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## The Exclusion of Mentally Ill Aliens Who May Pose a Danger to Others: Where Does the Real Threat Lie?

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## COMMENT

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## I. INTRODUCTION

In the early 1990's, there was a growing recognition that people with mental disorders could make important contributions to society.<sup>1</sup> As a result, laws were changed to end discrimination against the disabled.<sup>2</sup> The Immigration Act of 1990<sup>3</sup> was supposed to complement these changing attitudes by amending the laws that excluded mentally disabled aliens. Under the old immigration laws, mental illness alone was grounds to exclude an alien.<sup>4</sup> The Immigration Act of 1990 added the requirement

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1. See Juan P. Osuna, *Vaccinations of Immigrants and Other Health-Related Issues: An Update*, IMMIGR. BRIEFINGS, Aug. 1998, at 5.

2. See *id.*

3. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

4. See Helena Tetzeli, *Medical and Health-Related Grounds of Exclusion: Recent Law, Trends, and Practice*, IMMIGR. BRIEFINGS, Jan. 1997, at 2.

that mentally ill aliens pose a potential threat to others to be excluded.<sup>5</sup>

Section 1182(a)(1)(A)(iii) of the Immigration Act of 1990 specifically states that aliens could be excluded if they were determined:

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . .<sup>6</sup>

Under this language, a mentally ill alien cannot be excluded unless some kind of potentially threatening behavior accompanies the disorder. In theory, this makes it harder to exclude mentally ill aliens because not all such aliens exhibit threatening behavior.<sup>7</sup> This new classification also eliminates the old system of excluding aliens solely because they fit a particular medical diagnosis.<sup>8</sup>

Although the law now makes it harder to exclude mentally defective aliens, the law has not gone far enough to protect these aliens from discrimination. It is no surprise that people often fear and mistrust the mentally ill.<sup>9</sup> The label of mental illness is stigmatizing. Oftentimes, an ex-mental patient will be discriminated against more than an ex-criminal.<sup>10</sup>

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5. See 8 U.S.C. § 1182(a)(1)(A)(iii) (1999).

6. *Id.*

7. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, at 46, 435, 436, 481, 484, 487 (4th ed. 1994). Many of the disorders listed in this book, including mental retardation, various anxiety disorders and phobias, and dissociative disorders, have no harm associated with them. See *id.*

8. See H.R. REP. NO. 101-723, at 6732 (1990). In this report, The American Psychiatric Association applauded Congress for turning away from the old system.

9. See Eva S. Stubits, *Judgments of Dangerousness Mental Illness 1* (1977) (unpublished M.S. thesis, University of Miami) (on file with the University of Miami Library).

10. See *id.*

In its discussions, Congress implied that these concerns would be abated by the passage of the 1990 Act. The Conference Committee Report stated that many of the former mental health exclusion grounds were omitted because they did not comport with advances in medical science.<sup>11</sup> Congress also indicated that the change in laws "complements changes made to other laws to prohibit discrimination against disabled individuals."<sup>12</sup> In its House Reports, Congress characterizes the old exclusion grounds as "outmoded and inflexible," and the new grounds as "enlightened and flexible."<sup>13</sup>

But is this really true? The standard in the 1990 Act for determining possibly dangerous behavior is undefined. The standard could extend only to those with prior criminal convictions,<sup>14</sup> or it could extend to all aliens who may cause psychological harm to someone else.<sup>15</sup> The Immigration and Naturalization Service (INS) is left with a high level of discretion to exclude an alien under the 1990 Act.<sup>16</sup>

This standard is not applied to aliens who do not suffer from mental illness. There is considerable doubt whether mental illness alone increases the odds that a person will commit harmful behavior.<sup>17</sup> Under § 1182(a)(1)(A)(iii), a mentally ill alien posing a potential threat could be excluded from the country, while it can be assumed that a non-mentally ill person with the same characteristic could not.<sup>18</sup> On its face, this result appears to be discriminatory.

This comment criticizes § 1182(a)(1)(A)(iii), which excludes mentally disordered aliens who may pose a threat to others. Part II discusses the history of immigration laws that exclude aliens with mental disorders. Part III examines the pros and cons of

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11. See Daniel Levy, *Exclusion Grounds Under the Immigration Act of 1990: Part 1*, IMMIGR. BRIEFINGS, Aug. 1991, at 4-5.

