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Kerry E. Voss

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Re-evaluating Alien Exclusion in Light of AIDS

The coveted and sought after privilege of immigrating to the United States has historically and, of necessity, been accompanied by the corresponding burden of reasonable restrictions the Attorney General of the United States has deemed appropriate. This comment examines the very topical subject of Acquired Immune Deficiency Syndrome (AIDS) as a bar to immigration to the United States. Since 1891 the United States has elected under its sovereign powers to reject the application for entry of those persons suffering from loathsome or contagious diseases. The United States has extended the already existing list to include the disease commonly known as AIDS. The logic of this addition to the list of diseases is patent and in the best interest of the United States and the world community. The rapid spread of the AIDS virus is well known and the need to limit, if not eliminate, its spread is uncontroverted. This comment examines the Attorney General's action and adds a perspective and insight which readers will find both informative and provocative.

Foreword by John Milo Bryant*

* Assistant Chief Immigration Judge, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, Falls Church, Virginia; B.A., Loyola University of Chicago, 1972; M.A., Loyola University of Chicago, 1973; J.D., George Mason University School of Law, 1977.

The views expressed herein are those of the author and not necessarily those of the Executive Office for Immigration Review or the Department of Justice.

The often vehement controversy over the disease known as AIDS . . . is about to spread to the Courtrooms.¹

I. Introduction

The most recent² statistical data available indicates that there are 31,834³ cases of Acquired Immune Deficiency Syndrome⁴ (AIDS) in the United States. Five states account for 72% of all AIDS cases nationwide: New York, California, Florida, Texas and New Jersey.⁵ Estimates of the number of Americans exposed to the AIDS virus range from 500,000 to 2,000,000.⁶ Two to three million Americans may become infected with the AIDS virus within the next five to ten years.⁷

The understanding of this complex disease and the accompanying legal ramifications are still in the inchoate stages. An emerging issue in international law is the effect the AIDS epidemic will have on immigration. Attorney General Edwin Meese has recently announced that the Immigration and Naturalization Service (INS) has developed an AIDS testing program to screen individuals requesting permanent status⁸ in the United States.⁹ This Final Rule¹⁰ amends the Medical Examination of Aliens regulations¹¹ to include AIDS as a dangerous, contagious disease.¹² Under the Rule, a positive test result bars the applicant from entering the country.¹³

Opponents to the Rule argue that the Meese proposal is overly broad. Caitlan Ryan, former president of the National Lesbian and Gay Health Foundation, has said that "[t]here should not be any blanket rule categorically excluding people with AIDS. The govern-

1. Appleson, *Litigation Imminent in AIDS Issue*, 5 NAT'L L.J. 3 (1983).

2. It is virtually impossible to give an up-to-date count of AIDS cases nationwide, since identification of AIDS victims is an on-going process. See generally Wallis, *AIDS: A Growing Threat*, TIME, Aug., 12, 1985 [hereinafter Wallis].

3. Sullivan, *New York State Paroles 50 Men Sick with AIDS*, N.Y. Times, Mar. 7, 1987, § 1, at 1, col. 2.

4. "Acquired Immune Deficiency Syndrome" [hereinafter "AIDS"].

5. See Sullivan, *supra* note 3, at 33. New York State is the frontrunner with 31% of the national total, or 9,891.

6. Adler, *The AIDS Conflict*, NEWSWEEK, Sept. 23, 1985, at 18. A February 1985 analysis of AIDS studies suggested that 4-19% of those individuals exposed to the virus will develop AIDS; 25% will develop AIDS-related complex. Bishop, *Thousands in U.S. Exposed to Virus Linked to AIDS*, WALL ST. J., Feb. 21, 1985, at 22, col. 3. Other estimates rate the likelihood of developing AIDS upon exposure to the virus as high as 40%. Boffey, *AIDS in the Future: Experts Say Deaths Will Climb Sharply*, N.Y. Times, Jan. 14, 1986, at C1, col. 3 [hereinafter Boffey, *AIDS in the Future*].

7. Boffey, *AIDS in the Future*, *supra* note 6.

8. See *infra* text accompanying note 122.

9. 52 Fed. Reg. 21,532 (1987) (to be codified at 42 C.F.R. § 34).

10. *Id.*

11. 42 C.F.R. § 34 *et. seq.* (1986).

12. See *infra* text accompanying notes 67-75.

13. See *supra* note 9.

ment should consider the reasons people come to the country on a case by case basis."¹⁴

This Comment will examine this new policy in relation to the traditional bases for exclusion of aliens. The difficulties attendant to such a rule will be discussed, as well as the necessity for strict enforcement of exclusionary principles.

