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SEXUAL POLITICS AND THE ALIEN INVERT
BOUTILIER V. I.N.S. REREAD

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Author's Note

Throughout this paper, I use words such as "homosexual," "sexual invert," and "sexual deviant" as convenient historical and descriptive terms for people engaging in same-sex sexual behavior or who experience same-sex attractions. These are the terms most frequently used during the period that I am writing about. I use these words while acknowledging two caveats for the reader.

First, the terms are imprecise in their distinction (or lack thereof) between behavior, emotions, and identity. What constitutes a "homosexual" continues to be a contested issue and I do not claim to use the term in ways that solve the controversy.

Second, while these terms appear to be gender-neutral, the discourse on homosexuality has largely been defined by male (homo)sexuality. Most researchers did not distinguish between male and female homosexuality, although case studies indicate that the medicalization of homosexuality was a reaction to male homosexuality. Therefore, despite the use of gender-neutral terms, this story of how psychiatry, law and politics converged in the years leading up to the passage of the Immigration and Nationality Act is largely defined by male homosexuality.¹

¹ For an overview of the impact of psychiatry on female homosexuals, *see* ERIN G. CARLSTON, *FEMALE HOMOSEXUALITY AND THE AMERICAN MEDICAL COMMUNITY, 1926-1940*, in *SCIENCE AND HOMOSEXUALITIES* (VERNON A. ROSAIRO ED., 1997), and MARCEL T. SAGHIR & ELI ROBINS, *CLINICAL ASPECTS OF FEMALE HOMOSEXUALITY*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* (JUDD MARMOR ED., 1982).

*Mental health and illness are but new words for describing moral values. More generally, the semantics of the mental health movement is but a new vocabulary for promoting a particular kind of sexual ethic.*¹

I. Introduction

Q. I'm an officer of the United States Immigration and Naturalization Service, and I desire to question you under oath regarding your homosexual activities. Any statement you make must be made voluntarily and of your own free will. Such statement may be used against you and by the Government as evidence in any civil or criminal proceeding. Are you willing to make such a statement under oath?

*A. I do.*²

With those two words, Clive Michael Boutilier's deportation process began. It was January 13, 1964, and Boutilier, a Canadian immigrant who was seeking U.S. citizenship, found himself in front of Immigration and Naturalization Service (INS) investigator James B. Sarsfield. The topic of the ensuing interrogation was Boutilier's sexual history. In previous application documents, Boutilier had freely and openly admitted past sexual experiences with men. In doing so, he had, perhaps unknowingly, opened up the possibility not only of rejection of his citizenship application, but also deportation under Section 212(a) of the Immigration and Nationality Act of 1952 (INA).³

¹ THOMAS SZASZ, *IDEOLOGY AND INSANITY: ESSAYS ON THE PSYCHIATRIC DEHUMANIZATION OF MAN* 36 (1970).

² *Record of Sworn Statement In re: Clive Michael Boutilier*, *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) (No.440) [hereinafter STATEMENT].

³ Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(4), *hereinafter* INA.

Though decided in 1967, Boutilier's case.⁴ is linked to a deeper story about the concern with sexuality and masculinity, and the emergence of psychiatry decades earlier in post-World War Two America. The Supreme Court appeared to concern itself with a seemingly neutral and detached question of Congressional intent: whether Congress intended to include homosexuality within its definition of "psychopathic personality." Writing for the majority, Justice Clark took pains to make clear the purpose of the Court's examination:

It may be, as some claim, that "psychopathic personality" is a medically ambiguous term, including several separate and distinct afflictions. But the test here is what the Congress intended, not what differing psychiatrists may think. It was not laying down a clinical test, but an exclusionary standard which it declared to be inclusive of those having homosexual and perverted characteristics.⁵

Though Justice Clark may have properly framed the Court's duty, *Boutilier v. I.N.S.* is more than a case about statutory interpretation and legislative intent. The Court's distinction between Congressional intent and "what differing psychiatrists may think" obviates the central role played by the psychiatric community in shaping the political climate in which the INA was passed. World War II and its immediate aftermath produced an environment in which the goals of psychiatry and Cold War politics converged. The Immigration and Nationality Act of 1952 was a forum in which the language of politics and psychiatry merged, blurring the line between science, morality, and the law.

⁴ *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967), *hereinafter* *Boutilier II*.

⁵ *Boutilier II*, 387 U.S. at 124.

Section II of this paper introduces the reader to Clive Michael Boutilier. Using court documents and records, the process he went through leading up to his historic Supreme Court battle is traced. With the path of Boutilier the man traced, Section III provides a history of the Circuit court conflicts which led to the Supreme Court's granting of certiorari in *Boutilier v. Immigration and Naturalization Service*. Section IV concludes the historical chain by describing the outcome of the case, both at the appellate court and Supreme Court level.

With these facts set forth, Section V goes back in history and explains the medicalization of homosexuality. Spanning from Freud to World War Two to Kinsey, this section examines the evolution of the psychiatric approach to homosexuality. The second prong of the analysis, the politics of homosexuality, is explored in Section VI. Here, the effects of the Cold War and post-World War Two gender dynamics are used to explain the creation of the "sexual pervert." Section VII returns to the Immigration and Nationality Act and examines the ways the language of psychiatry and Cold War politics pervaded the 1952 drafting of the INA.