12. Osuna, *supra* note 1, at 5.

13. H.R. REP. NO. 101-723, at 6732 (1990).

14. See Osuna, *supra* note 1, at 5.

15. See Tetzeli, *supra* note 4, at 8.

16. The Immigration and Naturalization Service (INS) has the power to exclude an alien at the U.S. border or port of entry on the basis of 8 U.S.C. § 1182(a)(1)(A)(iii) (1999). Aliens can also be excluded by consular officers of the State Department overseas, who may refuse to issue a mentally defective alien a visa on the grounds that alien may pose a "threat" to others. See Tetzeli, *supra* note 4, at 1.

17. See MacArthur Research Network on Mental Health and the Law, (visited Mar. 24, 2000) <<http://ness.sys.virginia.edu/macarthur/violence.html>>.

18. See 8 U.S.C. § 1182(a)(1)(A)(iii) (1999).

the medical screening process. Part IV argues that § 1182(a)(1)(A)(iii) is unreasonable because it does not fulfill its purpose and is because the statute is overbroad. Part V poses the question whether this statute is constitutional. This comment concludes § 1182(a)(1)(A)(iii) should be altered or stricken because it is unreasonable and threatens the constitutional rights of aliens.

## II. THE HISTORY OF IMMIGRATION LAWS RELATING TO THE MENTALLY DISORDERED

### A. *Federal Immigration Laws and Policies Regarding the Mentally Ill*

From the time this country was founded, there has been a struggle between those who want our country to be a refuge to everyone, and those who want to sharply limit admission.<sup>19</sup> The United States has a long history of excluding physically or mentally defective aliens.<sup>20</sup> In fact, the individual states barred entry to mentally defective individuals until the middle of the Nineteenth Century.<sup>21</sup>

In 1875, the Supreme Court ruled regulation of immigration by the States violated the federal government's power to control foreign matters.<sup>22</sup> This ruling signaled the birth of modern federal immigration policy.<sup>23</sup> In 1882, the federal government

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19. See ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS* 7 (1985). Ms. Hull opines that confusion has ruled our country's immigration policy, and more often than not America has been a refuge to those who needed it. Ms. Hull humorously comments on this confusion in a story about Vice-President Alben Barkley. Chief Ben American Horse of the Sioux Indian Tribe once told Alben Barkley, "Young fellow . . . [b]e careful with your immigration laws. We were careless with ours." *Id.*

20. See Tetzeli, *supra* note 4, at 2.

21. See *id.*

22. See *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

23. See Jason A. Pardo, *Excluding Immigrants on the Basis of Health: The Haitian Centers Council Decision Criticized*, 11 J. CONTEMP. HEALTH L. & POL'Y 523, 526 (1995). See also *Henderson*, 92 U.S. 259 (holding that a state statute imposing a financial burden on a shipmaster bringing alien passengers invaded Congress's domain, and thus was void); *Smith v. Turner*, 48 U.S. 283 (1849) (holding state statutes imposing taxes on alien passengers invalid).

passed the first general immigration statute.<sup>24</sup> The Immigration Act of 1882 restricted admission for individuals suffering from a mental or physical condition, and made specific references to "lunatics" and "idiots."<sup>25</sup> Surprisingly, the provisions of the Act excluding mental defectives passed with little debate in Congress, whereas other provisions excluding alien criminals and public charges were more hotly contested.<sup>26</sup>

The United States has continued to bar mentally defective individuals throughout the years on grounds ranging from "one or more attacks of insanity" to a "psychotic personality or mental defect."<sup>27</sup> This system of exclusion was further delineated by the landmark Immigration and Nationality Act of 1952.<sup>28</sup> This Act formed the basic structure of modern U.S. immigration policy,<sup>29</sup> and continued the practice of excluding mentally defective aliens.<sup>30</sup>

Prior to the passage of the Immigration Act of 1990, there were seven health-related exclusion grounds. These were: "1) mental retardation, 2) insanity, 3) previous insanity, 4) sexual deviance, psychopathic personality, or mental defect, 5) drug addiction or chronic alcoholism, 6) affliction with a dangerous contagious disease, and 7) possession of physical defects or disabilities affecting one's ability to earn a living."<sup>31</sup> The 1990 Act eliminated the majority of these exclusion categories and combined the remainder into a single three-part subsection.<sup>32</sup> Section 1182(a)(1)(A)(iii) is a component of this three-part subsection.

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24. See Osuna, *supra* note 1, at 1.