II. History of the Rule

In 1986, Dr. Otis R. Bowen, Secretary of Health and Human Services, proposed the addition of AIDS to the exclusionary provisions for "dangerous, contagious diseases."¹⁵ Bowen considered it anomalous to have several forms of venereal disease listed as a basis for exclusion, yet omit a disease with the magnitude of AIDS.¹⁶

In April 1986, a Notice of Proposed Rulemaking was filed regarding medical examinations of aliens with AIDS.¹⁷ Thereafter, the Public Health Service (PHS) began formal proceedings to have the amendment added to the Immigration and Naturalization regulations.¹⁸ Comments and responses to the proposal were received from over one hundred individuals and organizations; the majority favored the exclusion of aliens with AIDS.¹⁹ Opponents to the proposal feared that high-risk groups for AIDS²⁰ might be subjected to discriminatory treatment by the INS through inappropriate referrals for medical examinations.²¹ Additionally, there was the fear that the proposal did not reflect the current state of medical knowledge regarding AIDS, thereby serving to perpetuate misinformation about the disease.²² Five commentators thought that similar action by other countries would essentially "gridlock" international travel.²³

Despite these objections, the proposal was accepted. The Final Rule cites AIDS as a dangerous, contagious disease, thereby denying an alien with AIDS entry into the United States, as provided under the Immigration and Nationality Act.²⁴ An examination of the traditional bases for alien exclusion supports the propriety of the Final Rule.

14. Pear, *U.S. to Pursue Proposal to Bar Aliens with AIDS*, N.Y. Times, Mar. 27, 1987, at A14, col. 1 [hereinafter Pear].

15. 51 Fed. Reg. 15,354 (1986) (to be codified at 42 C.F.R. § 34).

16. *Id.*

17. *Id.*

18. See Pear, *supra* note 14.

19. See *supra* note 9.

20. See *infra* note 88 and accompanying text.

21. See *supra* note 9.

22. *Id.*

23. *Id.*

24. 8 U.S.C. § 1182(a)(6) (1982).

III. The Exclusion of Aliens

A. Principles of Law

A practice that systematically denies certain groups of individuals the right of mobility²⁵ within the borders of foreign countries should be viewed with caution. However, immigration law is an area in which the American government traditionally has had virtually complete freedom.

A basic tenet of international law is that a sovereign nation has the prerogative to deny entrance²⁶ within its borders to any individual deemed a threat to that country's well-being.²⁷ Moreover, conditions regulating entrance are subject to the State's discretion.²⁸ An alien seeking entry into a foreign country is requesting that a privilege, rather than a right, be granted.²⁹ Therefore, he voluntarily curtails his rights and subjects himself to the laws and policies of that country.³⁰ The rationale behind this grant of seemingly unfettered power to a nation is the belief that the methods for protecting one's citizens and borders should be an individual assessment.

There is no provision in the United States Constitution specifically delineating among the three branches of government the power to regulate immigration.³¹ Nonetheless, judicial decisions have firmly established that, as an inherent part of national sovereignty, the federal government possesses plenary power in immigration matters.³² Measures intended to increase or decrease immigration, whether legal or not, are strictly within the province of the federal government.³³ The Supreme Court has held that the power to regulate immigration may be implied from those provisions of the Constitution governing the regulation of foreign commerce, declarations of war,

25. See generally G. HOUSEMAN, *THE RIGHT OF MOBILITY* (1979).

26. Immigration law has two methods of denying aliens residence in the United States: deportation and exclusion. Deportation occurs once an alien is already in the country; exclusion occurs when the alien is outside the country and seeking entry into the United States. *Landon v. Plasencia*, 459 U.S. 21, 25 (1982); see also *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

27. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 505 (1973).

28. *Id.* See also *Beltre v. Kiley*, 470 F. Supp. 87 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1285 (2d Cir. 1979) (right to establish entrance criteria a concomitant of plenary power).

29. See *Landon*, 459 U.S. at 32.

30. *Id.* However, once the alien has gained admission and begun establishing permanent residence, his constitutional status changes. *Marroquin-Manriquez v. INS*, 699 F.2d 129, 134 (3d Cir. 1983).

31. U.S. CONST. art. I, § 8, cl. 4 provides that Congress may establish a uniform Rule of Naturalization.

32. *Jean v. Nelson*, 711 F.2d 1455, 1465 (11th Cir. 1983) (citations omitted) (Congress and the Executive branch share power to regulate immigration).

33. *In re Alien Children Ed. Litigation*, 501 F. Supp. 544, 578 (S.D. Tex. 1980) (state statute whose goal was to slow down influx of illegal aliens was not based on a permissible state interest).

and treaty and naturalization powers.³⁴ Included among these is the broad power to determine which immigrants may enter.³⁵

Both the Executive and Legislative branches share the authority to regulate immigration, although an assumption exists that the Executive Branch will conform its action with congressional intent.³⁶ This authority is virtually unrestricted,³⁷ with the role of the judiciary limited to a determination of whether the legislature's procedures meet essential standards of fairness under a due process type of scrutiny.³⁸ Whereas a state must show a compelling governmental interest to sustain a law discriminating against non-citizens,³⁹ judicial review of federal enactments regarding alienage and immigration is "narrow."⁴⁰ There is simply no other area in which the congressional fiat holds such finality.⁴¹

B. *Examples of Exclusions*

The history of the exercise by Congress of its exclusionary power is expansive.⁴² Congress has engaged in periodic updating of the immigration laws to reflect more accurately the changes in societal conditions and mores. For example, in 1862, Congress prohibited the "Coolie Trade" by United States citizens in American vessels.⁴³ In 1875, Congress passed a statute barring prostitutes and criminals from entering the country.⁴⁴ In 1882, Congress enacted the first all-encompassing immigration act.⁴⁵ In 1947, a revamping of the immi-

34. *Chae Chan Ping v. U.S.*, 130 U.S. 581, 604 (1889) (The Chinese Exclusion Case); see generally C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 1.5(a) (1982) [hereinafter Gordon & Rosenfeld].

35. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (exclusion of aliens is a fundamental sovereign attribute).

36. *U.S. v. Frade*, 709 F.2d 1387, 1402 (11th Cir. 1983) (Executive power to exclude aliens does not include the power to enact general immigration laws by executive order).

37. *Frances v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (Congress may create different standards of admission for different groups of aliens).

38. See *Landon*, 459 U.S. at 34-5; see also *Fleurinor v. INS*, 585 F.2d 129, 133 (5th Cir. 1978) (citing *Henry v. INS*, 522 F.2d 130, 131 (5th Cir. 1977)).

39. *Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 43 (N.D. Ga. 1977) (federal government need not demonstrate compelling interest prior to exercising broad power of regulating immigration).

40. *Id.*

41. *Papakonstantinou v. Civiletti*, 496 F. Supp. 105, 109 (E.D.N.Y. 1980) (nowhere is legislative power of Congress more complete than in immigration matters).

42. See, *Fong Yue Ting v. U.S.*, 149 U.S. 698, 705 (1893) (right to exclude aliens is inalienable sovereign right); also *Galvan v. Press*, 347 U.S. 522, 530 (1954) (regulation of immigration is broad due to its effect on foreign relations and national security).

43. The Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (repealed 1974) prohibited citizens or residents of the United States from using vessels for the purpose of "procuring from any port or place the subjects of China, Japan, or of any other oriental country, known as 'coolies,' to be transported to any foreign port, or place, to be disposed of, or sold, or transferred, for any time, as servants or apprentices, or to be held to service or labor." 8 U.S.C. § 331 (1970).

44. 8 U.S.C. § 1182(9), (10), (12) (1982) (originally enacted as Act of Mar. 3, 1875, ch. 141, 18 Stat. 477).

45. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

gration laws⁴⁶ resulted in the Immigration and Nationality Act.⁴⁷ The Act continues to be refined even today.⁴⁸

Judicial precedent is also replete with examples of the Supreme Court's deference to Congress' interpretation and application of immigration law.⁴⁹ For example, the *Chinese Exclusion Case*⁵⁰ established for the first time that Congress had plenary power to exclude aliens. A Chinese laborer who had previously resided in the United States was denied re-entry into the country based upon a newly enacted federal statute that disallowed the entry of Chinese nationals.⁵¹ Although the new statute violated treaties between the United States and China, the Court upheld the exclusion as a valid exercise of Congressional power.

In *Nishimura Ekiu v. United States*,⁵² the petitioner contended that the procedures for denying admittance to aliens seeking entrance into the United States were unconstitutional.⁵³ The Act of 1891⁵⁴ excluded "all idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, [and] persons who [had] been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."⁵⁵ The Court held that the Act was constitutional and valid.⁵⁶

More recently, the Supreme Court has reaffirmed its view that the power to admit or exclude aliens is a sovereign prerogative. In *Fiallo v. Bell*⁵⁷ the Court reiterated its position that a government's exercise of its sovereign power to exclude aliens was largely immune from judicial control.⁵⁸ The Court refused to review the rationale

46. S. Res. 137, 80th Cong., 1st Sess., 93 CONG. REC. 7879, 10,352 (1947) (investigation of the immigration system); S. 3455, 81st Cong., 2d Sess. (1950) (bill accompanying the report).

47. H.R. 5678, 82nd Cong. 1st Sess. (1951) was introduced by Rep. Walter and passed by Congress on June 27, 1952 to become the Immigration and Nationality (McCarran-Walter) Act, ch. 2, 66 Stat. 166.

48. The Immigration Reform and Control Act, 8 U.S.C. § 1101 (1986).

49. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 283-4 (1976). The procedural requirements reviewed by the courts are found in *Johnson v. Shaughnessy*, 336 U.S. 806, 809 (1949).

50. *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889); see also *Yamatava v. Fisher*, 189 U.S. 86, 94 (1903) (The Japanese Immigration Case) (Congress may exclude aliens of a certain race who are paupers or likely to become a public charge).

51. The petitioner had secured a certificate of re-entry prior to leaving the United States. *Chae Chan Ping*, 130 U.S. at 582.

52. *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892).

53. For a more recent challenge to immigration procedures, see *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (excluded alien can not attack on constitutional grounds substantive provisions of immigration law).

54. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084; see generally, 8 U.S.C. § 1182 (1982).

55. *Id.*

56. See *Nishimura Ekiu*, 142 U.S. at 664.

57. *Fiallo v. Bell*, 430 U.S. 787 (1977).

