 1875, 18 Stat. 477 (1875)(repealed 1974).

18. COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 100TH CONG., 2D SESS., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 6 (Comm. Print 1988) (on file with *The Journal of Contemporary Health Law And Policy*) [hereinafter COMMITTEE REPORT].

19. Act of February 5, 1917, 39 Stat. 874, 875 (repealed 1952).

20. The current health-related grounds for exclusion are contained in § 212(a)(1) of the Immigration Act of 1990, which outlines the categories of aliens who are ineligible to receive visas and who are, therefore, excludable from the United States:

> (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,
> (iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be drug abuser or addict . . . .

Immigration Act of 1990 § 212(a)(1).

has primary authority over immigration matters within the Department of Justice, delegating many duties to the Immigration and Naturalization Service (INS).[21] The President appoints a Commissioner to head the INS, and the Attorney General grants the Commissioner regulatory authority to administer and enforce all immigration laws.[22] The Department of State, headed by the Secretary of State, has the authority to administer and enforce the provisions of the Immigration and Nationality Act (INA).[23] The Department of Health and Human Services is the arm of the federal government that issues rules and guidelines for immigration officials, and that implements the health-related immigration policies.[24]

A medical examination is required for all aliens who apply for permanent residence in the United States.[25] Although tourists and other nonimmigrants[26] are not examined routinely, they may be examined on a case-by-case basis as required by a consular authority.[27] The Public Health Service (PHS), a division of the Department of Health and Human Services (HHS), is authorized by statute to implement immigration laws regarding the medical examination of aliens.[28] Headed by the Surgeon General,[29] the PHS promulgates rules, regulations,[30] and guidelines governing medical examinations and their processes.[31]

Physicians designated by the consular offices of the Department of State conduct the medical examination of aliens abroad.[32] Pursuant to a written agreement, the physicians perform the examinations in accordance with the regulations issued by the PHS.[33] Physicians appointed by the Department of State examine arriving aliens who were not examined in their home coun-

21. 8 U.S.C. § 1103(a) (1988).

22. 8 U.S.C. § 1103(b).

23. 8 U.S.C. § 1104(a). Specifically, the Department of State directs diplomatic and consular officials in their duties and functions, except those relating to the granting or refusal of visas. Denise M. Druhot, *Immigration Laws Excluding Aliens on the Basis of Health: A Reassessment After AIDS*, 7 J. LEGAL MED. 85, 93 (1986).

24. 8 U.S.C. § 1224.

25. 42 C.F.R. § 34.1 (1991).

26. Generally, a nonimmigrant is an alien who seeks entry into the United States for a specific purpose that may be accomplished during a temporary stay. ALEINIKOFF & MARTIN, *supra* note 11, at 215-16.

27. 42 C.F.R. § 34.3.

28. 8 U.S.C. § 1224.

29. ALEINIKOFF & MARTIN, *supra* note 11, at 118.

30. *See* 42 C.F.R. pt. 34.

31. *Id.*; *see also* Druhot, *supra* note 23, at 95 (citing UNITED STATES PUBLIC HEALTH SERVICE GUIDELINES FOR MEDICAL EXAMINATION OF ALIENS (1984)).

32. 42 C.F.R. § 34.2(e).

33. 42 C.F.R. § 34.3.

try.[34] These examining physicians may consider only those matters deemed necessary to reach a conclusion about the presence or absence of a physical or mental abnormality, disease or disability.[35] Subsequent to a finding that any such condition exists, a medical certificate is issued[36] that serves as conclusive proof that the alien is excludable for health reasons.[37] Although the alien has the right, at his own expense, to appeal his medical diagnosis to a board of medical officers of the PHS,[38] the medical examiner's decision is not subject to judicial review.[39] Courts that have addressed the legality of

---

34. *Id.*

35. 42 C.F.R. § 34.3(a)(4).

36. 42 C.F.R. § 34.4. The following guidelines govern the medical classification of aliens by examining physicians:

> *Class A medical notifications.* (1) . . .
>
> (b) The medical examiner shall report his/her findings to the consular offices of the INS by Class A medical notification . . . if an alien is found to have:
>
> (i) A communicable disease of public health significance;
>
> (ii)(A) 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
>
> (B) A history of a physical or mental disorder and 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 lead to other harmful behavior;
>
> (iii) Drug abuse or addiction . . . .
>
> (c) *Class B medical notifications.* (1) If an alien is found to have a physical or mental abnormality, disease, or disability serious in degree or permanent in nature amounting to a substantial departure from normal well-being, the medical examiner shall report his/her findings to the consular or INS officer by Class B medical notification which lists the specific conditions found by the medical examiner. Provided, however, that a Class B medical notification shall in no case be issued with respect to an alien having only mental shortcomings due to ignorance, or suffering only from a condition attributable to remediable physical causes or of a temporary nature, caused by a toxin, medically prescribed drug, or disease.
>
> (2) The medical notification shall state the nature and extent of the abnormality, the degree to which the alien is incapable of normal physical activity, and the extent to which the condition is remediable. The medical examiner shall indicate the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization.
>
> (d) *Other medical notifications.* If as a result of the medical examination, the medical examiner does not find a Class A or Class B condition in an alien, the medical examiner shall so indicate on the medical notification form and shall report his findings to the consular or INS officer.

42 C.F.R. § 34.4(b)-(d).

37. In re Longstaff, 716 F.2d 1439, 1447-48, *cert. denied*, 467 U.S. 1219 (1984).

38. 8 U.S.C. § 1224.

39. In the past, varying interpretations of the language contained in statutes requiring medical examinations were challenged in the judicial arena when the congressional intent was not wholly apparent. *See infra* notes 56-86 and accompanying text. 42 C.F.R. § 34.8 clearly states, however, that, where an alien challenges his or her own exclusion based upon a Class A

this process have generally found that medical certificates alone may serve as conclusive proof of excludability.[40] Such decisions were based on the rationale that medical questions should be resolved by medical experts outside of the judicial arena.[41] Further, the Supreme Court upheld the general principle that aliens who have yet to enter the United States do not have rights protected by the Constitution and may be subject to rules that might be unjust if applied to persons present in the United States.[42]

II. THE EXCLUSION OF HOMOSEXUAL ALIENS

A. The Immigration Act of 1990

In 1973, the American Psychiatric Association (APA) removed homosexuality from its list of medical conditions.[43] The Surgeon General subsequently declared that the PHS would no longer issue medical certificates for homosexuals.[44] He reasoned that, because the APA and other mental health associations no longer considered homosexuality a mental disorder, homosexuality should not be a basis for PHS medical examiners to issue certificates of exclusion.[45] The predominant concern within the PHS was that homosexuality cannot be determined through a medical exam.[46] Nonetheless, the law excluding entry to homosexuals was not repealed until the enactment of the 1990 Immigration Act, which removed "sexual deviance"[47] from the list of excludable categories.[48]

In September 1990, the Judiciary Committee strongly advocated a policy change regarding the exclusion of homosexuals,[49] pointing out that the law supporting this exclusion was out of step with then-current notions of privacy and personal dignity, and was in such a "confused state" that its application necessarily "result[ed] in unfairness to some visa applicants."[50] The Committee believed that repealing the "sexual deviance" exclusion was nec-

---

or Class B notification, the only inquiry shall be a reexamination of the alien by a board of medical examiners convened by the Director of the Centers for Disease Control. 42 C.F.R. § 34.8.