25. See Pardo, *supra* note 23, at 527.

26. See E. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, 414-15 (1981).

27. Tetzeli, *supra* note 4, at 2.

28. Pub. L. No. 414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

29. See Pardo, *supra* note 23, at 528.

30. See Osuna, *supra* note 1, at 2.

31. *Id.*

32. See *id.*

*B. The Effect of Federal Immigration Laws and Policies on the Mentally Ill*

America has long utilized its immigration laws to keep out mentally ill aliens.<sup>33</sup> The United States excluded the highest number of mentally defective aliens between 1911 and 1920, when 42,129 mentally ill aliens were excluded.<sup>34</sup> Statistics indicate that this number dropped greatly in later years.<sup>35</sup> However, the real number of mentally disordered aliens excluded is probably much higher because these statistical numbers reflect minimums, not maximums.<sup>36</sup>

There is a danger in leaving § 1182(a)(1)(A)(iii) on the books. When the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>37</sup> was passed, there was a strong public feeling in the United States that the number of immigrants needed to be reduced.<sup>38</sup> One author argues that the restrictive IIRIRA was passed to appease this anti-immigration sentiment.<sup>39</sup> This indicates that political forces, rather than neutral forces, affect immigration policy.

Who is to say that if the political atmosphere in the United States should so warrant it, § 1182(a)(1)(A)(iii) will not be more

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33. See Tetzeli, *supra* note 4, at 2.

34. See John F. Stanton, *The Immigration Laws From A Disability Perspective: Where We Were, Where We Are, Where We Should Be*, 10 GEO. IMMIGR. L.J. 441, 451 n.82 (1996). Stanton's article lists statistics for the number of mentally ill aliens excluded between 1892 and 1970:

Year	Number of Aliens Excluded
1892-1900	1,309
1901-1910	24,425
1911-1920	42,129
1921-1930	11,044
1931-1940	1,530
1941-1950	1,021
1951-1960	956
1961-1970	145

35. See *id.*

36. See *id.*

37. Pub. L. No. 104-208, 110 Stat. 3009-575 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IIRIRA]. IIRIRA made sweeping changes to immigration law. In particular, it greatly reduced the number of due process rights available to illegal aliens. See Lolita Buckner Inniss, *Dutch Uncle Sam: Immigration Reform and Notions of Family*, 36 BRANDEIS J. FAM. L. 177, 199 (1998).

38. See Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 106 (1999).

39. See *id.* at 106-107.



rigorously enforced? If the atmosphere should become more anti-immigrant in nature, § 1182(a)(1)(A)(iii) may be utilized to keep out otherwise acceptable immigrants. Additionally, if the atmosphere becomes more biased against people with mental disorders,<sup>40</sup> the same section may be enforced to keep out the mentally ill.<sup>41</sup> The recent reductions in the number of mentally disordered aliens excluded under the immigration laws can be attributed to the disabled population's movement,<sup>42</sup> which brought about changes such as the Americans with Disabilities Act of 1990 (ADA).<sup>43</sup> Conversely, if the disabled population's movement should die down, the number of mentally disordered aliens excluded from the United States may increase. The danger of leaving this statute on the books is that these possibilities could become realities.

### III. THE INS TESTING PROCEDURES

#### A. *The Medical Screening Process*

Medical inspections are conducted in three instances: 1) when an individual applies for an immigrant visa abroad, 2) when an alien presents herself for inspection at the U.S border or ports of entry, and 3) when an alien seeks to adjust her status.<sup>44</sup> This section discusses what testing procedures are used for each circumstance and what potential problems they pose.

The Public Health Service (PHS) establishes the procedures for medically examining aliens.<sup>45</sup> These procedures are published partly as regulations and partly as official technical instructions.<sup>46</sup> When the PHS issues regulations concerning § 1182(a)(1)(A)(iii), they are required by law to consult with the Justice Department.<sup>47</sup> This appears to be an added safeguard to ensure that the INS accurately identifies which mentally ill aliens may pose a threat to others.

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40. See Stubits, *supra* note 9, at 1.

41. See Stanton, *supra* note 34, at 452.

42. See *id.*

43. 42 U.S.C. § 12101-213 (Supp. II 1990).

44. See Tetzeli, *supra* note 4, at 6-7.

45. See Levy, *supra* note 11, at 5.

46. See *id.*

47. See *id.*

Aliens wishing to obtain a visa abroad must apply for one from a U.S. embassy or consular office.<sup>48</sup> The consular officer will then require the alien to undergo a physical and mental examination. Even if an alien is applying for a nonimmigrant visa, a consular officer may still require a medical examination if he feels that it is necessary.<sup>49</sup> The U.S. embassy must appoint or approve the physicians who perform these examinations.<sup>50</sup> An alien applying for a visa abroad cannot appeal a finding of excludability.<sup>51</sup> The procedure for inspecting aliens at the border and for aliens adjusting their status is similar to that for aliens who obtain visas abroad.<sup>52</sup> Physicians conducting these medical examinations must follow the technical instructions issued by the Director.<sup>53</sup>

