ALIENS AND CITIZENSHIP—HOMOSEXUAL ACTIVITY PRIOR TO ENTRY INTO UNITED STATES HELD EVIDENCE OF "PSYCHOPATHIC PERSONALITY" SUFFICIENT TO WARRANT DEPORTATION. *Boutilier v. Immigration and Naturalization Service* (2nd Cir. 1966).

Clive Michael Boutilier, a native and citizen of Canada, entered the United States for permanent residence in 1955 at age twenty-one. In 1963, having been gainfully employed and a continuous resident of the United States since his entrance, he filed a petition for citizenship. An affidavit accompanying the petition aroused the suspicions of the Immigration and Naturalization Service, and Boutilier was requested to submit additional information, presumably about his sexual history.[1] In this later sworn statement, Boutilier readily admitted to several heterosexual experiences and to having been an active homosexual since the age of sixteen.

Upon forwarding of the information by the Immigration and Naturalization Service to the Public Health Service, the latter concluded that, in their opinion, Boutilier was a "psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence. . . ."[2] In reliance upon Boutilier's affidavits and armed with the statement issued by the Public Health Service, the government commenced deportation proceedings under section 212(a)(4) of the Immigration and Naturalization Act of 1952.[3] Boutilier declined the offer of an in personam examination by Public Health Service doctors.[4] He was thereafter found by the

[1] In the process of petitioning, Boutilier had signed an affidavit admitting to his arrest in 1959, on a charge of sodomy, in violation of New York Penal Law § 690. The charge was reduced to simple assault, and was eventually dismissed when the complaining party failed to appear in court.

[2] This opinion was in the form of a certificate signed by Paul H. Smith, M.D., Senior Surgeon, United States Public Health Service, Chief of Psychiatry, and Maria Sarrigiannis, M.D., Medical Director, United States Public Health Service.

[3] 66 Stat. 182 (1952), 8 U.S.C. § 1182(a)(4) (1952) [hereinafter cited as the Act]. Section 212(a) reads in pertinent part:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
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> . . . .
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> (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect . . . .

[4] 66 Stat. 204 (1952), 8 U.S.C. § 1252(b) (1952) ("[A] special inquiry officer shall conduct proceedings . . . to determine the deportability of any alien . . . ."). At the hearing Boutilier offered into evidence two letters from privately retained psychiatrists. One letter was signed by Edward F. Falsey, M.D., and dated March 2, 1964. It stated in pertinent part:

> [O]n psychiatric examination of Mr. Boutelier [sic], there was no indication

special inquiry officer to have been a homosexual at the time of entering the United States, thus excludable at that time as one afflicted with a "psychopathic personality,"[5] and therefore subject to present deportation under section 241(a) of the Act.[6] Following an unsuccessful appeal to the Board of Immigration Appeals,[7] the Second Circuit Court of Appeals, *held*, affirmed: Boutilier was a "psychopathic personality" within the meaning of the Immigration and Naturalization Act, was within that class excludable from the United States at entrance and therefore subject to present deportation. *Boutilier v. Immigration and Naturalization Service*, 363 F.2d 488 (2nd Cir. 1966), *cert. granted*, 385 U.S. 927 (1966).

Section 212(a)(4) of the Act prescribes the exclusion of certain classes of aliens from entry into the United States. Section 241(a) of the Act[8] states: "Any alien in the United States . . . shall . . . *be deported* who . . . at the time of entry was within one or more of the classes of aliens *excludable* by the law existing *at the time* of such entry . . . ." (Emphasis added.) Although Boutilier had been in the United States for eight years, he could nevertheless be deported if he failed to meet the requirements for entry into the United States which were in effect in 1955 when he entered the country.[9] The provision for "delayed exclusion," as used in *Boutilier*, has been criticized as "an unnecessary as well as undesirable

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> of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

Boutilier v. Immigration and Naturalization Service, 363 F.2d 488, 491 n.6 (2d Cir. 1966). The second letter was in the form of a "Clinical Abstract" on the stationery of Montague Ullman, M.D., under the date of March 30, 1965. In pertinent part it stated:

> [Boutilier's] sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interest as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form. 363 F.2d at 491 n.6.