40. In re Longstaff, 716 F.2d 1439, 1448 *cert. denied*, 467 U.S. 1219 (1984).

41. *Id.*

42. Fiallo v. Bell, 430 U.S. 787, 792 (1977).

43. H.R. REP. NO. 723, 101st Cong., 2d Sess., pt. 1, at 56 (1988).

44. *Id.*

45. COMMITTEE REPORT, *supra* note 18, at 81.

46. Robert Poznanski, *The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service's Authority Over Medical Examinations*, 17 U. MICH. J.L. REF. 331, 341 (1984).

47. *See infra* notes 47-51 and accompanying text.

48. Immigration Act of 1990 § 212(a).

49. H.R. REP. NO. 723, at 56.

50. *Id.*

essary to eliminate unfairness and to make it clear that the United States did not view personal decisions about sexuality as dangerous to other people.[51]

B. Evolution of the Exclusion

The enactment of the 1990 Immigration Act was a sizable legal step for the homosexual community. The long and ardent history of judicial and political opposition to the admission of homosexuals into the United States,[52] however, represents a well-rooted barrier to homosexual equality. The removal of the phrase "sexual deviance" represents the culmination of many years of debate surrounding the exclusion of homosexual immigrants.[53] An examination of the history of the exclusion of homosexuals is necessary to better understand the controversy and the relative significance of the removal of the phrase "sexual deviance."

Historically, health-related exclusion grounds were grouped into categories of physical disease, mental defect or disability, and drug abuse or similar threatening or harmful behavior.[54] The exclusion of homosexuals has been, by far, the most controversial application of the mental defect and disability exclusion.[55] The first serious controversy over the exclusion of homosexual aliens arose after Congress enacted the Immigration and Nationality Act (INA) in 1952.[56] Under the INA, one of the classes of aliens excludable on health-related grounds was individuals possessing a "psychopathic personality."[57] Whether the phrase "psychopathic personality" encompassed homosexuals was at issue in *Quiroz v. Neelly*[58] and *Boutilier v. Immigration and*

51. *Id.*

52. *See* COMMITTEE REPORT, *supra* note 18, at 80-83.

53. *Id.*

54. Federal health laws designed to prevent the introduction of infectious or contagious diseases into the United States were first implemented in 1879. Druhot, *supra* note 23, at 88-89. Contagious diseases then included cholera, yellow fever, plague, small pox, typhus fever, and relapsing fever. *Id.* Changes during the next decade added mentally disabled persons to the list and medical inspections of aliens entering the United States began in 1981. *Id.* In 1903, epileptics were added, and by 1917 the following classes of persons were included in the vast list of aliens excluded from entering the United States on medical grounds: "idiots," "imbeciles," "feeble-minded persons," "epileptics," "insane persons," "persons who had one or more attacks of insanity at any time previously," "persons of constitutional psychopathic inferiority," "persons with chronic alcoholism," "tuberculosis or [any] loathsome or dangerous or contagious disease," and those certified as "defective, such defect being of a nature which may affect the ability of such alien to earn a living." *Id.*

55. COMMITTEE REPORT, *supra* note 18, at 80.

56. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 (1990)).

57. *Id.* § 1182(a)(4).

58. 291 F.2d 906 (5th Cir. 1961).

Nationalization Service.[59] In *Quiroz*, the first major case challenging the statutory use of the phrase "psychopathic personality," the Fifth Circuit Court of Appeals concluded that the phrase represented a valid health ground upon which to issue an order of deportation for a homosexual, regardless of the medical profession's interpretation of its meaning.[60] The court declared, "Whatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts."[61]

A few years later, the Supreme Court directly addressed this issue for the first time in *Boutilier*.[62] In 1963, Clive Boutilier, a Canadian national and lawful permanent resident[63] of the United States since 1955, applied for naturalization as a United States citizen. Boutilier stated in affidavits that prior to his entry into the United States in 1955, and subsequently thereafter, he engaged in homosexual activities.[64] Based upon the affidavits, the examining physician issued a medical certificate stating that Boutilier was afflicted with a condition of "psychopathic personality, sexual deviate" at the time of his entry and was thus excludable.[65] The Supreme Court upheld Congress' intent to exclude homosexuals stating, "the legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals . . . ."[66] The Court determined that Congress used the phrase "psychopathic personality" as a catch-all phrase to exclude "homosexuals and other sexual perverts"[67] from the United States rather than as a clinical term in assessing the alien's mentality.[68]

In 1965, Congress clarified its intent to exclude homosexuals by adding the phrase "sexual deviation" to the list of health-related exclusion grounds.[69] The House and Senate Reports on this issue specifically state

59. 387 U.S. 118 (1967).

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

61. *Id.*

62. *Boutilier*, 387 U.S. at 118.

63. After admission, immigrants are referred to as lawful permanent residents until they obtain citizenship through naturalization. As long as they abide by the terms of their admission, lawful permanent residents may remain in the United States as long as they wish, regardless of whether they ever actually apply for citizenship. ALEINIKOFF & MARTIN, *supra* note 11, at 119.

64. Boutilier v. I.N.S., 387 U.S. 118, 120-21 (1967).

65. *Id.* at 120.

66. *Id.*

67. *Id.* at 122.