After inspection, an alien may be issued either a Class A or Class B notification.<sup>54</sup> These class notifications apply to all types of aliens, whether they are obtaining a visa abroad, presenting themselves for inspection at the border, or seeking an adjustment of status.<sup>55</sup> The finding of a Class A condition will exclude an alien.<sup>56</sup> Class A conditions include certain communicable diseases, and physical or mental disorders that may have associated threatening behavior.<sup>57</sup> Class A notifications cannot be based merely on an alien having mental shortcomings.<sup>58</sup> The finding of a Class B condition will not automatically exclude an alien.<sup>59</sup> Class B conditions include both physical and mental abnormalities. These abnormalities are not necessarily accompanied by a possible threat to others.<sup>60</sup> Although a Class B finding will not alone exclude an alien, it can be given great weight when combined with other factors in deciding whether to exclude an alien.<sup>61</sup>

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48. See 8 U.S.C. § 1201(a) (1996).

49. See 8 U.S.C. § 1201(d) (1996).

50. See Tetzeli, *supra* note 4, at 7.

51. See *id.*

52. See *id.*

53. See 42 C.F.R. § 34.3(f) (1998).

54. See 42 C.F.R. § 34.4 (1998).

55. See Tetzeli, *supra* note 4, at 7.

56. See 42 C.F.R. § 34.4(b) (1998).

57. See *id.*

58. See *id.*

59. See 42 C.F.R. § 34.4(c) (1998).

60. See *id.*

61. See Tetzeli, *supra* note 4, at 7.

An alien who is found excludable under § 1182(a)(1)(A)(iii) may appeal the decision to the Board of Medical Officers of the PHS.<sup>62</sup> This appeals process is open to aliens who were inspected at the border or who are adjusting their status, but not to aliens who obtain visas abroad.<sup>63</sup> In reviewing the decision, the Board considers the record, any necessary laboratory studies, and statements made by the alien's physician.<sup>64</sup> The Board also conducts its own independent medical examination of the alien at their option.<sup>65</sup> This means that an independent medical examination is not required and that the Board can merely rely on the record if it so chooses. The granting of an appeal is not necessarily guaranteed. An alien's request for an appeal could very well be refused.<sup>66</sup>

### *B. Problems with the Medical Screening Process*

There are several problems with the medical screening process. One problem is that the right people may not be performing these exams. Many States have passed laws requiring that a psychiatrist determine whether an individual may be dangerous.<sup>67</sup> However, Immigration Regulations do not require that all of the examining physicians be psychiatrists.<sup>68</sup> This means that the person determining that an alien is potentially dangerous may not be the best qualified to do so. Although an alien will have access to a psychiatrist during the appeals process, there is no guarantee that an alien will obtain an appeal.<sup>69</sup>

Another problem is that there may not be adequate time to determine whether a mentally ill alien poses a possible threat to others. In the 1983 case of *In re Longstaff*,<sup>70</sup> a former immigration officer testified that INS officers spent an average of thirty-eight seconds inspecting alien's papers at the border.

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62. See 8 C.F.R. § 245.5 (1998). The Board of Medical Officers is made up of three medical officers, at least one of which must be a board certified psychiatrist. See 42 C.F.R. § 34.8(b)(3) (1998).

63. See Tetzeli, *supra* note 4, at 7.

64. See 42 C.F.R. § 34.8 (1998).

65. See 42 C.F.R. § 34.8(c) (1998).

66. See 42 C.F.R. § 34.8 (1998).

67. See Stubits, *supra* note 9, at 3.

68. See 42 C.F.R. § 34.8 (1998).

69. See *id.*

70. 716 F.2d 1439, 1446 (5th Cir. 1983).

Although these aliens had usually undergone medical examinations prior to their arrival in the United States, the border officers still had the power to admit or deny entry to aliens based on their visas.<sup>71</sup> With only thirty-eight seconds being spent on the perusal of visas, it is easy for an officer to make a mistake. This is exactly what happened in *Longstaff*.

The alien in *Longstaff* was originally admitted to the United States even though he was a homosexual at the time of entry, which was a ground for exclusion. The officers inspecting the alien at his time of entry did not ascertain his sexual orientation.<sup>72</sup> When the alien's homosexuality was later discovered, he was refused naturalization.<sup>73</sup> A mentally ill alien with associated threatening behavior could be treated this same way. For instance, if such an alien manages to enter the United States and the existence of his mental illness is not discovered until much later, he could be later be denied naturalization. This situation could be avoided if border officers spent more time inspecting aliens.