[5] The special inquiry officer noted that the phrase "psychopathic personality" as used in section 212(a)(4) of the Act is a "legal term of art" rather than a "medical formulation." 363 F.2d at 491; *accord*, Quiroz v. Neelly, 291 F.2d 906 (5th Cir. 1961); *cf.* United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956).

[6] 66 Stat. 204 (1952), 8 U.S.C. § 1251(a) (1952).

[7] C.F.R. 3.1(b) (1966) (decisions of special inquiry officers in deportation cases appealable).

[8] See statute cited note 6 *supra*.

[9] See statute cited note 3 *supra*.

feature of immigration policy."[10] Yet without the provision, a premium would be placed upon one's ability to deceive immigration officials at the time of original entry into the country.[11]

Is a homosexual a "psychopathic personality" per se? The Fifth Circuit Court of Appeals had this to say about the phrase: "[T]o the Congress it was intended to include homosexuals and sex perverts . . . ."[12] In *Boutilier*, the Second Circuit also considered the legislative intent surrounding section 212(a)(4) of the Act[13] and reached a similar conclusion. Prior to the 1952 enactment the exclusionary term used was "constitutional psychopathic inferiority"[14] instead of the present "psychopathic personality." In 1950, the Senate Committe on the Judiciary, in the process of revising the Act of 1917, recommended that "the classes of mental defectives should be enlarged to include homosexuals and other sex perverts."[15] Several bills incorporating this recommendation were drafted, but none were adopted.[16] A report from the Public Health Service was contained within the House Judiciary Committee report[17] which accompanied H.R. 5678, the bill which ultimately became the Immigration and Naturalization Act of 1952. The Health Service report contained recommendations for medical exclusion from the United States, which the committee accepted with one exception not relevant to this discussion. Homosexuals and other sex deviates were specifically included within the phrase "psychopathic personality," rather than being given a separate category unto themselves. It would seem, based on this legislative history, that Congress did specifically intend to exclude homosexuals from entry into the United States by including them under the general classification "psychopathic personality."[18]

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[10] Comment, *Limitations on Congressional Power to Deport Aliens Excludable as Psychopaths at Time of Entry*, 68 YALE L.J. 931, 948 (1959).

[11] Comment, *Development in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643, 682 (1953).

[12] Quiroz v. Neelly, 291 F.2d 906, 907 (5th Cir. 1961).

[13] 363 F.2d at 492 ([W]e believe the term . . . reflects a Congressional purpose to prevent alien homosexuals from obtaining admission into the country . . . .").

[14] Act of February 5, 1917, 39 Stat. 875 (hereinafter referred to as the Act of 1917).

[15] S. REP. No. 1515, 81st Cong., 2d Sess. 345 (1950).

[16] S. REP. No. 1137, 82d Cong., 2d Sess. 9 (1952); S. 2550, 82d Cong., 2d Sess. § 212(a) (1952); S. 716, 82d Cong., 1st Sess. § 212(a) (1951); S. 3455, 81st Cong., 2d Sess., § 212(a) (1950).

[17] H.R. REP. No. 1365, 82d Cong. 2d Sess. 46-48 (1952).

[18] See Ganduxe y Marino v. Esperdy, 278 F.2d 330 (2d Cir. 1960), *cert. denied*, 364 U.S. 824 (1960); United States v. Flores-Rodriguez, 237 F.2d 405, 412-13 n.2 (2d Cir. 1956) (concurring opinion).

In attacking this legislative intent surrounding passage of section 212(a)(4) of the Act, the *Boutilier* dissent quoted the Health Service report to the House Judiciary Committee[19] and reached the conclusion that Congress intended each fact situation to be determined on its own merits. That is, each homosexual alien would receive an individual determination by competent medical authority as to whether he was a psychopathic personality.[20]

If the aforementioned intent of Congress to include homosexuals within section 212(a)(4) of the Act is not apparent to one who reads the statute, is not the statute void for vagueness? There is the legal fiction that everyone is presumed to know the law; however, if the "void-for-vagueness" doctrine is to be applied, the legislative intent is of no consequence. Although the doctrine is usually applied in criminal cases,[21] it is also relevant in considering legislation that imposes civil sanctions.[22] If "psychopathic personality" as used in the Act is so vague as to camouflage the intent of Congress, it would seem that a homosexual alien could not be excluded from entry because he was unaware of his susceptibility to that exclusion.