68. *Id.*

69. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1182(a)(4)).

that the terminology of the statute was changed from "psychopathic personality" to "sexual deviance" in order expressly to resolve any doubt as to Congress' original intent to exclude homosexuals.[70] Both the Senate and House Reports state that the phrase "psychopathic personality" was used previously because the PHS said that it encompassed homosexuals, but that when the term was found to be too vague, it was changed explicitly to include homosexuals.[71]

A more recent controversy focused on the issue of whether a homosexual alien could be excluded without the issuance of a medical certificate by an examining physician.[72] The 1983 decisions in *Hill v. Immigration and Naturalization Service*[73] and *In re Longstaff*[74] left the Courts of Appeals for the Ninth and Fifth Circuits split on this issue. In the former case, Hill, a nonimmigrant[75] visitor from the United Kingdom, made an unsolicited statement to an immigration inspector that he was a homosexual.[76] Without obtaining a formal medical certificate for sexual deviation or mental defect, the immigration official notified Hill that he was excludable because of his homosexuality.[77] The Ninth Circuit held that a homosexual alien could not be excluded on medical grounds when a medical certificate had not been issued.[78] This decision was based upon a finding that the intent of Congress was to require the medical examination and certification of all aliens who were to be excluded on health-related grounds.[79]

In *In re Longstaff*, Longstaff, a native and citizen of the United Kingdom was admitted to the United States as a permanent lawful resident in 1965.[80] When he applied for naturalization as a United States citizen fifteen years later, his application was denied because he had engaged in homosexual activities.[81] The Fifth Circuit ordered that he be deported because "at the time of entry [he] was within one or more of the classes of aliens excludable by the

70. COMMITTEE REPORT, *supra* note 18, at 77 (quoting H.R. REP. NO. 745, 89th Cong., 1st Sess. 16 (1965), and S. REP. NO. 748, 89th Cong., 1st Sess. 19 (1965)).

71. *Id.*

72. Medical examination is a prerequisite for an alien seeking entry into the United States. A Class A Certificate for homosexuality is the basis upon which homosexual aliens have been denied entry in the past. *See supra* notes 25-42 and accompanying text.

73. 714 F.2d 1470 (9th Cir. 1983).

74. In re Longstaff, 716 F.2d 1439, *cert. denied*, 467 U.S. 1219 (1984).

75. For a definition of nonimmigrant *see supra* note 26.

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

77. *Id.*

78. *Id.* at 1481.

79. *Id.* at 1480.

80. *Longstaff*, 716 F.2d at 1440.

81. *Id.*

law existing at the time of such entry."[82] The Fifth Circuit further held that Longstaff was excludable without the issuance of a medical certificate.[83] The court determined that, although the issuance of a medical certificate serves as conclusive proof of the grounds for exclusion based on sexual deviance, the absence of a medical certificate is not conclusive proof of nonexcludability for sexual deviance.[84]

The need for a Supreme Court resolution of the medical certification issue was eliminated by the enactment of the 1990 Immigration Act, which removed "sexual deviance" from the list of health-related exclusion grounds.[85] Although the longstanding prohibition was stricken from the Act, much concern remains as to the fate of homosexuals seeking entry to the United States.

The greatest concern involves the current United States policy to exclude aliens who test positive for HIV infection. The rationale underlying this policy, combined with the subjective standard granted to examining physicians, may be applied indiscriminately to exclude aliens, such as homosexuals, who are not infected but who are at high risk of contracting the virus.[86]

III. HEALTH-RELATED EXCLUSIONS: HIV AND "ANY OTHER PHYSICAL ABNORMALITY"

A. Human Immunodeficiency Virus and United States Immigration Policy

Human Immunodeficiency Virus is an international crisis and its effects are felt in every realm of society. The virus progressively weakens the body's immune system, rendering its victims susceptible to diseases that the immune systems of healthy people can normally resist.[87] In the final stage of HIV infection, the victim's immune system virtually collapses, and the vic-

82. *Id.* at 1441-42 (citing 8 U.S.C. § 1251(a)(1) (1976)). An alien who enters the United States under circumstances that, had they been known to the immigration officials granting him entry, would have made him excludable, is considered excludable as of the time of entry. *Id.* If these circumstances are later discovered, as it was in this case with the discovery of Longstaff's homosexuality during the naturalization process, the alien becomes deportable because he was technically "excludable" at the time of entry. *Id.*

83. *Id.* at 1450.

84. *Id.* at 1448.

85. Immigration Act of 1990 § 212(a).

86. Presumably, this is a concern only relevant to homosexual men, as lesbians have not been found to be at any greater risk of infection than the general public. Nancy J. Eckhardt, Note, *The Impact of AIDS on Immigration Law: Unresolved Issues*, 14 BROOK. J. INT'L L. 223, 233 (1988).

87. Jeffrey Laurence, *The Immune System in AIDS*, SCI. AM. Dec. 1984, at 84, 84-88. This Note distinguishes between HIV and AIDS in quoting medical and economic statistics. A reference to HIV represents initial infection with minimal or no symptoms, while a reference

tim inevitably dies from one or more of the diseases he or she may have contracted.[88] This final stage is referred to as Acquired Immunodeficiency Syndrome (AIDS).[89] As AIDS spread nationally and internationally, the federal government grew concerned about the impact that immigration might have on the spread of HIV and the increased incidence of AIDS.[90]

In June 1987, HHS, upon the recommendations of the PHS and the Centers for Disease Control (CDC), amended the regulations governing the medical examination of aliens, adding AIDS to the list of dangerous contagious diseases.[91] The regulations were again amended in August 1987 to substitute HIV infection for AIDS and to expand the scope of the medical examination to include mandatory blood testing for HIV infection of any alien seeking permanent residence in the Unites States.[92] In substituting HIV infection for AIDS, HHS relied upon the PHS's recognition that an HIV-infected alien may not exhibit the visible symptoms associated with AIDS but may, nonetheless, be capable of transmitting the disease.[93]

AIDS activists, doubtful that the current immigration regulations are a rational and effective means of significantly preventing the spread of AIDS, strongly oppose the addition of HIV to the list of dangerous contagious diseases.[94] In a report commissioned by then President Reagan, former Surgeon General C. Everett Koop argued that the most effective methods for

---

to AIDS represents the stage of deteriorating medical health that leads to the victim's death. The epidemic is referred to generally herein as HIV/AIDS.

88. *Id.*

89. *Id.*

90. Eckhardt, *supra* note 86, at 233.

91. Medical Examination of Aliens (AIDS), 52 Fed. Reg. 21,532 (1987)(codified at 42 C.F.R. pt. 34). If the alien is determined to be HIV-infected, this addition makes an alien excludable under § 212(a) of The Immigration Act of 1990.