58. *Id.* at 792 (citations omitted).

underlying the legislature's decision;⁵⁹ examination of legislative intent was deemed an unwarranted extension of judicial power.⁶⁰ However, some scholars believe that by excluding aliens from the country, the courts have not always acknowledged a limitation that an alien must pose a threat to national peace and security.⁶¹

IV. Screening Procedures

By statute, the INS is granted permission to detain aliens for observation and examination. Immigration law provides that:

[f]or the purposes of determining whether aliens . . . arriving at ports of the United States belong to any of the classes excluded . . . , by reason of being afflicted with any of the diseases or mental or physical defects or disabilities . . . set forth . . . such aliens shall be detained . . . for a sufficient time to enable the immigration office and medical offices to subject such aliens to observation and an examination sufficient to determine whether or not they belong to the excluded classes.⁶²

A. Health Exclusions

The first step in the process at the border is the medical examination.⁶³ The purpose is two-fold: to satisfy quarantine requirements and determine the alien's admissibility under INS exclusionary provisions.⁶⁴ Medical examiners are directed to consider only those issues relating to the physical and mental health of the applicant.⁶⁵ Moreover, the examination must comply with administrative regulations.⁶⁶

Since 1891, aliens have been denied entrance into the country if they are afflicted with a "dangerous, contagious disease."⁶⁷ The

59. In *Fiallo*, the special preference immigration status was at issue. 430 U.S. at 788-89.

60. See *Fiallo*, 430 U.S. at 799 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952)).

61. See Nafziger, *The General Admission of Aliens under International Law*, 77 AM. J. INT'L L. 804 (1983) [hereinafter Nafziger].

62. 8 U.S.C. § 1222 (1982).

63. See GORDON & ROSENFELD, *supra* note 34, at § 3.15.

64. *Id.*

65. 42 C.F.R. § 34.4(a) (1986). Aliens may be found excludable on the basis of health for the following conditions: mental retardation (8 U.S.C. § 1182(a)(1) (1982)); insanity (8 U.S.C. § 1182(a)(2), (3) (1982)); psychopathic personality, sexual deviation, or mental defect (8 U.S.C. § 1182(a)(4) (1982)); narcotic drug addiction or chronic alcoholism (8 U.S.C. § 1182(a)(5) (1982)); or afflictions with a dangerous, contagious disease (8 U.S.C. § 1182(a)(6) (1982)).

66. 8 U.S.C. § 1224 (1982).

67. 8 U.S.C. § 1182(a)(6) (1982) (originally enacted as Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1085). For cases dealing with health exclusions, see *Chung Fook v. White*, 264 U.S. 443 (1924) (contagious disease not specified); *U.S. v. Esperdy*, 277 F.2d 537 (2d Cir. 1960) (tuberculosis); *Zartarian v. Billings*, 204 U.S. 170 (1907) (trachoma); *U.S. v. Wiley*, 160 F.2d 92 (7th Cir. 1947) (gonorrhea); *Gee Shew Hong v. Nagle*, 18 F.2d 248 (9th Cir.

PHS, pursuant to statutory authority,⁶⁸ determines what constitutes a dangerous, contagious disease.⁶⁹ One scholar believes that the PHS's determination of the scope of this particular exclusion cannot be challenged if there is a rational basis for such a decision.⁷⁰

In 1986, the Public Health regulations⁷¹ listed seven diseases as a basis for excluding aliens for health reasons.⁷² The list included several forms of venereal disease,⁷³ infectious leprosy,⁷⁴ and active tuberculosis.⁷⁵ With the addition of AIDS to the category of "dangerous, contagious disease," aliens are now subject to an additional diagnostic exam.⁷⁶ When confronted with clinical signs of AIDS in an applicant, the medical examiner must make a diagnosis and report his findings to the consular or immigration officer.⁷⁷ The PHS will provide guidelines to medical examiners to ensure compliance with laws and regulations. These guidelines include the proper manner of eliciting a medical history, and evaluative techniques for assessing the presence of AIDS.⁷⁸

Certificates indicating the presence of AIDS or any other excludable condition in an alien, may issue only when the existence of the disease has been "clearly established."⁷⁹ However, detecting the AIDS disease will be somewhat more difficult than the diseases previously included in the category of contagious diseases. The following analysis of the AIDS disease reveals the nature of these difficulties.

B. *Acquired Immune Deficiency Syndrome*

AIDS is a viral⁸⁰ disease that causes a breakdown in the body's immune system. The virus inhibits the body's ability to resist disease by infecting white blood cells, which are an integral party of the

1927) (chlonorchiasis); U.S. v. Reimer, 25 F. Supp. 552 (S.D.N.Y. 1938) (ringworm).

68. 42 C.F.R. § 34 (1986).

69. *Id.* at § 34.2(b); see also 8 U.S.C. § 1182(a)(6) (1982).

70. Bogatin, *The Immigration and Nationality Act and the Exclusion of Homosexuals: Boutilier v. INS Revisited*, 5 IMMIG. & NATIONALITY L. REV. 95,121 (1981-2) [hereinafter Bogatin].

71. See *supra* note 68.

72. *Id.*

73. The diseases include: chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, and syphilis, infectious stage. 42 C.F.R. § 34.2(b)(1), (2), (3), (5), (6) (1986).

74. *Id.* at (b)(4).

75. *Id.* at (b)(7).