Aliens do have the right to appeal an exclusion decision, which can remedy any problems in the medical screening process. However, this appeals process is not open to aliens who obtain their visas abroad. This leads to the paradoxical conclusion of rewarding those aliens who come to the U.S. border even though there is a possibility such aliens could be turned away and forced to go back home. It is as if the United States is punishing aliens for not taking that risk.

#### IV. SECTION 1182(a)(1)(A)(III) IS UNREASONABLE

Congress should revise § 1182 because it is not reasonable. First, there is no proven link between mental illness and violence, and thus the statute does not provide any additional safeguards to protect U.S. citizens from violence. Second, the disorders for which an alien can be excluded under the statute do not necessarily have associated harmful behavior or the potential of associated harmful behavior. Lastly, the wording of the statute is vague. This vagueness can lead to an overbroad

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71. See *id.* at 1445-46.

72. See *id.* at 1440.

73. See *id.* at 1451.

reading and thus exclude more aliens from the United States than the statute intended.

### A. *Mental Illness and Violence*

There has always been considerable debate about whether a connection exists between mental disorder and violence. In previous years, research indicated that there may be a link, but the research was not conclusive.<sup>74</sup> Among criminal populations, a greater percentage of inmates were diagnosed with schizophrenia than any other type of disorder.<sup>75</sup> Schizophrenics also had a higher-than-average likelihood, .05%, of being implicated in a homicide.<sup>76</sup> Although this sounds low, this rate is significantly higher than that of the general population.<sup>77</sup>

There was also evidence that a connection existed between violence and other types of psychotic disorders.<sup>78</sup> In Sweden, researchers examined the histories of a group of 15,117 people from birth and found that criminal convictions were statistically more prevalent among those adults who suffered from major mental disorders.<sup>79</sup> The study did not indicate whether those who suffered from minor mental disorders, which can also be grounds of excludability under the 1990 Act, were more likely to pose a threat to others.<sup>80</sup>

During this same period, research suggested that there is no link between mental disorder and dangerousness. One study, conducted between 1983 and 1984, asked whether the presence of a mental disorder increased the risk of violent crime among jail detainees.<sup>81</sup> Among the jail detainees examined, the researchers found that the presence of mental disorder could not accurately predict a future violent criminal act.<sup>82</sup> The researchers concluded the longstanding hypothesis that mentally ill people would

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74. See MENTAL DISORDER AND CRIME, ix (Sheilagh Hodgins ed., 1993).

75. See *id.* at 64-65 (basing conclusions on research conducted by Hafner & Boker in 1973 & 1982, and by Taylor & Gunn in 1984).

76. See *id.*

77. See *id.*

78. See *id.* at ix.

79. See *id.* at x.

80. See *id.* at x.

81. See *id.* at 87.

82. See *id.* at 97.

commit a violent crime after they are released from incarceration is faulty.<sup>83</sup>

Today, there is groundbreaking research that suggests there is little, if any, connection between mental illness and violence.<sup>84</sup> One of the most notable studies is the MacArthur Violence Risk Assessment Study, which has been referred to as "the most important study ever conducted in this area."<sup>85</sup> The MacArthur study analyzed whether there was a link between mental illness and violence.<sup>86</sup> Similar studies in the past have been criticized for examining too small a patient sample or for examining too few variables.<sup>87</sup> The main reasons these deficiencies existed were: "(a) inadequate predictor variables, (b) poorly defined and inadequate measures of violence, (c) constricted samples, and (d) unsystematic and poorly organized research efforts."<sup>88</sup>

The MacArthur Study attempted to solve these problems by looking at a more comprehensive set of data. The study examined approximately 1,000 patients located in three mental hospital sites.<sup>89</sup> After analyzing the data, researchers found that there was "no significant differences in the risk of violence between the inpatient and non-patient populations, absent

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83. See *id.*

84. See MacArthur Research Network on Mental Health and the Law, (visited Mar. 24, 2000) <<http://ness.sys.virginia.edu/macarthur/violence.html>>. Some of this new research suggests that any correlation found between mental illness and violence is due to the presence of substance abuse. See Bruce G. Link et al., *Real in their Consequences: A Sociological Approach to Understanding the Association Between Psychotic Symptoms and Violence*, 64 AM. SOC. REV. 316, 320 (1999). The MacArthur Study found that "patients discharged from psychiatric facilities who did not have co-occurring substance abuse disorders were no more violent than their neighbors. However, substance abuse raised the rate of violence among discharged patients by nearly five times, whereas it caused the rate only to triple for the general population." VIOLENCE IN HOMES AND COMMUNITIES 188 (Thomas P. Gullota & Sandra J. McElhaney eds., Issues in Children's & Families' Lives Series Vol. No. 11, 1999).