The major difficulty in applying the "void-for-vagueness" doctrine to *Boutilier* is that section 212(a)(4) of the Act is not prohibitive; it does not attempt to prevent aliens from committing homosexual acts. Rather, the purpose of the law is to exclude persons having certain characteristics from becoming permanent residents of the United States.[23] If Boutilier was being deported for *post-entry* behavior, then perhaps he could have recourse to the "void-for-vagueness" doctrine, for even the Public Health Service admitted that the phrase was "vague and indefinite."[24] But it was Boutilier's *pre-*entry behavior which was the cause of his deportation,[25] despite the fact that it was his post-entry behavior which first gave evidence of

19 H.R. REP. No. 1365, 82d Cong. 2d Sess., 4 (1952). "Psychopathic personalities" are "disorders of the personality . . . characterized by developmental defects of pathological trends in the personality structure manifested by lifelong patterns of . . . behavior . . . ." Those "psychopathic personalities" who are "ill primarily in terms of society and prevailing culture . . . frequently include those . . . suffering from sexual deviation."

20 363 F.2d at 499.

21 *E.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954) ("The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.").

22 Jordon v. De George, 341 U.S. 223, 229-32 (1951); A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925).

23 363 F.2d at 495.

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

25 363 F.2d at 495.

his homosexuality. His freely-admitted homosexuality *at the time of entry* is the cause of the deportation order.[26]

Fleuti v. Rosenberg,[27] decided by the Court of Appeals for the Ninth Circuit, held that "psychopathic personality" was vague, that section 212(a)(4) of the Act was void, and that an alien was not to be deported because he was a homosexual at the time of entry into the United States. The *Fleuti* court reasoned that most frequently the strongest evidence by which a homosexual alien is discovered is that alien's post-entry behavior. If the statute is vague and the alien does not receive adequate warning that his post-entry homosexual conduct may subject him to deportation, then his rights have been prejudiced and section 212(a)(4) is "void-for-vagueness."[28] Applying the *Fleuti* reasoning to the facts in *Boutilier*, we find the reasoning of the two circuits at opposite poles. If "psychopathic personality" were not vague, the possibility exists that Boutilier might have refrained from his homosexual activities,[29] and thereby avoided his New York arrest and the subsequent investigation by Immigration officials.[30] The *Fleuti* court felt that since the phrase "psychopathic personality" was vague, the court could not look beyond the wording of the Act to the legislative intent.[31] Conceding that Congress did intend to exclude homosexuals, the *Fleuti* court felt that Congress had failed to articulate this intent in the Act.[32]

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[26] The question of due process was raised by the dissent in *Boutilier*, primarily on the grounds that Boutilier was labeled a psychopathic personality without an in-depth medical and psychiatric examination. Section 234 of the Act directs that certification of the physical and mental condition of arriving aliens must be made by Public Health Service medical officers, and Boutilier received no such examination. In 1955, if Boutilier was to have been excluded, he would have been entitled to such an examination. But under section 242(b) of the Act, covering deportation procedures, such an examination is not necessary. 363 F.2d at 497. The dissent also quoted at length such varied sources as Kinsey and the *New York Times*, and listed famous personages who would have been excludable under the Act, including "Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare. . . ." 363 F.2d at 497 and 499.

[27] 302 F.2d 652 (9th Cir. 1962), *remanded on other grounds*, 374 U.S. 449 (1963).

[28] *Id.* at 656.

[29] "The patient [Boutilier] has sexual interest in girls and has had intercourse with them on a number of occasions . . . His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality." Clinical Abstract on the stationery of Montague Ullman, M.D., of March 30, 1965; 363 F.2d at 498.

[30] See material cited note 1 *supra*.

[31] *Accord*, United States v. Harriss, 347 U.S. 612, 617 (1954); United States v. Spector, 343 U.S. 169, 171 (1952).

[32] 302 F.2d at 658.