76. Applicants are already subject to a chest x-ray for identification of tuberculosis, and a serologic test for identification of syphilis. 42 C.F.R. § 34.4(a)(1). AIDS testing is now mandatory for certain applicants. See *infra* text accompanying notes 122-23; see also *infra* text accompanying notes 92-102.

77. See *supra* note 9.

78. *Id.*

79. 42 C.F.R. § 34.4(a).

80. The retrovirus that causes AIDS is distinguishable from other viruses by its different chromosome structure and method of reproduction. Lawrence, *The Immune System in AIDS*, 253 SCI. AM. 84, 88 (1985).

immune system.⁸¹ As a result of their lowered immunity to disease, AIDS victims are susceptible to infections that do not normally afflict healthy people.⁸² To date, the disease is both incurable and fatal.⁸³

The AIDS virus has been found in blood, semen, saliva, urine, breast milk, and tears.⁸⁴ The virus is spread through mostly avoidable occurrences: sexual contact involving the exchange of body fluids, sharing contaminated needles and syringes by intravenous drug users, receiving a blood transfusion contaminated by the virus, and transmitting the virus from an infected mother to her infant.⁸⁵

Although AIDS has been identified in patients of all races, ages, and sexual orientation, the people classified as high risk candidates for contracting AIDS are homosexual and bisexual men, intravenous drug users, recipients of blood transfusions, and hemophiliacs. In fact, ninety percent of all AIDS cases in the United States are attributable to homosexual and bisexual men,⁸⁶ intravenous drug users,⁸⁷ and homosexual and bisexual men with a history of intravenous drug use.⁸⁸

In an attempt to deal with this epidemic, the American government has initiated massive campaigns to educate the public.⁸⁹ This is the first time that public health officials have attempted to eradicate an epidemic by changing human behavior on a massive scale.⁹⁰ However, according to several national polls, a surprising minority of

81. *Id.*

82. U.S. PUBLIC HEALTH SERVICE, PAMPHLET NO. 19, AIDS, SEX AND YOU (1986).

83. The possibility of developing a vaccine is uncertain. Schmeck, *AIDS Researchers Begin Testing New Version of Smallpox Vaccine*, N.Y. Times, Apr. 10, 1986, at A1, col. 2. *But see* Clarke, *Uproar over AIDS Drugs*, NEWSWEEK, Apr. 6, 197, at 24; Altman, *U.S. and France End Rift on AIDS — Rival Scientists Acknowledge Roles in Virus Discovery*, N.Y. Times, Apr. 1, 1987, at A1, col. 1; Altman, *Tests on Humans Near in AIDS Vaccine Hunt*, N.Y. Times, Mar. 18, 1987, at A1, col. 1; Weinraub, *Panel Says New AIDS Drug May Cost Too Much*, N.Y. Times, Mar. 11, 1987, at A24, col. 2.

84. *See supra* note 82.

85. *Id.* at 2.

86. 65%. Memorandum from Charles J. Cooper, U.S. Department of Justice, to Ronald E. Robertson, Department of Health and Human Services (Mar. 11, 1986) (*citing Update, Acquired Immunodeficiency Syndrome—United States*, 35 Centers for Disease Control: MORBIDITY AND MORTALITY WEEKLY REPORT ["MMWR"] 18 (Jan. 17, 1986)).

87. 17%. *Id.*

88. 8%. *Id.* A further breakdown of AIDS cases in the United States shows that 94% of the total cases can be classified as follows: homosexual and bisexual men with a history of using intravenous drugs (8%); homosexual and bisexual men who are not known intravenous drug users (65%); heterosexual drug users (17%); hemophiliacs (1%); heterosexual sex partners of persons with AIDS or at risk for AIDS (1%); recipients of contaminated blood (2%). Difficulties in data collection account for the 6% unclassified. *Id.*

89. Boffey, *For Now, Lone Weapon on AIDS is Prevention*, N.Y. Times, Mar. 19, 1987, at A1, col. 3. The Public Health Service plans to spend almost 104 million dollars in the current fiscal year. *Id.* at B10, col. 6. In the meantime, organizations across the country are forming to disseminate information to those individuals at high risk of contracting AIDS. *Id.* at B10, col. 5. *See also* Winerip, *On the Street: Helping Addicts Combat AIDS*, N.Y. Times, Mar. 20, 1987 at B1, col. 1 [hereinafter Winerip].

90. *See Boffey, supra* note 89, at B10, col. 1.

Americans are changing their sexual behavior in light of AIDS.⁹¹ Although the percentages of Americans concerned enough about AIDS to alter their behavior are growing, the fact remains that the American government cannot monitor citizens' behavior sufficiently to halt the epidemic. However, the government can monitor aliens who want to enter the country.

C. *Testing Difficulties*

Not everyone infected with the AIDS virus will develop AIDS. A positive result from an AIDS antibody test⁹² generally means that the patient has been infected by the AIDS virus and can probably infect others, even in the absence of manifested symptoms.⁹³ However, it does not mean that the individual testing positive will, in fact, develop AIDS.⁹⁴ The individual may develop AIDS-related complex (ARC)⁹⁵ that sometimes, but not always, turns into a full-blown case of AIDS.⁹⁶ The incubation period between viral infection and the appearance of AIDS or ARC symptoms ranges from six months to seven years or even longer.⁹⁷

Although the AIDS antibody test is quite reliable, it is not infallible.⁹⁸ An individual may test negative because he is recently infected and his body has not yet developed antibodies to the virus.⁹⁹ It is also possible that the test simply will not detect antibodies to the AIDS virus in certain individuals.