92. Medical Examination of Aliens, 52 Fed. Reg. 32,540 (1987)(codified at 42 C.F.R. pt. 34). The Guidelines issued by the PHS in 1984 included only a physical examination, serologic testing for syphilis, and a chest X-ray for tuberculosis. Druhot, *supra* note 23, at 95-97 (citing UNITED STATES PUBLIC HEALTH SERVICE GUIDELINES FOR MEDICAL EXAMINATION OF ALIENS).

93. 52 Fed. Reg. 21,607 (1987). Blood testing for HIV infection is required as a part of the medical examination for the following, provided the alien seeking entry is 15 years of age or older:

> (1) Applicants for immigrant visas;
>
> (2) Students, exchange visitors, and other applicants for a nonimmigrant visa who are required by a consular authority to have a medical examination;
>
> (3) Applicants outside the United States who apply for refugee status;
>
> (4) Applicants in the United States who apply for adjustment of status under the immigration statute and regulations . . . .

42 C.F.R. § 34.3 (1991).

94. Eckhardt, *supra* note 86, at 237.

combating the disease are education and counseling.[95] Opponents of the current regulations maintain that mandatory testing for HIV infection does not comport with the Surgeon General's recommendations.[96] In addition, they criticize the federal government for its sluggishness and lack of organization in instituting educational and counseling services to slow the spread of HIV.[97] These critics further contend that the policy behind HIV testing is inconsistent because it applies only to those aliens seeking permanent residence and not to tourist visitors or individuals under fifteen years of age.[98] The World Health Organization (WHO) also strongly opposes HIV testing of immigrants and international travelers. Instead, the WHO advocates international cooperation in disease control rather than national isolation and self-protectionism.[99]

Despite criticism, there is vast support in the United States for mandatory HIV testing of all prospective immigrants and exclusion of all those who test positive. Forty-thousand comments opposing Surgeon General Lewis Sullivan's proposal to strike HIV infection from the exclusionary list of diseases were received by HHS.[100] Proponents of HIV testing argue that United States immigration policy excluding HIV-infected aliens is not inconsistent with the concomitant need for programs to prevent the spread of HIV. The enormity of the HIV/AIDS crisis alone is a compelling reason to take any effective means to combat the spread of the disease[101] and the exclusion of

95. AIDS PRINCIPLES, PRACTICES & POLITICS 194, 194-97 (Inge B. Coreless & Mary Pittman-Lindeman eds., 1988).

96. Eckhardt, *supra* note 86, at 236-37. The Brookings Institution reported in 1988 that HIV testing of potential immigrants to date had detected only six HIV-positive persons. Matea Falco, *Introduction* to TOWARD A NATIONAL POLICY ON DRUG AND AIDS TESTING (Matea Falco & Warren I. Cikins, eds., 1989).

97. Philip M. Boffey, *Health Experts Fault U.S. on Response to AIDS*, N.Y. TIMES, Aug. 13, 1987, at A20.

98. 42 C.F.R. § 34.3.

99. The World Health Organization (WHO) was founded in 1946 to establish a centralized and organized international agency to promote cooperation in the world health arena. Inherent in the WHO's purpose is the aim of preventing the spread of disease. Allin, *supra* note 5, at 1048-49.

100. Malcolm Gladwell, *Reversal of AIDS Exclusion Is Said to Be Shelved: 4 Year Bar to Immigration Criticized as Discriminatory and Medically Unjustified*, WASH. POST, May 25, 1991, at A6.

101. Court E. Golumbic, Comment, *Closing the Open Door: The Impact of the Human Immunodeficiency Virus Exclusion on the Legalization Program of the Immigration Reform and Control Act of 1986*, 15 YALE J. INT'L L. 162, 176-77 (1990). An additional concern is the recent discovery that HIV can depress tuberculin reactions in testing for tuberculosis, before signs and symptoms of HIV infection develop. Therefore, an individual with tuberculosis may not be diagnosed if not also tested for HIV infection. This is alarming because tuberculosis is highly contagious and is also a disease for which aliens may be denied entry into the United States. 40 HHS MORBIDITY AND MORTALITY WKLY. REP. 29 (1991); *see infra* note 143.

HIV-infected aliens is consistent with United States immigration policy to combat the proliferation of disease.[102] Representative William E. Dannemeyer of California summarized the argument stating, "it simply is not in the interests of this nation to allow into this country as permanent immigrants people who have a noncurable disease. Our health care system is already inundated trying to keep up with the health needs of American people who are here as citizens."[103]

In keeping with the United States' interest in maintaining acceptable, humanitarian immigration policies, the 1990 Immigration Act contains various waiver provisions that are specifically applicable to aliens who are excludable for health reasons.[104] Section 245A of the INA states that the Attorney General may waive any provision of the health-related exclusion grounds in section 212(a)[105] "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[106] Thus, aliens seeking asylum[107] or safe haven[108] may be eligible for a waiver of the HIV exclusion.[109] Additionally, when it is in the best interest of the public to grant entry to certain aliens, such as educators or doctors, they too are covered by the waiver provision.

Although Congress originally intended these waivers to be granted liberally,[110] the INS subsequently limited the Attorney General's authority to grant waivers by establishing additional standards that must be met to waive the HIV exclusion:[111]

---

102. For a list of the dangerous contagious diseases for which an alien may be excluded from the United States *see infra* note 143.

103. Gladwell, *supra* note 100, at A6.

104. Immigration Act of 1990 § 245A(2)(B)(1).

105. *See supra* note 20.

106. Immigration Act of 1990 § 245A(2)(B)(i).

107. Refugees may seek asylum in the United States if they are able to document a well-formed fear of persecution based upon: race, religion, nationality, political opinions, or membership in a particular social group, based on such ties as ethnicity, outlook on life, opinions, cultural affinity, education, linguistic origin, or familiar background. Carlos Ortiz-Miranda, Lecture on Refugees and U.S. Immigration Policy (Oct. 31, 1991) (Carlos Ortiz-Miranda is an attorney practicing immigration law in the District of Columbia and is a professor of immigration law at the Catholic University of America, Columbus School of Law).

108. "Safe haven" is a term for aliens who are granted Temporary Protected Status. Immigration Act of 1990 § 244(a). Section 244(a) of Immigration Act of 1990 establishes a general safe haven law that gives the Attorney General the authority to grant entry into the United States to nationals of designated countries who are otherwise admissible for a period of 18 months. *Id.* This period of safe haven may be extended by the Attorney General. *Id.* The alien, however, has no option for permanent residence and admission may be granted solely at the discretion of the Attorney General. Immigration Act of 1990 § 244(a).