II. Clive Michael Boutilier

On June 22, 1955, at the age of 21, Boutilier, a native and citizen of Canada, was admitted into the United States for permanent residence. A building maintenance man, Boutilier lived and worked in New York City as a legal immigrant. His troubles began when he decided to apply for U.S. citizenship.

In September 1963, as part of his citizenship application, Boutilier submitted an affidavit to an Immigration and Naturalization Service examiner which admitted that he had been arrested in October 1959 on a charge of sodomy, in violation of New York Penal Law. Boutilier stated that he had been released on his own recognizance, the charge was reduced to simple assault and the count against him was dismissed when the complaining party failed to appear in court. Boutilier also admitted that the charges against him stemmed from acts of anal sodomy and oral sex with a minor - a 17-year-old male. In January of 1964, an Immigration Officer informed Boutilier that the government needed additional information about his sexual history. In an interview with an INS investigator, Boutilier revealed the full extend of his sexual history.⁶ Immigration officials sent a transcript of the interview to the United States Public Health Service for its experts' opinions as to whether Boutilier was excludable from the United States when he entered in 1955. The Public Health Service issued a report stating that it believed Boutilier was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence.⁷

⁶ See STATEMENT, *supra* note 1.

⁷ *Certification of United States Public Health Service, Subject: Clive Michael Boutilier*, Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967) (No.440).

Following the Public Health Service's recommendation, the government began deportation proceedings. At a second hearing the Special Inquiry Officer, Boutilier declined an opportunity to be examined by Public Health Service doctors.⁸ In support of his position, he introduced two letters from psychiatrists who concluded that Boutilier was not a psychopath.⁹

Based on the evidence before him, the Special Inquiry Officer concluded that Boutilier had been a homosexual at the time of entering the United States and, thus, was excludable as one afflicted with a 'psychopathic personality.'¹⁰ The Special Inquiry Officer noted that the phrase 'psychopathic personality' as used in section 212(a)(4) of the Immigration and Nationality Act, the provision under which the I.N.S. sought to have Boutilier deported, was not a medical term, but rather a legal term.¹¹ Clive Michael Boutilier was ordered deported.

⁸ *Hearing on July 26, 1965 Before Special Inquiry Officer, Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) (No.440).

⁹ The letters were written by Dr. Edward F. Falsey of New York, NY, and Dr. Montague Ullman, Professor of Psychiatry at the State University of New York. U.S. Supreme Court Records and Briefs, Vol. 387, No. 440, folder 12, 14.

¹⁰ *Decision of Special Inquiry Officer, In the Matter of Clive Michael Boutilier, , Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) (No.440).

¹¹ *Id.*

Boutilier's fight to stay in the United States was made all the more difficult when, during his deportation process, Congress amended the Immigration and Nationality Act to explicitly make sexual deviation a ground for exclusion.¹² After an unsuccessful appeal to the Board of Immigration Appeals¹³, Boutilier asked the Second Circuit to vacate his deportation order. In a 2-1 ruling, the Second Circuit upheld the deportation order.¹⁴ The Supreme Court affirmed the Second circuit's ruling in a 6-3 decision.¹⁵

III. The Path to the Supreme Court

Although *Boutilier II* marked the Supreme Court's first treatment of the constitutionality of the Immigration and Nationality Act's exclusion of homosexuals, the case was not the first time Section 212(4)(a) appeared for the Court's consideration. Four years earlier, in *Rosenberg v. Fleuti*¹⁶, the Court heard arguments in the case of another gay man who was ordered deported by the Immigration and Naturalization Service. However, the Supreme Court declined to review whether Section 212(4)(a)'s terms were unconstitutionally vague and ambiguous, deciding instead that there was a threshold question about the statutory meaning of the word

¹² 8 U.S.C. §1182(a)(4), *as amended* 1965. The Board of Immigration Appeals in its rejection of Boutilier's appeal, claimed that this amendment served to clarify the purpose behind the prior law. See *infra* note 10..

¹³ *Order and Decision of Board of Immigration Appeals, In re: Clive Michael Boutilier*, Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967) (No.440).

¹⁴ Boutilier v. Immigration and Naturalization Service, 363 F.2d 488 (2nd. Cir. 1966), *hereinafter* Boutilier I.

¹⁵ Boutilier II, 387 U.S. 118 (1967).

¹⁶ *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), [*hereinafter* Fleuti II].

"entry" within the meaning the INA.¹⁷

By refusing to address Fleuti's vagueness challenge, the Supreme Court let stand the 9th Circuit holding that Section 212(a)(4) was unconstitutionally vague.¹⁸ This decision led to the conflict in the federal circuits which surely spurred the Court's granting of *certiorari* in *Boutilier II*. In April of 1996, the 9th Circuit, relying on its decision in *Fleuti v. Rosenberg*, reversed the deportation of Gerald Joseph Lavoie.¹⁹ Lavoie had also been deemed to have been a homosexual upon his entry into the United States and had been ordered to be deported by the Immigration and Naturalization Service. Coincidentally, Lavoie, like Clive Michael Boutilier, was a Canadian. Three months later, the 2nd Circuit handed down its decision in *Boutilier I*. When the 2nd Circuit upheld Boutilier's deportation, its decision created a situation where those seeking relief from the federal courts would be spared deportation if they sought redress in the 9th Circuit, but not if they had the misfortune of living in an area covered by the 2nd Circuit.