85. Kirk Heilbrun & Gretchen Witte, *The MacArthur Risk Assessment Study: Implications for Practice, Research, and Policy*, 82 MARQ. L. REV. 733 (1999).

86. See MacArthur Research Network on Mental Health and the Law, (visited Mar. 24, 2000) <<http://ness.sys.virginia.edu/macarthur/violence.html>>.

87. See Alison McChrystal Barnes, *Competency, Coercion, and Risk of Violence: Legal Intersects with Fundamental Issues of Mental Health*, 82 MARQ. L. REV. 713, 720 (1999).

88. Heilbrun, *supra* note 85, at 740.

89. See McChrystal Barnes, *supra* note 87, at 720-21.

factors of drug and/or alcohol abuse."<sup>90</sup> The study concluded: "mental illness does not correlate strongly with violent behavior."<sup>91</sup>

Other current researchers support the theory that there is no significant link between mental illness and violence. In 1993, one researcher discovered that ninety percent of mentally ill people are not violent.<sup>92</sup> Another researcher, in a 1992 study, pitched this figure even lower by claiming that the mentally ill commit no more than three per cent of the violent acts in America.<sup>93</sup> Also, "epidemiological research shows that the association between mental disorder and violence is slight."<sup>94</sup> This conclusion has been echoed repeatedly throughout other publications.<sup>95</sup>

Even if a slight correlation between mental illness and violence does exist, it is not significant. The effect of any correlation is minimized since mental illness is a poor predictor of violence.<sup>96</sup> Other factors, such as gender, age and substance abuse, are better predictors of future violent behavior.<sup>97</sup> One author commented:

If a community were to use the risk of violence as the sole basis for the exclusion of people with mental illnesses, such a community might just as well exclude men in favor of women, teenagers in favor of people who are 50 years old, and grade school graduates in favor of college graduates.<sup>98</sup>

Applying this rationale to § 1182(a)(1)(A)(iii), if the legislature is going to exclude mentally ill persons who may pose a threat to others, then they might as well exclude potentially

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90. *Id.*

91. *Id.*

92. See VIOLENCE IN HOMES AND COMMUNITIES, *supra* note 84, at 185 (Swanson obtained this statistic by reviewing the findings from the National Institute of Mental Health Epidemiological Catchment Area Study).

93. See *id.* (Monahan performed this study).

94. Charles M. Boisvert & David Faust, *Effects of the Label "Schizophrenia" on Causal Attributions of Violence*, 25(3) SCHIZOPHRENIA BULL. 479, 480 (1999) (relying on research done by Link and by Monahan in 1992).

95. See VIOLENCE IN HOMES AND COMMUNITIES, *supra* note 84, at 183. See also Link, *supra* note 84, at 320.

96. See VIOLENCE IN HOMES AND COMMUNITIES, *supra* note 84, at 183.

97. See *id.*

98. Link, *supra* note 84, at 330.

threatening aliens who fall into an unfavorable gender or age group. In fact, it would make even more sense to do so, considering age and gender are better predictors of violence than the existence of a mental illness.

A close reading of § 1182(a)(1)(A)(iii) suggests that one of its purposes in singling out the mentally ill is to protect American citizens from possible threats of violence. If the mentally ill do not pose a significantly greater threat than the non-mentally ill, then the statute is not fulfilling its purpose. This makes § 1182(a)(1)(A)(iii) unreasonable.

*B. Disorders for Which an Alien Can Be Excluded  
Under §1182(a)(1)(A)(iii)*

A finding that an alien has a Class A disorder permits the United States to exclude that alien.<sup>99</sup> These disorders are identified in the PHS Technical Instructions.<sup>100</sup> Class A disorders include: (1) antisocial personality disorders, (2) impulse control disorders, (3) paraphilias, (4) conduct disorders, (5) mood disorders, (6) schizophrenic disorders, (7) alcoholism, and (8) drug abuse.<sup>101</sup> Not all of these disorders are particularly associated with harmful behavior.<sup>102</sup> Section 1182(a)(1)(A)(iii) does not delineate which disorders should establish per se excludability, and therefore it is unreasonable.

A growing body of research suggests that a connection between violence and mental illness is mostly found in people who have psychotic symptoms.<sup>103</sup> Not all psychotic symptoms lead to violence.<sup>104</sup> Researchers have targeted specific psychotic

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99. See 42 C.F.R. § 34.4(b) (1998).