109. Golumbic, *supra* note 101, at 178.

110. *Id.* (citing H.R. REP. No. 115, 98th Cong., 1st Sess., pt. 1, at 69-70 (1983)).

111. *Id.*

> [The] discretionary authority of the Attorney General will not be used unless the applicant can establish that (1) the danger to the public health of the United States created by the alien's admission is minimal, (2) the possibility of the spread of the infection created by the alien's admission to the United States is minimal, and (3) there will be no cost incurred by any level of government agency of the United States without prior consent of that agency.[112]

In light of such stringent requirements, waivers will be rare and available only to individuals who can pay for their medical expenses in advance.

The rampant spread of HIV is truly sobering. Documented incidents of HIV are increasing exponentially and it is estimated that by 1992 over 365,000 cases of the disease will be documented in the United States.[113] As of December 31, 1991, the cumulative number of deaths associated with AIDS in the United States was 133,232.[114] The first 100,000 cases of AIDS were reported during an eight-year period; the second 100,000 cases were reported during a two-year period.[115]

In the past, aliens infected with dangerous, contagious diseases were excluded primarily to protect our nation's health. Although national health is unquestionably the principal concern of the HIV exclusion policy, the financial burden that the HIV/AIDS pandemic imposes on its victims and on society in general is also a major concern. In 1988, the CDC approximated lifetime hospital costs at $147,000 per AIDS patient, and lifetime indirect costs at almost three times this figure.[116] Later estimates generally proved the CDC's figures to be somewhat inflated, and in 1988 estimates were reported between $70,000 and $90,000.[117] Although more difficult to estimate and project, the additional costs of nonpersonal services such as research, blood screening services, and local community and government based sup-

---

112. *Id.*

113. *New AIDS Case Reported Every 4 Minutes in U.S.*, WASH. POST, June 14, 1988, at A14. The WHO estimates that by the year 2000, 40 million people may be infected with HIV and more than 90% of these persons will reside in developing countries Latin America, the Caribbean, Africa, South and Southeast Asia. 40:22 HHS MORBIDITY AND MORTALITY WKLY. REP. 1 (1991).

114. 41 HHS MORBIDITY & MORTALITY WKLY. REP. 28 (1992).

115. *Id.* at 29.

116. Estimates of the direct costs of lifetime hospital care and indirect costs of economic losses from disability and premature death were based upon the first 10,000 AIDS cases reported in the United States. Anne A. Scitovsky & Dorothy P. Rice, *The Cost of AIDS Care, in* AIDS: A HEALTH CARE MANAGEMENT RESPONSE 57, 57-58 (Kevin D. Blanchet ed., 1988).

117. Anne A. Scitovsky, *Estimates of the Direct and Indirect Costs of AIDS in the United States, in* THE GLOBAL IMPACT OF AIDS 137, 139 (Alan F. Fleming et al., eds., 1988). Major factors determining lifetime medical costs are the number of days an AIDS patient spends in the hospital and the cost of treatment where the patient resides. *Id.*

port organizations are substantial.[118] The most recent projections of lifetime medical costs alone range from $23,000 to $168,000.[119]

Scientists believe that unless a cure is discovered all HIV-infected persons will eventually become fatally ill with AIDS.[120] The HIV incubation period can be as long as fifteen years, with an average of about 7.8 years for homosexual men.[121] Once a person develops AIDS, however, life expectancy rarely exceeds two years.[122] The only drug approved for use against AIDS in the United States is AZT, which is effective in prolonging life and restoring some improved health to those who can tolerate its toxic side effects.[123] The cost of treatment with AZT ranges from $10,000 to $20,000 per year per patient.[124]

The AIDS crisis is especially alarming given the rapid spread of the virus among the poorest communities who are least likely to be covered by medical insurance.[125] Although AIDS in the United States originally affected a generally affluent population of young, Caucasian, homosexual males in a handful of urban areas, the virus is now spreading to inner-city populations of poor, black and Hispanic, heterosexual men, women, and children.[126] In fact, a disproportionate number of cases is reported among blacks and Hispanics.[127] Among white adults in the United States, the incidence of AIDS cases is 189 per million persons; for blacks it is 578 per million persons; and for Hispanics it is 564 per million.[128] Black and Hispanic women in the United States represent seventy-one percent of all women with AIDS,[129] although they represent only nineteen percent of the total population of persons with AIDS.[130] Black and Hispanic persons also die sooner from AIDS

118. Scitovsky & Rice, *supra* note 116, at 71-72.

119. Raymond C. O'Brien, *Discrimination: The Difference With AIDS*, 6 J. CONTEMP. HEALTH L. & POL'Y 93, 118 (1990).

120. Michael Specter, *AIDS Virus Likely Fatal to All Infected*, WASH. POST, June 3, 1988, at A1.

121. *Id.*

122. June E. Osborn, M.D., *Medical Considerations*, *in* TOWARD A NATIONAL POLICY ON DRUG AND AIDS TESTING 26, 35 (Matea Falco & Warren I. Cikins, eds., 1989).

123. *Id.* Although it does not prevent HIV-infected individuals from developing AIDS, AZT has prolonged the lives of some AIDS patients by preventing the virus from multiplying. Specter, *supra* note 115, at A4.

124. O'Brien, *supra* note 119, at 118 (quoting NATIONAL RESEARCH COUNCIL, A COMMON DESTINY BLACKS AND AMERICAN SOCIETY 421 (Jaynes & Williams, eds. 1989)).

125. Raymond C. O'Brien, *A Legislative Initiative: The Ryan White Comprehensive AIDS Resources Emergency Act of 1990*, 7 J. CONTEMP. HEALTH L. & POL'Y 183 (1991).

126. *Id.*

127. 41 HHS MORBIDITY & MORTALITY WKLY. REP. 29 (1992).

128. RENEE SABATIER, BLAMING OTHERS: PREJUDICE, RACE AND WORLDWIDE AIDS 7 (1988).

129. *Id.*

130. O'Brien, *supra* note 125, at 187 n.18.

than white people.[131] They have an average post-diagnosis lifespan of nineteen weeks, whereas Caucasians average a two-year post-diagnosis lifespan.[132]

AIDS has become rampant in the poorest neighborhoods of New York City, Newark, Baltimore, Washington, D.C., and Miami, where social problems and the lack of quality medical care rival Third World conditions.[133] New York, New Jersey, Florida, Texas, and California, the states that house the highest rates of HIV infection, currently absorb almost seventy percent of the immigration population in the United States.[134] Viewed collectively, these factors spell disaster for metropolitan, immigrant communities.