¹⁷ The Court wrote that it "ought not to pass on questions of constitutionality...unless such adjudication is unavoidable." *Boutilier II*, 387 U.S. at 449, 451, *quoting* *Spector Motor Service Inc. v. McLaughlin*, 323 U.S. 101.

¹⁸ *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), *rev'd on other grounds*, 374 U.S. 449 (1963) [hereinafter, *Fleuti I*].

¹⁹ *Lavoie v. Immigration and Naturalization Service*, 360 F.2d. 27 (9th Cir. 1966).

It is ironic that the Supreme Court waited until 1967 to finally rule on §212(4)(a) itself. By then, Congress had already changed the INA to reflect its desire to exclude homosexuals by including "sexual deviants" as an excludable group.²⁰ In essence, the Court in *Boutilier II* was clarifying the application of the law to those people who entered the United States between 1952 and 1965, and who had not yet completed citizenship applications.

IV. The Decision

a. The Majority Opinions

The decisions in both the 2nd Circuit and the Supreme Court shed light on the competing viewpoints about homosexuality which emerged in post-World War Two America. Justice Clark's admonition that the Court's duty was only one of statutory interpretation mirrored the opinion by Circuit Judge Kaufman in the 2nd Circuit decision. Judge Kaufman used language similar to Justice Clark's to delineate the 2nd Circuit's role in reviewing Boutilier's petition for review:

Our function in this case, therefore, is not to approve or disapprove of the conduct we are examining; nor is it necessary for us to determine the mores of the community. Rather, our duty is simply to interpret a statute and to make the traditional determination as to its application.²¹

The majority opinions in both decisions were careful to state that courts were not supposed to decide on the wisdom of Congress' decision to exclude homosexual. Judge Kaufman repeated several times that the term "psychopathic personality" needed to be removed from a medical context and viewed instead as:

²⁰ 8 U.S.C. ss 1182(a)(4), *as amended* 1965.

a term of art to be interpreted by what Congress intended as a guide, and not to be left to the vagaries and honest but conflicting theories of psychiatry for determination.²²

Justice Clark agreed, concluding that:

Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts.²³

Despite the Supreme Court's insistence that its duty was to divorce clinical meaning and Congressional intent, the term "psychopathic personality" --and hence Congressional intent -- was rooted in the psychiatric community. The phrase was not a neutral legal term when it was adopted in 1952. That Congress believed it encompassed homosexuality is undeniable; it is equally undeniable is that the term reflected a view that argued homosexuality was a mental illness in the clinical sense. The Supreme Court, despite its attempts to frame the issue neutrally, tacitly endorsed the view of homosexuality as emotionally deviant.

b. The Dissent

Three justices dissented from the decision in *Boutilier II*. Justice Brennan did not file a separate opinion, choosing instead to state that he dissented on the grounds stated by the lone dissenter the 2nd Circuit, Judge Moore. Justice Douglas, joined by Justice Fortas, wrote separately to express his dissatisfaction with the Court's holding. He too relied on Judge Moore's reasoning, stating that the "the term 'psychopathic personality' is

²¹ *Boutilier I*, 363 F.2d at 489.

²² *Boutilier I*, 363 F.2d at 493.

²³ *Boutilier II*, 387 U.S. at 122.

a treacherous one...much too vague by constitutional standards for the imposition of penalties or punishment."²⁴

Beyond his concerns with vagueness, Justice Douglas was not convinced that Congress intended as broad an exclusionary basis as the majority contended .

Notwithstanding his comment that "the homosexual is one, who by some freak, is the product of an arrested development"²⁵, Justice Douglas thought it unlikely that:

Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society. ...[H]istory should not be read as imputing to Congress a purpose to classify under the heading of "psychopathic personality every person who had ever had a homosexual experience."²⁶

Sadly, Justice Douglas' belief that Congress intended a case-by-case examination of homosexuals for traits of psychopathic personality²⁷ was historically inaccurate. Congress *did* intend a blanket prohibition and, contrary to Justice Douglas' urging otherwise, history *should* be read to impute to Congress the desire to draft such a broad policy.

Even as they quoted from the INA's legislative history, neither Justice Douglas nor Justice Clark touched on the essence of *why* Congress intended to exclude

²⁴ *Id.* at 125.

²⁵ *Id.* at 127.

²⁶ *Id.* at 127.

²⁷ Among the characteristics Justice Douglas listed as being indicative of a true psychopathic personality are inadequately motivated antisocial behavior, poor judgment and failure to learn from experience, pathological egocentricity and incapacity for love, specific loss of insight, unresponsiveness, sex life impersonal, trivial and poorly integrated, and failure to follow any life plan. *See* Boutilier II at 125,126.

homosexuals. The answer would have taken the court back more than two decades to World War Two and the years immediately preceding the INA's passage in 1952.