100. See Levy, *supra* note 11, at 7.

101. See *id.* at 8.

102. See AMERICAN PSYCHIATRIC ASS'N, *supra* note 7, at 218. People abusing the drug cannabis, for example, do not have associated harmful behavior.

103. See VIOLENCE IN HOMES AND COMMUNITIES, *supra* note 84, at 187. This body of research includes a 1996 study by Junginger that found a connection between violence committed by the severely mentally ill and psychotic symptoms. See *id.* at 186. There were also a number of studies about threat/control-override symptoms and their link to violence. These studies included a 1995 study by Link and Strueve, a 1996 study by Swanson, Borum, Swartz and Hiday, and a 1997 study by Swanson, Borum, Swartz and Monahan. See *id.* at 187.

104. The term "psychotic," as used in the phrase "psychotic symptoms," has a variety of different definitions. The term can be restricted to delusions or hallucinations or expanded to include symptoms of schizophrenia, such as disorganized speech and grossly



symptoms, known as threat/control-override symptoms, as those that could possibly lead to violence.<sup>105</sup>

Threat/control-override symptoms fall into two types. The first type, threat, involves a person feeling threatened to the point where they think violent behavior is justified.<sup>106</sup> The second type, control-override, involves a person looking at a situation in such a way as to override their usual behavioral constraints.<sup>107</sup> Not all psychotic symptoms are associated with violence because the element of threat is not always present. For example, a person hearing voices in his or her head would not necessarily be connected with future violence, unless of course, those voices were telling the person to commit harm.<sup>108</sup>

Of the disorders mentioned in the PHS Technical Instructions, only mood disorders, schizophrenic disorders and possibly drug abuse are associated with psychotic symptoms.<sup>109</sup> The other five disorders, therefore, should not be listed as Class A medical conditions because there is no intrinsic threat.

Even though mood disorders, schizophrenic disorders, and drug abuse have associated psychotic symptoms, their inclusion in the PHS Technical Instructions is still over inclusive. Some of the aliens suffering from these disorders will have no psychotic symptoms at all. Drug abuse, for example, encompasses many substances that produce no psychotic effects.<sup>110</sup> Depression, which falls under mood disorders, is also not typically associated with psychotic symptoms.<sup>111</sup> Even the aliens who do show psychotic symptoms will not necessarily have threat/control-override symptoms.

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disorganized or catatonic behavior. See AMERICAN PSYCHIATRIC ASS'N, *supra* note 7, at 273. It can also be defined as a gross impairment in reality testing or a loss of ego boundaries. See *id.*

105. See Link, *supra* note 84, at 318.

106. See *id.*

107. For example, a person thinking God was commanding them to kill someone would fit the definition of control/override because in that situation the person's normal behavioral constraints against murder are overridden. See *id.* at 318.

108. See Link, *supra* note 84, at 318.

109. See AMERICAN PSYCHIATRIC ASS'N, *supra* note 7, at 285-86, 232-33, 380. Drug abuse is included in this list because there is considerable debate about whether hallucinogen use can trigger psychotic symptoms in susceptible persons. See *id.* at 235.

110. See AMERICAN PSYCHIATRIC ASS'N, *supra* note 7, at 218. Except for hallucinogens, most of the drugs listed, such as cocaine, marijuana, etceteras, do not have associated psychotic symptoms. See *id.* at 232-34.

111. See AMERICAN PSYCHIATRIC ASS'N, *supra* note 7, at 327.

Threat/control-override symptoms are only one subset of psychotic symptoms.<sup>112</sup> It has been suggested that symptoms are a better way to predict who will become violent than are disorders.<sup>113</sup> The PHS Technical Instructions make no attempt to distinguish between aliens who have threat/control-override symptoms, and aliens who do not. Although it would be difficult to make this distinction within the three disorders that have associated psychotic symptoms, it would be easy to eliminate the other five disorders that have no associated psychotic symptoms. The PHS, however, does not do this.

There is also a dangerous catchall provision within the PHS Technical Instructions. This provision, which encompasses physical and mental disorders not covered by the other provisions, imposes per se excludability for disorders that limit capacity and may have associated threat.<sup>114</sup> This provision is open to abuse.

In *Morell-Acosta v. INS*,<sup>115</sup> a lawful permanent resident alien who had been diagnosed with mental retardation was ordered deported. The resident protested the deportation, claiming that § 1182(a)(1)(A)(iii) eliminated the practice of excluding aliens on the basis of mental retardation.<sup>116</sup> However, the reviewing court countered, while mental retardation could no longer be a per se reason for exclusion, an alien could still be excluded if their mental disorder causes them to be a potential threat.<sup>117</sup> The Ninth Circuit upheld the deportation order,<sup>118</sup> and in so doing implicitly classified mental retardation to be a mental disorder under § 1182(a)(1)(A)(iii).