Furthermore, an individual may yield a "false positive" reaction,¹⁰⁰ which occurs when the patient has never been exposed to the AIDS virus, but the test results indicate otherwise.¹⁰¹ A second, different test will usually show negative results.¹⁰² At times, such variability in test results inevitably leads to erroneous conclusions. Nonetheless, scientists believe that the screening test used at blood banks

91. In January 1987, a poll of 800 adults showed only 7% of the adult population had changed its sexual behavior in light of AIDS. *Id.* at B10, col. 5. However, the numbers are increasing. In the latest poll, 37% of the sample were taking precautions against AIDS. *Id.*

92. Since the spring of 1985, an antibody test for identification of the AIDS virus has been utilized by blood collection organizations. U.S. PUBLIC HEALTH SERVICES, PAMPHLET NO. 14, IF YOUR TEST FOR ANTIBODY TO THE AIDS VIRUS IS POSITIVE . . . (1986).

93. *Id.* at 2. "They have no symptoms at all or very minimal symptoms, but they have persistent infection and are probably infectious to others." Dr. James Curran, head of the Center for Disease Control Task Force on AIDS, *quoted in* Wallis, *supra* note 2, at 42.

94. *See supra* note 92, at 2. However, the person will most likely carry the virus in his body for the remainder of his life. U.S. PUBLIC HEALTH SERVICE, PAMPHLET NO. 16, GAY AND BISEXUAL MEN AND AIDS (1986) [hereinafter GAY AND BISEXUAL MEN AND AIDS].

95. *See* Wallis, *supra* note 2, at 42.

96. *Id.*

97. *See* GAY AND BISEXUAL MEN AND AIDS, *supra* note 94, at 2.

98. *Id.* at 3.

99. The average time is six weeks. *Id.*

100. *See supra* note 98, at 3.

101. *Id.*

102. *Id.*

have been extremely successful in detecting the AIDS virus in the nation's blood supply, thereby preventing the proliferation of AIDS through contaminated blood transfusions.¹⁰³ Similarly, it is submitted that the testing procedures used by the INS should be considered sufficiently accurate for the purposes of screening aliens. As AIDS research continues to progress, testing methods will undoubtedly become more reliable. In the meantime, a few erroneous test results — and hence, unfair denial of entry into the country — are the necessary by-products of a science still in its infant stage.

Gay rights activists are concerned that AIDS testing will be misused to discriminate against aliens who are at high-risk of contracting AIDS.¹⁰⁴ However, a review of the exclusionary classifications traditionally applicable to these groups sufficiently rebuts these activists' contentions.

V. Historical Bases for Exclusion

A. *Narcotic Drug Addiction*

Narcotic drug addiction has been a ground for exclusion since the enactment of the Immigration and Nationality Act of 1947.¹⁰⁵ The growth of AIDS cases among intravenous drug users is explosive.¹⁰⁶ Moreover, intravenous drug users constitute a tremendous threat to the heterosexual community by spreading the virus through sexual intercourse. In fact, the vast majority of heterosexual victims of AIDS can link their exposure to the virus from contact with intravenous drugs or a drug user.¹⁰⁷

Drug addicts are notoriously unconcerned about their health, and view public officials with suspicion.¹⁰⁸ Attempts to change their behavioral patterns regularly meet with opposition.¹⁰⁹ Therefore, the detection of narcotic drug use by entering aliens should remain a firm ground for exclusion. The importance of careful examination of the alien for traces of drug use cannot be over-emphasized in light of

103. See Wallis, *supra* note 2, at 41.

104. See generally, *supra* note 14 and accompanying text.

105. 8 U.S.C. § 1182(a)(5) (1982). This exclusion has been effective since December 24, 1952. J. WASSERMAN, *IMMIGRATION LAW AND PRACTICE*, at 134 n.79 (1979). While case law in this area is sparse, it has been established that occasional use of a narcotic drug does not constitute addiction. *Ex parte Eng.*, 77 F. Supp. 74 (N.D. Cal. 1948).

106. See Boffey, *supra* note 89 at B10, col. 2. Unlike the homosexual population in this country, drug users have not formed organizations geared to their specific need for information and referrals. *Id.* Blood tests on several thousand addicts in New York City indicated that at least one-half may be carrying the AIDS virus. *Id.* at B10, col. 3.

107. See Boffey, *supra* note 89, at B10, col. 2-3.

108. *Id.* at B10, col. 4. Nonetheless, in response to the AIDS epidemic, more and more addicts are trying to break their drug habits. As a result, the already understaffed drug treatment centers are being overwhelmed with requests for help. *Id.* See also Winerip, *supra* note 89.

109. See Winerip, *supra* note 89.

the AIDS epidemic.