V. Psychiatry and the Medicalization of Morality

*What is considered deviant in a society is a product of a political process of decision making. The behaviors or activities that are deviant in a given society are not self-evidence; they are defined by groups with the ability to legitimate and enforce their definitions.*²⁸

*Though shalt not lie with mankind, as with womankind: it is an abomination.*²⁹

The condemnation of homosexuality is most often associated with religious ethos. The Christian Bible's description of the destruction of Sodom³⁰ is commonly interpreted as a sign of G-d's anger towards same-sex sexual activity. History reveals the pervasive role of religion as the enforcer of sexual mores.³¹ The modern trend towards the medicalization of homosexuality dates to the late 19th century.³²

²⁸ PETER CONRAD AND JOSEPH W. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 22 (1992), [hereinafter CONRAD & SCHNEIDER].

²⁹ Leviticus 18:22.

³⁰ Genesis 19:1-11.

³¹ For a cross-cultural overview of the treatment of homosexuality in by religious institutions, see CONRAD & SCHNEIDER, *supra* note 29, at 22.

³² *Id.* at 181

a. Freud

Sigmund Freud's revolutionary approach to mental illness brought renewed attention on homosexuality. Freud did not consider homosexuality as an illness *per se*³³. Rather, he considered homosexuality as a variation rather than a deviation, and a psychiatrist's primary role in treating a homosexual was to "facilitate the individual's life as that of one who sexuality represents a variation rather than a moral blemish."³⁴

Freud's work played an important role in the medicalization of homosexuality.

Because of Freud, homosexuality

was established first and foremost as a psychiatric condition and psychiatrists became the medical experts - the new "priests" in charge of diagnosis and treatment. The therapeutic had triumphed over the religious and legal as the official language to define and explain homosexual conduct and, more to the point, those who engaged in it.³⁵

While Freud envisioned therapeutic intervention as a tool for facilitating the adjustment of the homosexual into society, the medicalization of homosexuality soon became a tool for controlling and condemning homosexual behavior.

³³ In a famous letter to a mother who had written Freud about her son, Freud wrote "homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness." *Id.* at 186.

³⁴ *Id.* at 187.

³⁵ *Id.* at 187.

The late 19th and early 20th centuries produced dozens of case-study research papers on homosexuality.³⁶ Havelock Ellis, a British physician, compiled a book of case studies and commentary in 1897 that reflected the author's desire to "get at the facts, and having got at the facts, to look at them simply and squarely in the face."³⁷ Ellis' book is historically noteworthy because it rejected the then-prevailing view of homosexuality as criminal:

Has society the right to punish individuals sent into the world with homosexual instincts? ... It is established that their appetites, being innate, are to them at least natural and undepraved: the common appetites, being excluded from their sexual scheme, are to them unnatural and abhorrent. Ought not such beings, instead of being hunted down and persecuted by the law, to be regarded with pitying solicitude as among the most unfortunate of human beings...³⁸

This early period was characterized by much disagreement between mental health professionals, based largely on the fact that "few realized the severe limitations of basing their conclusions on small, biased clinical case studies of patients that they had in therapy."³⁹

³⁶ One researcher located 45 articles in medical journals, psychoanalytic journals and other social science publications between 1895 and 1948. MALE AND FEMALE HOMOSEXUALITY: PSYCHOLOGICAL APPROACHES 34 (Louis Diamant ed., 1987) [hereinafter DIAMANT].

³⁷ HAVELOCK ELLIS & JOHN ADDINGTON SYMONDS, SEXUAL INVERSION at vi (Ayer Company Publishers 1994) (1897).

³⁸ *Id.* at 265, 266

³⁹ Marvin Siegelman, *Kinsey and Others: Empirical Input, in Male and Female Homosexuality: Psychological Approaches* in DIAMANT, *supra* note 37, at 35.

Even as other psychiatrists attempted to explain the causes of homosexuality, "Freud's pessimism regarding the possibility of the therapeutic reversal of homosexual dominated psychoanalytic thinking for almost forty years."⁴⁰ Although the importance of early 20th century research should not be minimized when examining the evolution of the medical treatment of homosexuality, the key post-Freudian development was the reestablishment of homosexuality as a psychopathology which needed to be cured; gone was Freud and Ellis' compassionate psychiatric treatment of the homosexual.⁴¹ The renewed focus on homosexuality as illness occurred during a major social and political upheaval: World War Two. It was the War which would provide a vehicle for the convergence of psychiatry and politics and institutionalized homosexuality as a mental disease.

b. World War Two and the Notorious "4-F"

Q. Let the record show that the respondent presents Selective Service Notice of Classification in his name...reflecting his classification as 4-F on Dec. 24, 1957 at the local board.... Could you tell me why they classified you 4-F?

A. I'm a homosexual.

Q. Did they just accept your statement that you're a homosexual?

A. After filling out the forms and asking the questions, I was sent to see a psychiatrist and as a result I'm classified as 4-F.⁴²

In October of 1940, 16 million men between the ages of 21 and 35 registered for the draft. Since the United States had not yet entered the War, military administrators

⁴⁰ RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 28 (1981).

⁴¹ See CONRAD & SCHNEIDER, *supra* note 29 at 187.

could set strict standards for qualifying for military service. African-Americans and women were excluded from certain segments of the military and, on the advice of psychiatrists, homosexuals were as well. The rationale was always the same: these subgroups of the population were deemed unfit to serve as good soldiers and their presence in military units would harm morale.