The decrease in the rate of infection among the wealthier and more politically vocal homosexual community and the rapid spread of the disease among the poorest communities may result in less private funding, thus placing an even greater financial burden on public funds.[135] Limits exist on the degree to which the private health insurance industry can afford to financially support those insureds who contract HIV, while still providing adequate support for the balance of their policy holders.[136] Some suggest that people who are not insured before infection with HIV should be precluded from acquiring coverage based upon their preexisting condition.[137] In addition, over thirty-five million Americans are now without private health insurance.[138] As the need for health care services for HIV-infected persons grows even more rapidly than was originally anticipated, the increasing diversity among the victims of the HIV/AIDS epidemic will further stress the public health-care systems' ability to provide preventative and therapeutic services.[139] Medical care facilities in our inner cities are currently so

131. SABATIER, supra note 128 at 19.

132. *Id.* Although speculative, it is entirely possible that this differential results from delayed diagnosis of those individuals residing in depressed, urban areas where access to medical facilities is significantly restricted.

133. Philip Elmer-Dewitt, *How Safe is Sex?*, TIME, Nov. 25, 1991, at 72, 73.

134. B. Meredith Burke, *A Statue With Limitations*, NEWSWEEK, Feb. 24, 1991, at 10. The rates of HIV infection in these states are well above the national average. As of October 25, 1991, New York reported 44.8 AIDS cases per 100,000 persons; New Jersey reported 29.7 per 100,000; Florida found 37.8 per 100,000; Texas documented 18.0 per 100,000; and California reported 24.8 per 100,000. 40 HHS MORBIDITY & MORTALITY WKLY. REP. 735 (1991).

135. O'Brien, *supra* note 125, at 195-96.

136. Russel Iuculano, *Private Sector Concerns*, *in* TOWARD A NATIONAL POLICY ON DRUG AND HIV TESTING 18, 48-49 (Matea Falco & Warren I. Cikins, eds., 1989).

137. *Id.*

138. A.E. Benjamin & Philip R. Lee, *Public Policy, Federalism, and AIDS*, *in* AIDS PRINCIPLES, PRACTICES, AND POLITICS 489, 490-91 (Inge B. Coreless & Mary Pittman-Lindeman, eds., 1989).

139. 40 HHS MORBIDITY & MORTALITY WKLY. REP. 363 (1991).

overburdened that it is difficult to imagine how they will support the growing numbers of HIV victims.

The denial of entry into the United States of HIV-infected persons, whether seeking improved medical treatment, family reunification, or refuge from intolerable conditions, may seem irrational and inhumane. This result is unavoidable, however, because HIV itself is irrational and inhumane. Although HIV infection is nondiscriminatory, the United States cannot afford to be indiscriminate in its determination of whether and when to accept the responsibility of sheltering and providing care for its victims. Our health care system cannot support the incidence of HIV infection already existing in this country. To further obligate a system that is already overburdened is illogical.

B. The Revised Medical Examination of Aliens

The changes to the health-related exclusion grounds in the 1990 Act reflect a decision to move away from specific mental and physical grounds in favor of more generic terms.[140] The revisions require that HHS establish specific criteria to ensure that the PHS physicians and consular officials clearly understand the foundations upon which the exclusions are based.[141] Although the Act does not change the screening process, its terms are intentionally more general, thus adapting to medical advances and allowing PHS physicians maximum flexibility.[142]

To establish consistency in light of the increased flexibility in the health-related exclusion grounds of the 1990 Act, HHS proposed a revision in the categories of dangerous, contagious diseases designated for exclusion purposes.[143] A Notice of Proposed Rulemaking was published on May 31, 1991 suggesting that infectious tuberculosis be designated the only communicable disease of public health significance for exclusion purposes.[144] Conse-

140. H.R. REP. NO. 723, at 52.
141. *Id.* at 53.
142. *Id.* at 52-53.
143. The dangerous contagious diseases currently listed at 42 C.F.R. § 34.2(b) are:
(1) Chancroid.
(2) Gonorrhea.
(3) Granuloma inguinale.
(4) Human immunodeficiency virus (HIV) infection.
(5) Leprosy, infectious.
(6) Lymphogranuloma venereum.
(7) Syphilis, infectious stage.
(8) Tuberculosis, active.
42 C.F.R. § 34.2(b) (1991).
144. Medical Examination of Aliens; Interim Rule, 56 Fed. Reg. 25,000 (1991)(to be codified at 42 C.F.R. Pt. 34)(proposed May 31, 1991).

quently, the Surgeon General was inundated with commentaries from approximately 40,000 sources[145] and, due to the overwhelmingly negative response,[146] HHS decided not to alter the categories of dangerous contagious diseases in the new rule that was adopted on October 1, 1991.[147] The standards upon which medical examiners issue a medical notification, however, were altered significantly.[148] The new rule is at least twice as long as the former Rule,[149] is increasingly complex, and leaves room for considerable discretion on the part of the examining physicians.[150]

Two sections of the new rule are of specific concern in light of their generality, subjectiveness, and the introduction of potential hospitalization or institutionalization as a basis for health-related exclusion. Section 34.4(b) requires medical examiners to give notification of "a physical or mental disorder, and behavior associated with the disorder that may pose . . . a threat to the property, safety, or welfare of the aliens or others."[151] The examiner is further required to report on the likelihood that the alien will require extensive medical care or institutionalization.[152] HHS and the PHS have specifically stated that they do not consider homosexuality a disease or a mental disorder. Moreover, the medical definition of a disorder is a disturbance of a body's function or systems resulting from a genetic failure in development or from factors originating outside of the body, such as a poison, infection or disease.[153] Therefore, it appears clear that an examining physician appointed by the PHS would not classify a homosexual as excludable under this category. Section 34.4(c), however, provides an entirely different standard for the examining physician to assess excludability. That section requires medical examiners to report any "physical or mental abnormality, disease, or disability serious in degree or permanent in nature amounting to a substantial departure from normal well-being."[154] Again, the examiner is required to report on the likelihood that, because of the abnormality, the

145. *Id.*

146. Gladwell, *supra* note 100, at A6.

147. For the dangerous, contaigous diseases listed in 42 C.F.R. § 34.2(b) (1991), *see supra* note 143.

148. One expert theorizes that the Interim Rule reflects a negative reaction by the Surgeon General to the attempt by numerous factions to sway policy via the use of the medical examination. Rather than yield to a more simple and objective, yet less inclusive exam, the Surgeon General made the rule even longer, increasingly subjective, and more complex. Carlos Ortiz-Miranda, Lecture on the Exclusion Grounds in U.S. Immigration Policy (Sept. 19, 1991).