*B. Psychopathic Personality, Sexual Deviation, and Mental Defect*¹¹⁰

An obvious exclusion under the classification of mental defect would be that of a mentally retarded alien. In this instance, the INS has historically excluded such individuals.¹¹¹ However, "mentally defective" has not always meant merely a lack of intellectual capacity.¹¹² Aliens have traditionally been denied entrance into the United States on the basis of a "psychopathic personality,"¹¹³ sexual deviation,¹¹⁴ or mental defects by virtue of their homosexuality *per se*.¹¹⁵

In 1982, the INS policy of excluding homosexuals on the basis of their sexual preference, without regard for a medically recognized disorder, was found to be contrary to congressional intent and, therefore, invalid. The court in *Lesbian/Gay Freedom Day Committee, Inc. v. United States Immigration and Naturalization Service*¹¹⁶ held that the INS had failed to assert any legitimate or bona fide reasons for upholding an exclusionary provision on the basis of homosexuality alone.¹¹⁷ Today the PHS adheres to the American Psychiatric Association's position that homosexuality is no longer considered a mental disease, but rather, an alternative lifestyle.¹¹⁸ Thus, the PHS no longer issues medical certificates based on an applicant's homosexuality alone,¹¹⁹ and aliens seeking entry into the United States may not be questioned about their sexual proclivities.¹²⁰

110. 8 U.S.C. § 1182(a)(4) (1982).

111. *U.S. v. Shaughnessy*, 180 F.2d 687 (2d Cir. 1950) (exclusion of alien with Down's Syndrome).

112. *U.S. v. Flores-Rodriguez*, 237 F.2d 405, 411 (2d Cir. 1956) (inclusion of homosexuals in category of mental defects).

113. *Quiroz v. Neely*, 291 F.2d 906 (2d Cir. 1961) (regardless of what term "psychopathic personality" meant to the medical community, Congress intended it to include "homosexuals and sex perverts").

114. Act of October 3, 1965, § 15(b), 79 Stat. 911 (codified at 8 U.S.C. § 1182(a)(4) (amendment to provide for exclusion of homosexuals as persons afflicted with a sexual deviation)).

115. *Ganduxe y Marino v. Murff*, 183 F. Supp. 565 (S.D.N.Y. 1959), *aff'd* 278 F.2d 330, *cert. denied*, 364 U.S. 824 (1960) (exclusion of aliens exhibiting psychopathic personality or mental defect is sufficiently broad to encompass homosexuals).

116. *Lesbian/Gay Freedom Day Committee, Inc. v. INS*, 541 F. Supp. 569 (N.D. Cal. 1982), *vacated*, 714 F.2d 1470 (9th Cir. 1983).

117. *Lesbian/Gay Freedom Day Committee*, 541 F. Supp. at 586.

118. UNITED STATES PUBLIC HEALTH SERVICE, GUIDELINES FOR MEDICAL EXAMINATION OF ALIENS at 10, (1984), *noted in Note, Immigration Laws Excluding Aliens on the Basis of Health — A Reassessment After AIDS*, 7 J. LEGAL MED. 85, 106. "We will no longer insist on a label of sickness for individuals who insist that they are well and demonstrate no generalized impairment in social effectiveness." Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. Times, Dec. 16, 1973, at 1, col. 1. *See also Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982) (expert testimony regarding homosexuality).

119. *See Bogatin, supra* note 70, at 105.

120. *See GUIDELINES FOR MEDICAL EXAMINATIONS OF ALIENS, supra* note 118.

Opponents to the new rule fear that INS officials will nonetheless order unwarranted medical examinations based on a suspicion that the applicant is a homosexual, and thus a likely candidate for AIDS. The Final Rule does not alter who must submit to a medical examination.¹²¹ All applicants seeking permanent residence in the country, refugees, fiance(e)s of United States citizens, and their children must undergo AIDS testing.¹²² However, an alien seeking temporary admission *may* be screened for AIDS if, in the examiner's opinion, there is reason to suspect the existence of an excludable condition.¹²³

A de facto policy that endorses the testing of *all* homosexual applicants — regardless of the status sought (temporary or permanent residence) — would suffer from overbreadth and smack of discrimination. An over-inclusive classification includes both those individuals who are similarly situated and those who are not, notwithstanding similarities among the two.¹²⁴ The court in *Hill v. United States Immigration and Naturalization Service* indicated that it was pure speculation whether aliens would ever be excluded once again on the basis of their homosexuality per se.¹²⁵ Constitutional, moral and ethical issues arise when a country starts implementing procedures based on speculation or suspicion.¹²⁶ It could be argued that the government was acting against the entire homosexual community based on a suspicion that all homosexuals have, or are likely to contract, AIDS.¹²⁷ Notwithstanding the status of homosexuals as an AIDS high-risk group, a return to such discriminatory treatment — in light of the advances in homosexual rights in immigration law — would be counter-productive.¹²⁸

VI. International Responses to AIDS

In other countries, the response to the AIDS epidemic has often yielded similar action. In India, African students known to be carrying the AIDS virus were forced to leave the country.¹²⁹ Belgium re-

121. See *supra* note 9, at 21, 532.

122. *Id.*

123. *Id.*

124. See generally Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

125. *Hill v. INS*, 714 F.2d 1470, 1481 (9th Cir. 1983).