The early 1940s marked the heightened focus on the psychiatric aspects of homosexuality. Psychiatrists gained authority within the armed forces and new screening procedures were developed to discover and disqualify homosexuals.⁴³ The screening methods used to exclude homosexuals centered on identity rather than behavior. Screening processes included directions to look for feminine bodily characteristics and effeminate dress and manners. In one of the more bizarre projects, doctors worked to develop a detection system through the insertion of tongue depressors into the mouths of psychiatric patients. They justified this test through studies that showed that 89% of those who admitted to fellatio had lost their gag reflex.⁴⁴

The declaration of war in 1941 removed the military's ability to disqualify large groups of people from the pool of available men for combat. While many gay men were concerned by the military's anti-homosexual policies, they were unwilling to avoid military service either due to the fear of being classified 4F (unacceptable to serve) during the war or because they truly wanted to help defend the country.

⁴² Statement, *supra* note 1.

⁴³ ALLAN BERUBE, *COMING OUT UNDER FIRE 2* (1990).

⁴⁴ CHARLES KAISER, *THE GAY METROPOLIS: 1940-1996* 49 (1997).

Although the concern for manpower continued to be a pressing concern during the course of the war, the military continued to screen, albeit sometimes half-heartedly, for homosexuals during the initial draft interviews. Psychiatrists advanced many reasons for excluding homosexuals. They were either considered sexual deviants - disruptively acting out sexual desires, or they were viewed as gender deviants - too weak and effete to be effective soldiers. While initial screening tests focused on both physiological (effeminacy) and psychological (attitudes toward sex) problems and thus cast a wide net, the need for more fighting men forced psychiatrists to focus their tests. The new screening methods centered on effeminacy and outward characteristics. Detection of homosexuality during the screening process consisted largely of looking for three main characteristics: feminine body traits and effeminate dress mannerisms, and an expanded rectum.⁴⁵

The screening process instituted by psychiatrists had two major effects. First, it institutionalized the notion that homosexuals were sick. While the military's pre-War approach to homosexuality led to either prison and/or discharge, psychiatrists recommended mandatory hospitalization, psychiatric diagnosis, discharge as sexual psychopaths, and therapy.⁴⁶ The view of gay men and lesbians as mentally ill would have a profound impact on the post-War approach to homosexuality in the civilian sector.

⁴⁵ ALLAN BERUBE, *COMING OUT UNDER FIRE* 19 (1990).

⁴⁶ GEORGE CHAUNCEY, *GENDER, URBAN CULTURE, AND THE MAKINGS OF THE GAY MALE WORLD: 1890-1940* 49 (1994).

The other major impact of the military's screening process was a reinforcement of the view of homosexuals as gender deviants. Among gay men, homosexuality was equated with effeminacy and the passive sexual role. The second set of screening methods described virtually ignored the possibility of the masculine gay man.

Regardless of what military officials thought about the reliability of the screening processes, post-War reports clearly indicated that the screeners had often failed at their tasks. *Newsweek* reported in June of 1947 that:

Although Army regulations strictly forbade the drafting of homosexuals, scores of these inverts managed to slip through induction centers. ... Between 3,000 and 4,000 were discharged for this abnormality; others were released as neuropsychiatric cases. ... Frequently, a latent homosexual, who had no knowledge of his predilection, was inducted...only to develop alarming symptoms in camp, and on the battlefield.⁴⁷

The military clearly was not as adept as they believed at detecting all homosexuals during the screening process. Many gay men and lesbians served during the War. Their experiences laid the groundwork for the post-War emergence of a gay subculture.⁴⁸

c. Kinsey and The Rise of the "Expert"

⁴⁷ *Homosexuals in Uniform*, NEWSWEEK, June 9, 1947, reprinted in JONATHAN NED KATZ, GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY (1983).

⁴⁸ For an in-depth examination of the emergence of the gay subculture in American cities, see CHARLES KAISER, THE GAY METROPOLIS: 1940-1996 (1997).

The war-era screening process served as a catalyst for post-War debates among psychiatric professionals about the categorization of homosexuality as an illness. The 1950s marked a turbulent era for the gay minority in the United States. The decade started off on a promising note thanks to the aftershocks of the "Kinsey Report".⁴⁹ In his report, Kinsey claimed that 37% of adult American men has at least one orgasm with another man, and that the numbers might be even higher if it weren't for social constraints.⁵⁰

Several other events gave some hope that the 1950s would be an era of change for homosexuals. The early 1950's saw the creation of the homophile movement, the forerunner to the modern gay rights movement. The movement, termed homophile rather than homosexual in order to shift the emphasis away from sex, spurred the birth of two gay rights organizations, Mattachine Society, and One Inc. Another boost to the gay movement came in 1951 with the publication of *The Homosexual in America* by Donald Webster Cory, a book that, reported *The Nation*, "presents us with the picture of male homosexuality in the country from a homosexual's point of view."⁵¹ The book presented homosexuality in a positive light, arguing that psychiatrists who criticized gay lifestyles were privy only to the experiences of unhappy homosexuals who sought therapy, missing out on the experiences of happy, well-adjusted gays.⁵²

⁴⁹ ALFRED C. KINSEY ET AL, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948)

⁵⁰ *Id.* at 623

⁵¹ THE NATION, December 22, 1951, *reprinted in* JONATHAN NED KATZ, *GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY* (1983).