149. Interim Rule, 56 Fed. Reg. 25,000; 42 C.F.R. pt. 32.

150. 42 C.F.R. pt. 32.

151. 42 C.F.R. § 34.4(b).

152. *Id.*

153. STEDMAN'S MEDICAL DICTIONARY 456, 549, 1197 (25th ed. 1990).

154. 42 C.F.R. § 34.4(c).

alien will require extensive medical care or institutionalization.[155] Here, the word "abnormality" is excessively subjective, conferring upon the examining physician a degree of personal interpretation that Congress could not have intended in the 1990 Immigration Act.[156] The medical definition of abnormality is not normal, differing in any way from the usual state, structure, condition or rule.[157] The legal definition, which is surprisingly similar, is having the tendency to be not normal, not average, not typical, not usual, or irregular.[158] Viewed together, these two sections clearly equip medical examiners with an objective as well as a subjective standard. The term "abnormality," however, establishes a standard that is ill-defined and ambiguous,[159] and is, therefore, prone to conflicting application. The potential for arbitrary and differing treatment of aliens is too great and may lead to the unauthorized "fishing for diseases."[160]

Although the 1990 Immigration Act removed the explicit reference to homosexuality from the specific exclusion grounds,[161] the new subjective standard, as applied, may result in the continued exclusion of homosexuals. Employing the standard of "any other physical abnormality," HHS seeks to identify those aliens who are likely to require medical treatment or institutionalization in the future because of their condition. In light of the HIV/AIDS pandemic and the classification of homosexuals as a group generally at high risk of contracting HIV,[162] this standard may operate to exclude homosexuals based upon the general fear that they may contract HIV in the future. The requirement that the medical examiner evaluate the likelihood

155. *Id.*

156. *See supra* note 49-51 and accompanying text.

157. STEDMAN'S MEDICAL DICTIONARY 3 (25th ed. 1990).

158. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 3 (3d ed. 1986).

159. Letter from Mark E. Chopko & Carlos Ortiz-Miranda, Office of General Counsel, United States Catholic Conference, to Charles R. McCance, Director, Center for Disease Control 3 (Aug. 2, 1991)[hereinafter LETTER](on file with *The Journal of Contemporary Health Law & Policy*).

160. *Id.* at 4. The Interim Rule, however, gives physicians some discretion not to automatically exclude aliens based upon a finding of a mental or physical disorder. Interim Rule, 56 Fed. Reg. at 25,001. The Rule states that the mere presence of such an "illness alone does not determine whether the alien poses a significant risk to the general population of the United States." *Id.* Under the new provisions, the alien is excludable for a mental or physical disorder only if there is a history of harmful behavior. *Id.* The Interim Rule is substantially more lenient than the old regulation which made the alien automatically excludable. *Id.*

161. Immigration Act of 1990 § 212(a)(1).

162. The high risk groups for AIDS are considered to be homosexual men, bisexual men, intravenous drug users, and the sexual partners of the members of these groups. Eckhardt, *supra* note 86, at 233 (citing Alan Cooper, Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, Re: Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex or Infection with the AIDS Virus at 2, 3 (June 20, 1986)).

that the alien may need extensive medical treatment in the future closely resembles the recognized grounds for excluding an alien who, in the opinion of the consular officer or the Attorney General, is likely at any time to become a public charge,[163] as set forth section 212(a)(4) of the 1990 Immigration Act.[164] Commenting on the proposed Interim Rule, the United States Catholic Conference pointed out that section 212(a) vests statutory authority over the public charge exclusion ground with the Justice Department and the Department of State, not with HHS.[165] Further, because the public charge ground is in itself ambiguous and without legal definition, this expansion of its application into the medical arena is inherently problematic.[166]

The discriminatory treatment that would-be Haitian immigrants have received dispels any notion that the potential for the exclusion of homosexuals as a result of the ambiguity in the new rule is remote. In the Fall of 1991, the United States was propelled into a panic state when thousands of Haitians attempted to enter American territories, having fled for the United States by boat after the first democratically elected president in the country's history was overthrown in a violent military coup. The United States government refused to grant the Haitians save haven[167] and denied their claims for asylum.[168] Although the government's actions mirrored public sentiment, which vehemently opposed granting entry to the Haitians, such actions were wholly inconsistent with longstanding United States policy to accept individuals fleeing from violent communist regimes in favor of democracy. Because our government accepted Cubans, Vietnamese, Russians, and Cambodians during communist rule in their countries, our refusal to admit the Haitians is questionable.[169]

In 1982, the United States Centers for Disease Control (CDC), in a unique categorization by nationality, singled out Haitians as a "high-risk group for AIDS" because thirty of the first thirty-four Haitians diagnosed with AIDS denied homosexual activity or intravenous drug use.[170] By 1985, the serious

163. *See* LETTER, *supra* note 159, at 4.

164. Immigration Act of 1990 § 212(a)(4).

165. LETTER, *supra* note 159, at 4.

166. *Id.*

167. For a discussion of phrase "safe haven" *see supra* note 108.

168. For a discussion of the term "asylum" *see supra* note 107.

169. Undeniably, economics continues to be a principal factor in our government's refusal to admit Haitian refugees, as economic hardship is not a ground upon which an alien may base a successful asylum claim. *See supra* note 107. As Haiti is one of the poorest nations in the world, economic hardship refusal provides an obvious ground for mass refusal to the many would-be Haitian immigrants, some of whom could potentially maintain legitimate asylum claims.

170. THE PANOS INST., AIDS AND THE THIRD WORLD 69 (1989)[hereinafter THE PANOS INSTITUTE]; *see* SABATIER, *supra* note 128.

error of this classification became apparent. American researchers had failed to consider the Haitian attitudes and societal condemnation of homosexuality and drug use.[171] In fact, the infected men were not contracting AIDS from some unknown source, but were lying to researchers about homosexuality and drug use. Although the CDC withdrew Haitians from the list of high-risk groups in 1985, it refused to admit any error in the original classification.[172] Moreover, the American populous had already accepted that Haitians were specially at risk of HIV infection,[173] although, in fact, HIV infection occurs with less frequency in Haiti than in the United States. As of March 1988, Haiti reported a rate of 186 HIV infections per million persons, and the United States was reporting 234 HIV infections per million persons.[174] Haitians continue to be stigmatized and victimized by this error and even now are prevented from donating blood in the United States.[175] In the United States, where the tolerance for and acceptance of AIDS is low, the continued association of AIDS with the Haitian community arguably reinforced the impulse to reject potential immigrants from this impoverished country.