126. *Id.*

127. See *Wragg v. Griffin*, 185 Iowa 243, 170 N.W. 400 (1919) (nowhere does the law provide for deprivation of liberty of persons without due process by forcing an exam on mere suspicion).

128. Riviera, *Recent Developments in Sexual Preference Law*, 30 DUKE L. REV. 311, 344 n.311 (1980-81) (support of bills eliminating discrimination in immigration law based on sexual preference).

129. Nordland, *AIDS: Fear of Foreigners*, NEWSWEEK, Apr. 6, 1987, at 36.

quires all foreign scholarship students to submit to AIDS tests.¹³⁰ Likewise, in Bavaria drug addicts, prostitutes and new resident foreigners must undergo AIDS testing.¹³¹ In Japan, the visas of foreigners currently residing in the country may be re-examined if such individuals are found to be carriers of the AIDS virus.¹³² Japan wants to deny visas to foreigners who carry the virus and are "likely to spread the virus to Japanese residents."¹³³ The Japanese government has determined that female prostitutes, male homosexuals, and intravenous drug users are the high risk groups.¹³⁴ No substantive provisions for the detection of these high risk candidates have been posited. However, it is unclear exactly how the proposal is to be implemented.

Consideration must be given to the international consequences of such decisions. In order to facilitate global development, immigration must not be unnecessarily restricted.¹³⁵ A "qualified duty"¹³⁶ on the part of a nation to admit aliens, directly corresponds with basic human rights principles of freedom of movement, good faith, mutual aid, humanity and hospitality, and comity.¹³⁷ Additionally, the allowance of immigration encourages peace by relaxing demographic pressures, helps foster an appreciation of other cultures, and may positively impact on the economy.¹³⁸

Although decisions involving immigration are usually implemented following consideration of the potential foreign policy implications,¹³⁹ in the absence of an abuse of power by Congress, an immigration rule will withstand attack. While a provision denying the right of mobility to American citizens with AIDS would probably be constitutionally impermissible or at least suspect, the same does not hold true when applied to aliens.¹⁴⁰

In the first AIDS case decided, Judge Rosenblatt said, "[t]he scientific knowledge and hygienic procedures with regard to AIDS may be expected to change, with each new medical advance. In a matter of time, the ailment may be conquered, or inhibited by tactics

130. *Id.*

131. *Id.*

132. Haberman, *Japan Plans to Deny Visas to Aliens with AIDS Virus*, N.Y. Times, Apr. 1, 1987, at A18, col. 5.

133. *Id.*

134. *Id.*

135. *See generally*, Nafziger, *supra* note 61.

136. *See supra* note 61, at 843.

137. *Id.* at 843-44; *see generally* Address by J. Shestack, Samuel Rubin Lecture (Oct. 28, 1983), *reprinted in* Shestack, *The Rise and Decline of Human Rights in United States Foreign Policy*, 15 COLUM. HUM. RTS. REV. 19, 21 (1983).

138. *See* Nafziger, *supra* note 61, at 843-44.

139. *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893) (exclusion of aliens affects international relations and thus should be regulated by treaty or an act of Congress).

140. *See* text accompanying notes 29-30.

which are yet unfathomed."¹⁴¹ Similarly, advancements in AIDS research may result in a change in the Immigration and Naturalization Service's approach to aliens with AIDS. In the meantime, the PHS has recently proposed an even more restrictive amendment to the Final Rule. Rather than listing AIDS as an exclusionary condition, evidence of human immuno deficiency virus (HIV) would be grounds for exclusion, since a person infected with HIV, whether or not he has AIDS symptoms, is assumed to be capable of transmitting the virus.¹⁴² Regardless of the future of this proposal, the Final Rule as it currently stands must be strictly enforced.

VII. Conclusion

The reasonableness of a policy regarding aliens with a particular medical condition should be examined in conjunction with current medical facts. Indeed, the AIDS statistics are compelling; although advances have been made in AIDS research, an AIDS vaccine continues to elude scientists. By implementing the Final Rule, Congress intends to prevent, as best it can, the proliferation of AIDS in the United States. Aliens afflicted with a contagious disease have been subject to exclusion from this country for decades. The methods utilized by the Final Rule to exclude aliens with AIDS does not deviate from previously accepted INS procedures used to detect and exclude those aliens with a contagious disease. The severity of the AIDS epidemic provides ample support for the extension of the well-established health exclusion category to include newly identified diseases such as AIDS. And, without such flexibility, the rule would quickly fall behind the changing needs of the country in exercising its discretion over who enters at its borders.

Congress has shown a level of resiliency in the continued revision of immigration law to accommodate changes in our society. As medical technology advances, testing procedures improve, and identification of AIDS victims becomes more reliable, Congress can make alien admission requirements less intrusive. In the meantime, the rights of all, heterosexual and homosexual, American and foreign, may have to be abridged in an attempt to halt this disease.

Kerry Elise Voss

141. *LaRocca v. Dalsheim*, 120 Misc.2d 697, 467 N.Y.S.2d 302 (1983).

142. 52 Fed. Reg. 21,607 (1987) (to be codified at 42 C.F.R. § 34).