⁵² This criticism is similar to the one made by researchers examining early case studies of homosexuals. *See supra* note 40, and accompanying text.

However, the same events which raised the possibility of a change in attitudes toward homosexuality also created strong anti-homosexual backlashes. Cory's book drew heavy fire from anti-gay critics who, in the face of Cory's suggestion that homosexuals not be pushed to change their sexual orientation through psychiatric treatment, insisted that

more than ever before, homosexuality is considered an emotional illness, psychically determined, which is only a symptom of complex character problems frequently amenable to psychotherapy.⁵³

The 1950s saw a dramatic rise in the number of books examining the psychological and sociological aspects of homosexuality. The Kinsey report's focus on the discrepancy between mores and actual behavior, had brought on the need to hear from other "experts" to rebut Kinsey's findings. Shortly after Kinsey's report was published, Robert P. Knight, a professor of clinical psychiatry at Yale, wrote scathingly about Kinsey's survey methods.⁵⁴ He also saved room to criticize Kinsey's normative conclusions:

...the Kinsey report goes on to fall into one of the worst traps of the whole normal-abnormal bipolarity. This is the assumption that "prevalence" or "high incidence" equals "normality." ...Kinsey cites this high incidence [of homosexual activity] as a challenge to the contention that homosexuality is evidence of a psychopathic personality. This is a strange statement in relation to a disease with high incidence and would be more recognizable as flagrantly unscientific if the common cold (which has the same incidence as Kinsey attributes to homosexuality) were substituted for homosexuality in this piece of reasoning.⁵⁵

Hearing from other psychiatrists and psychologists reassured non-gays about the moral

⁵³ THE NATION, December 22, 1951, reprinted in JONATHAN NED KATZ, GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY (1983)..

⁵⁴ Robert P. Knight, *Psychiatric Issues in the Kinsey Report*, in ALBERT DEUTSCH (ED.), SEX HABITS OF AMERICAN MEN: A SYMPOSIUM ON THE KINSEY REPORT 57 (1948).

⁵⁵ *Id.* at 67.

correctness of anti-homosexuality. The back cover of one book, supposedly meant to present an unbiased, scientific look at homosexuality said:

I, HOMOSEXUAL, focuses the spotlight upon the homosexual himself; observes him in the very act of his sexual transgressions, allows him to speak, to purge himself of his inner torment and long-suffering guilt...(these cases are) revelations from the UNDERGROUND OF THE SEXUAL INVERT.⁵⁶

Not only did these "experts" reassure the general population and restore the veneration of the mental health professional, but they also served to exacerbate the self-hatred that some homosexuals already felt. The word "homosexual" took on a slew of negative connotations and was paired with other words like "pervert", "invert" and "faggot". The use of these terms by psychiatrists and medical professionals added a moral judgment to supposedly scientific findings. Morality was seen to have received scientific backing thanks to these books.

⁵⁶ Royal, D. I, HOMOSEXUAL: PERSONAL CASE HISTORIES OF HOMOSEXUALS (1952).

Books on homosexuality relied mainly on case studies of gay men and most often focused on male prostitutes, street kids, drag queens and promiscuous men.⁵⁷ No mention was made of possibly well-adjusted gays or of homosexuals who did not wish to change. A large part of this is due to concerted attempts by anti-gay professionals to rebut the findings of the Kinsey Report. The fear that Kinsey's report would provoke new ideas about homosexuality because of its non-judgmental approach spurred some authors to write value-laced books which either attacked Kinsey or sought to explain his findings in a "proper" anti-gay fashion..

VI. The Politics of Homosexuality

Q. When did you last enter the United States?

*A. I entered the United States on June 22, 1955 at New York for permanent residence.*⁵⁸

a. Cold War Politics

Boutilier's first sexual experience occurred in 1947, after the end of World War Two and when the psychological terror of the Cold War was just beginning to develop. In those years following this first sexual encounter with a man, Boutilier could not know that his fate was already being determined. By the time he arrived in the United States in 1955, the cultural and political forces which would underlie his deportation had already taken root.

The gay movement was caught up in many political and cultural waves which were engulfing the United States. With the advent of the Cold War, Senator Joseph

⁵⁷ ROYAL, D. I, *HOMOSEXUAL: PERSONAL CASE HISTORIES OF HOMOSEXUALS* (1952).

McCarthy went on a mission to weed out suspected Communists. McCarthy's hearings created a general atmosphere of fear, a fear felt especially by those groups who were seen as outcasts. Though McCarthyism is commonly associated with the hunt for communists, its reach spread beyond just communism, seeking to ensnare all groups of people who did not conform to rigid social and political mores: communists, homosexuals and unmarried women were just some of the groups targeted.

The focus was security, and homosexuals, just like in World War II, were considered unable to serve their country, or worse, would betray their country.