In the light of the *Fleuti* decision, Congress amended section 212 (a) (4) of the Act[33] to read:

> "(a) Except as otherwise provided . . . the following classes of aliens shall be . . . excluded from the United States:
> . . . .
> "(4) Aliens afflicted with psychopathic personality, or *sexual deviation*, or a mental defect . . . ." (Emphasis added.)

The Senate report which accompanied the Amendment makes it very clear that Congress dimly viewed the *Fleuti* decision.[34]

Although any homosexual who has entered the United States since passage of the Amendment should have notice of his possible exclusion or deportation,[35] Congress seems to have attempted to eliminate confusion regarding the 1952 Act. However, the converse appears to have resulted. An alien reading the 1952 Act in light of the 1965 Amendment could assume that sexual deviates were not excludable until 1965 since "psychopathic personality" is in both statutes and "sexual deviation" is used in the Amendment only. Rather than clarifying its original intention, Congress has made it more obscure.[36] It is submitted that if the "void-for-vagueness" doctrine applies to section 212(a) (4) of the Act, the term "psychopathic personality" is vague and ambiguous on its face; consequently the section would be void. It is further submitted that Congress did intend to exclude homosexuals as a group from admission to the United States in the Act of 1952, but expressed this intention poorly. Both the Second and Ninth Circuits admit to these facts, yet differ in the application of the "void-for-vagueness" doctrine.

The behavior against which Congress attempted to legislate repels the ordinary person. Homosexuals live on the perimeter of society,

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33 79 Stat. 919 (1965), 8 U.S.C. § 1182 (Supp. I, 1966) (hereinafter referred to as the Amendment).

34 S. REP. No. 748, 89th Cong., 1st Sess., 19 (1965).

> The U.S. Court of Appeals for the Ninth Circuit on April 17, 1962, set aside a deportation order and enjoined its enforcement holding that section 212(a)(4) (of the Immigration and Naturalization Act of 1952) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term "psychopathic personality." . . .
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> To resolve any doubt, the committee specifically included the term "sexual deviation" as a ground of exclusion in this bill.

35 See statute cited note 33 *supra*.

36 This observation is borne out in a 1966 Ninth Circuit Court of Appeals decision, Lavoie v. Immigration and Naturalization Service, 360 F.2d 27 (9th Cir. 1966), *petition for cert. filed*, 35 U.S.L. WEEK 3081 (U.S. Sept. 13, 1966) (No. 513), a per curiam opinion in total agreement with Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962).

in a shadowed segment of which few persons know. Kinsey estimated that persons with Boutilier's sexual habits comprise somwhere between four and eight per cent of American males, and that some thirty-seven per cent of American men have had at least one homosexual experience.[37] In reality, homosexuals as a group are neither particularly dangerous[38] nor are they easily definable.[39]

The rationale for banning homosexual aliens from our shores seems subject to some question: Is behavior which is contrary to the norm, even disgusting to most of the populace, justifiable grounds for exclusion from the United States? The United States should not become a haven for persons afflicted with various kinds of sexual deviations—no such suggestion is made. The Act specifically excluded persons with epilepsy,[40] but advanced medical knowledge and a more sophisticated approach to immigration policies have eliminated this term from the Amendment.[41] As the knowledge of psychosexual behavior develops and such behavior becomes more understandable, Congress may see that the general classification of sexual deviates may include a number of persons who can be an asset to this country rather than a liability. It is submitted that the Immigration and Naturalization Service be given the latitude of making individual determinations as to whether an applicant for citizenship has a record of past behavior or a particular trait which will prevent him from becoming a useful member of a democratic society.

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37 KINSEY, POMEROY, and MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE, 623 (1948).

38 COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 369 (2d ed. 1956) ("[T]hose who are predominantly homosexual . . . apparently manifest no other evidences of serious personality deviation than we would expect to find in a comparable group of heterosexuals.").

39 Finger, *Sex Beliefs and Practices Among Male College Students*, JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY (1947).

> [I]t is not possible to divide people into two clear-cut groups—homosexuals and heterosexuals. Rather these terms represent the extreme poles of a continuum, and in between we find many individuals whose experiences and psychic reactions combines both heterosexual and homosexual components . . . .

40 See statute cited note 3 *supra.*

41 See statute cited note 33 *supra.*