Although the United States has a history of commitment to individual liberties, it is not immune to incidents of crisis-born hysteria that erode civil liberties, especially where the minority group is not a part of the mainstream political community, such as was the case in the Haitian crisis.[176] Author Paul Joseph points out that hard times make bad civil liberties law.[177] For example, in times of public panic, government institutions charged with enforcing the limits on majority power will bow to mass pressure and fail to adequately protect minority rights.[178] Homosexuals are one of the least accepted minorities in America and, until HIV began affecting the heterosexual community, the treatment that HIV-infected homosexuals received was characterized by government apathy and neglect as well as a high level of irrational public fear, founded not upon demonstrated medical facts but upon fallacies and misconceptions.[179]

---

171. *See* SABATIER, *supra* note 128.

172. *Id.* at 70. Shortly after American researchers linked AIDS to Haitians, the number of American tourists travelling to Haiti dropped from 70,000 to 10,000 within one year. Previously, tourism had been Haiti's second largest source of income, directly and indirectly supporting 25,000 jobs. THE PANOS INST., *supra* note 170, at 87.

173. SABATIER, *supra* note 128, at 45.

174. *Id.* at 10.

175. THE PANOS INST., *supra* note 170, at 70.

176. Paul R. Joseph, 16 HUMAN RTS. Q. 15 (1989).

177. *Id.* at 17.

178. *Id.*

179. *Id.*

IV. CONCLUSION: THE NEW RULE, THE MEDICAL EXAMINATION, AIDS, AND HOMOSEXUAL ALIENS

Rules and regulations that make certain classes of persons excludable from the United States do not actually reduce the number of immigrants which come into the country, nor do they necessarily dissuade other aliens from seeking entry. When one alien is excluded on a health-related ground, there are literally millions of others waiting in the wings to take that spot.[180] The critical question, then, is whether the excluded alien has been excluded for a valid reason. In the context of the health-related exclusion grounds, determining whether the alien actually poses any medical threat to United States citizens and permanent residents is essential. The removal of "sexual deviance" from the list of health-based exclusion grounds in the 1990 Immigration Act reflects an attempt to achieve uniform application of the health-related standards for exclusion. The subjective standard in the new rule by which physicians determine for themselves whether an alien is likely to become a public charge, however, opens the door to confusion and potential disparate treatment.

HIV-infected aliens who lack the financial ability to support themselves pose a grave financial threat to the United States and a threat to our ability to care for those persons in the United States who are presently suffering from the disease. It is unquestionable that admitting such aliens obligates our government to care for them should they eventually become public charges. The public charge provision in the new rule, however, is too broadly drawn to ensure its limited application to HIV-infected aliens who pose a threat to the public. Essentially, medical examiners are granted a license to define for themselves what constitutes "any physical or mental abnormality, disease, or disability serious in degree or permanent in nature amounting to a departure from normal well-being."[181] The subjective determination that an alien is likely to become a public charge is one which may be founded upon innumerable bases and, as such, is a breeding ground for inconsistency and discriminatory abuse.

The vast potential for indiscriminate diagnoses is especially disturbing in light of the limited review available to aliens who have not yet entered United States territory. An alien outside of the United States does not enjoy the same constitutional rights to due process and equal protection as do

180. ALEINIKOFF & MARTIN, *supra* note 11, at 121. One method of obtaining entry into the United States is through the diversity program that established a lottery among the immediate relatives and certain family members of aliens currently residing in the United States. Although the lottery contains an annual ceiling of 700,000 immigrants for the years 1992-94, several million candidates are likely to apply each year. *Id.*

181. Interim Rule, 56 Fed. Reg. at 25,001.

United States citizens and permanent residents. The Supreme Court reaffirmed the general principle that aliens who have not made entry into the United States do not enjoy the protections of the United States Constitution.[182] Thus, an appeal from a medical certification is limited to a hearing before a board convened by the PHS at the expense of the alien, assuming he or she can afford such an appeal.[183]

Homosexuals are categorized as a high-risk group for HIV infection[184] and, as such, are constantly subject to the cruel wrath that is characteristic of those who fear HIV but who are poorly educated as to the facts surrounding its transmission. Although HIV infection cannot be passed through casual contact,[185] homosexuals, whether infected or not, are feared by the uneducated, avoided by the knowing, and ignored by the government. Ardent prejudice against homosexuals is evidenced daily in American society and the HIV/AIDS crisis fuels this prejudicial fire. The conclusion that such prejudice exists in all walks of our society is undeniable and, although we expect physicians to act upon medical impartiality rather than personal sentiment, it is unrealistic to believe that the judgment of physicians is never clouded by personal beliefs. As the HIV/AIDS crisis continues to veer out of control, the public charge provision in the new rule poses a very real threat to homosexual aliens. Personal bias, combined with the subjective determination that is required to be made by physicians in the medical examination of aliens, creates the opportunity for the inconsistent exclusion of suspected homosexuals. Potential for discrimination and subjective application leave not only homosexuals but also many other classes of immigrants vulnerable to unfair treatment.[186]

"The fate of aliens wishing to enter into, reside in, or become citizens of, the United States remains unsettled" and will continue to change with social and medical advances.[187] The citizens of the United States are free to engage in personal relationships in the privacy of their own homes, free from government meddling or interference. This standard, however, does not apply to those aliens who seek to become permanent residents and citizens of the United States. United States immigration policy must keep pace with the medical and scientific advances as well as with changes in social attitudes and beliefs about morality and sexual orientation. In addition, it is equally

182. Fiallo v. Bell, 430 U.S. 787, 792 (1977); Druhot, *supra* note 23, at 98.

183. 42 C.F.R. § 34.14 (1990); Interim Rule, 56 Fed. Reg. at 25,004 (1991).

184. Eckhardt, *supra* note 86, at 233.

185. AIDS can be transmitted only through direct blood-to-blood contact or through sexual activity. Gladwell, *supra* note 100, at A7.

186. For example, the law exempts refugees from the public charge exclusion ground but not from the health-related grounds. LETTER, *supra* note 159, at 4.

187. Poznanski, *supra* note 46, at 359.

important for the government and the public to be aware that HIV, by its very nature, is shrouded in unfairness and that sincere attempts to combat its proliferation should not be obscured by apparent inhumanity.

Lyn G. Shoop