Senator Joseph McCarthy thus equated the social sin of Communism with the sexual sin of homosexuality and used the two labels as if they were synonymous. He could not have done this had there been no general belief that...men labeled "homosexual" are totally bad. ... Given this premise -- which McCarthy did not invent, but only appropriated for his own use -- it follows that homosexuals must also be politically deviant, that is Communists.⁵⁹

Homosexuals were considered to be particularly high security risks because of the perception that they could be easily blackmailed into revealing national secrets. In a letter to party members, then Republican National Committee chairman Guy Georges Gabrielson warned that "perhaps as dangerous as the actual communists are the sexual perverts who have infiltrated our Government in recent years."⁶⁰

While McCarthy's House Subcommittee on Un-American Activities was meeting, other branches of the U.S. government also moved to quash gay activity and presence.

⁵⁸ STATEMENT, *supra* note 1.

⁵⁹ THOMAS S. SZASZ, *THE MANUFACTURE OF MADNESS: A COMPARATIVE STUDY OF THE INQUISITION AND THE MENTAL HEALTH MOVEMENT* 166 (1970)

The Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Departments was on a witch hunt of its own, investigating the employment of homosexuals by the Government. Its report, *Employment of Homosexuals and Other Sex Perverts*, concluded that homosexuals lacked stability and tended to have a corrosive influence upon his fellow employees.

These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert.... One homosexual can pollute a government office.⁶¹

The Committee's report, issued in 1950, would be a landmark in the development of government policies towards homosexuals. Ironically, the language of the homosexual panic "had its core the contradictory fears that homosexuals were weak, but at the same time constituted a serious threat in their immense power over other susceptible Americans."⁶² The report criticized the federal government for failing to take "adequate steps to get these people out of government, claiming that government officials had "taken an unrealistic view of the problem of sex perversion."⁶³

⁶⁰ NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 259 (1992).

⁶¹ U.S. Senate, 81st Cong., 2d Sess., Committee on Expenditures in Executive Departments, *Employment of Homosexuals and Other Sex Perverts in Government* (1950), reprinted *IN WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 247 (Mark Blasius & Shane Phelan eds., 1997) [hereinafter, COMMITTEE REPORT]

⁶² . Molly McGarry and Fred Wasserman, *Becoming Visible: An Illustrated History of Lesbian and Gay Life in Twentieth Century America* 37 (1998).

⁶³ Committee Report, supra note 59.

b. The Nuclear Family

The anti-homosexual propaganda of the Cold War era was always couched in terms of national security. . Though sexual and gender rigidity extended beyond homosexuality, "the persecution of homosexuals was the most blatant for of sexual paranoia lining 'perversion' to national weakness."⁶⁴ However, the rhetoric always had strong gender overtones. Historian Emily Tyler May, in her study of family relationships in the Cold War era, summarized the rationale behind the sexual side of the McCarthy witch hunts:

National strength during the Cold War depended upon the ability of strong, manly men to stand up against communist threats It was not simply a matter of political weakness leading to a soft foreign policy; rather, sexual excess or degeneracy would make individuals easy prey for communist tactics. According to the common wisdom of the time, "normal" heterosexual behavior culminating in marriage represented "maturity" and "responsibility;" therefore, those who were "deviant," were, by definition, irresponsible, immature, and weak.⁶⁵

World War II also had a profound impact on post-War gender roles. The return of men from the War renewed the focus on marriage and family. Whereas women protected the home front during their husbands', brothers', and sons' absence, the return of men from fighting overseas meant that women had to be returned to their subordinate roles in their families and communities. The primacy of masculinity in the household was not only part of a belief that a strong nuclear family would protect America from the threat of Communist ideology, but it was also an aggressive attempt to recapture those institutions which women had become a part of during the war. The survival of American society

⁶⁴ ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 96 (1988)

⁶⁵ *Id.* at 96.

was linked to the survival of the American family and marriage became a cultural and moral cornerstone of conservatism.

The years following the War were marked by strong suspicion of single men. Homosexuals were threats to the institution of marriage and to the conservative family values of the time. Homosexuality had no role in the division of gender roles; it was starkly unwelcome in any discussion about the responsibilities of men and women within the family structure. Labeling gay men and lesbians as sexual deviants helped define the boundaries of appropriate behavior for men and women and penalized those who strayed outside the traditional family structure and gender hierarchy.

VII. Section 212(a)(4)

The rhetoric of psychiatry and Cold War politics permeates the legislative history and statutory language of the INA. The section of the INA at issue in *Boutilier's* case, Section 212(a)(4), states that those afflicted with psychopathic personalities were among the classes of aliens who would be ineligible to receive visas and would be excluded from admission into the United States.. The Supreme Court's majority, scrutinizing the legislative history, concluded that Congress had, "beyond a shadow of a doubt,"⁶⁶ intended that the term "psychopathic personality" be a term wide enough to include homosexuality. The Public Health Service's February, 1952, report to the House Committee on the Judiciary stated that:

ordinarily, persons suffering from disturbances in sexuality are included within the classification of "psychopathic personalities with pathological

⁶⁶ *Boutilier II*, 387 U.S. at 120.

sexuality." This classification will specify such types of pathological behavior as homosexuality or sexual perversion.

While the original version of the INA explicitly included sexual perverts as a separately identified excludable class, the Court concluded that the broader term "psychopathic personality" used in the final version was intended to encompass sexual "perversions" such as homosexuality.

The task of determining who was afflicted with a "psychopathic personality" was entrusted to the Public Health Service, whose officers were supposed to decide whether or not to issue a Class A certification of a psychopathic personality. Despite the Supreme Court's insistence in *Boutilier II* that the term "psychopathic personality" was a term of legal art, the medical community was entrusted with the responsibility of enforcing the term's application. While commenting on the original version of the INA's use of the term "sexual perverts" –which was the term of choice for homosexuals in Cold War discourse -- Public Health Service admitted that it would often be difficult to detect and diagnose homosexuality:

In some instances, considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis.⁶⁷

⁶⁷ H.R. Rep. No. 1365, *Report of the Public Health Service on the Medical Aspects of H.R. 2379, A Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, and for Other Purposes*, (1952).

Boutilier made the Immigration and Naturalization Service's task simple by admitting his sexual history with men.

The Public Health Service's concern with detection and diagnosis of homosexuality, however, is one which dates back to World War Two. During the War, psychiatrists attempted to develop the very tests the Public Health Service doubted could be found. After the war, Dr. William Menninger, the chief consultant in Neuropsychiatry to the surgeon general of the U.S. Army from 1943-1946, wrote about the military's efforts to detect homosexuality in soldiers. He described four types of homosexuality he claimed the army encountered: "latent homosexuality... [who] when placed in a strictly male communal life became disturbed and anxious;" "homosexual individual...[who] had accepted his make-up. ... Usually he remained discreet about it... Only a few of them were detected by accident;" "a third group whose homosexual tendencies arose in "special situations, usually when under the influence of excess alcohol;" a small group who were "a social menace in the use of their deliberative seductive tactics."⁶⁸ It is this last category which most influenced Cold War discourse on homosexuality, helping to paint homosexuals as dangerous to society.

War-time efforts by the governments' health officials laid a framework for the post-war views of homosexuality as a mental illness. The politics of the Cold War allowed these views to flourish. It is not just coincidence that the language of McCarthyism, psychiatry, and the INA (both in its original form and revised versions),

reveal high degrees of similarity. Whether it was psychiatrists talking about the social menace posed by homosexuals, or the Public Health Service describing sexual perversion, the era in which the INA was passed reflects a concerted effort by elements of the government and the scientific community to use sexuality as a tool for power and control.

VIII. Conclusion

Q. When did you have your first homosexual act? Approximately?

A. Approximately when I was 14.

...

Q. When did you have a homosexual act after this? About how long ago?

A. About two years after that.

...

Q. On how many occasions did you have these blowjobs in Halifax?

A. I had them twice at that place.

...

Q. And after these two blowjobs in Nova Scotia, in Halifax, that you mentioned when did you again have a homosexual act?

A. It was on average of three or four times a year for the next six or seven years in Halifax and in Pictou County.

Q. Was this all prior to your entry into the United States on June 22, 1955?

A. Yes. .⁶⁹

In describing his earliest same-sex experiences, Boutilier lay down the groundwork for his own deportation. The INA's exclusion of psychopathic personalities was contingent on such disorders being present at the time of entry into the United States. Boutilier's teenage and young adult sexual experiences were the basis for his exclusion. The era of immigration policy in which Boutilier was deported came to an end more than 30 years after Clive Michael Boutilier was deported. The passage, and subsequent

⁶⁸ William C. Menninger, *Psychiatry in a Troubled World: Yesterday's War and Today's Challenge*, quoted in JONATHAN NED KATZ, *GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY* 636 (1994).

⁶⁹ STATEMENT, *supra* note 1.

signing by President Bush, of the Immigration Act of 1990 repealed the exclusion of homosexuals under the INA.⁷⁰ Ironically, the repeal lagged almost two decades behind the psychiatric community which spurred the INA, the American Psychiatric Association having removed homosexuality from the Diagnostics and Statistical Manual of Mental Disorders in 1973.⁷¹

Unlike Michael Hardwick, who has become notoriously linked to the Supreme Court case which bears his name, Clive Michael Boutilier rests in relative anonymity despite his own handling at the hands of the High Court in 1967. In the end, the most intriguing question of this story will never be known: what compelled Boutilier to be so open about his homosexuality? Though we may never know the answer, it is undeniable that he was caught up in political and social forces which began forming well before he ever had his first same-sex experience, and well before he arrived in the United States.

The political, cultural, and medical forces which Boutilier's fate was shaped by continues to have strong saliency today. Conservative activists continue to use the rhetoric of illness and deviance to counter advances made by the gay and lesbian rights

⁷⁰ 8 U.S.C. §1182(a)(4), *as amended* 1965.

⁷¹ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTICS AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3rd Ed. 1980). For an examination of the battle over the removal of homosexuality from the DSM, *see* HERBERT KUTCHINS AND STUART A. KIRK, *MAKING US CRAZY: DSM, THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS* (1997). For a critique of the use of the DSM in the construction of mental disorder, *see* PAULA J. CAPLAN, *THEY SAY YOU'RE CRAZY: HOW THE WORLD'S MOST POWERFUL PSYCHIATRISTS DECIDE WHO'S NORMAL* (1995).

movement. Although the use of psychiatric discourses serves different political ends now, psychiatry and politics continue to feed anti-gay policies and ideologies.