Finally, the disorders listed in the PHS Technical Instructions do not match current research findings on predictors of violence. The instructions should therefore be revised so that they are not over inclusive.

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112. See Link, *supra* note 84, at 319. In the Psychiatric Epidemiology Research Interview's psychotic symptom scale, thirteen items indicative of psychoses were listed. Of these thirteen, only three were threat/control-override symptoms. See *id.*

113. See VIOLENCE IN HOMES AND COMMUNITIES, *supra* note 84, at 190.

114. See Levy, *supra* note 11, at 8.

115. No. 94-70442, 1996 WL 290037 (9th Cir. May 31, 1996).

116. See *id.* at \*2.

117. See *id.*

118. See *id.* at \*4.

C. *The Wording of § 1182(a)(1)(A)(iii)*

One of Congress's purposes in enacting the Immigration Act of 1990 was "to make it possible for aliens who do not pose a danger to enter this country."<sup>119</sup> Section 1182(a)(1)(A)(iii) is supposedly in line with this goal because it only excludes the mentally ill who may pose a threat. However, § 1182(a)(1)(A)(iii) fails to define the term "danger" and therefore lacks the concreteness of other statutes dealing with harmful behavior. This lack of definition makes the statute unreasonable.

Section 1182(a)(1)(A)(iii) excludes mentally or physically disordered aliens who may pose a "threat" or whose behavior may lead to other "harmful behavior."<sup>120</sup> However, this statute does not tell us which specific acts constitute threat or harm.<sup>121</sup> Although Congress may have had some specific guidelines in mind when creating the exclusion for mentally ill aliens, it failed to convey them in the drafting process.

The result is that "danger" under § 1182(a)(1)(A)(iii) is left to a wide range of interpretations. For example, a schizophrenic who damages property or people can be considered "dangerous" under the statute.<sup>122</sup> So can aliens who suffer from behavioral disorders that are not violent, but still pose a threat to others.<sup>123</sup> With all of the above, the finding of past criminal behavior or a conviction is not necessary to exclude an alien under § 1182(a)(1)(A)(iii).<sup>124</sup> The notion of dangerousness under the statute can even be taken to ridiculous extremes. According to the Foreign Affairs Manual, an alien merely causing psychological harm to someone can qualify as "dangerous" under the statute.<sup>125</sup>

Congress may not have intended for the word "threat" under the statute to be so liberally defined. In its House Reports, Congress asserts that an alien who was involved in minor incidents, such as a street fight many years ago, was not meant

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119. H.R. REP. NO. 101-723, at 6733 (1990).

120. 8 U.S.C. § 1182(a)(1)(A)(iii) (1999).

121. *See id.*

122. *See* H.R. REP. NO. 101-723, at 6734 (1990).

123. *See id.* Antisocial personality disorder and exhibitionism are two examples of behavioral disorders that may not be violent, but may still pose a threat to others.

124. *See* Tetzeli, *supra* note 4, at 8.

125. *See id.*

to fall within this definition of "threat."<sup>126</sup> However, Congress has legally left the door open to this possibility by not putting more definitive guidelines into the statute.

#### V. CONSTITUTIONALITY OF § 1182(a)(1)(A)(III)

##### A. *The Standard of Review for the Exclusion of Aliens Under §1182(a)(1)(A)(III)*

Courts use the facially legitimate and bona fide standard to determine whether the exclusion of an alien under § 1182(a)(1)(A)(iii) is proper.<sup>127</sup> The meaning of this standard is difficult to define. On the surface, it appears that if an agency advances a reason for excluding an alien that is legitimate on its face, a court will not look behind the reason to see if the record supports it.<sup>128</sup> In *Cuban American Bar Association, Inc. v. Christopher*,<sup>129</sup> the Attorney General paroled Cuban children into the United States while refusing the same to Haitian children. The court permitted the action because the Attorney General advanced a facially legitimate reason for doing so—the very different political climates in Cuba and Haiti warranted the different treatment.<sup>130</sup>

Courts could also use the abuse of discretion standard for determining whether an agency's decision to exclude an alien is

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126. *See id.*

127. *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). This case concerned a Belgian journalist and Marxist theoretician who wished to come to this country to participate in academic conferences. The Attorney General refused to grant visas, citing security reasons because of the alien's communist affiliations. The Supreme Court, in a 6-3 decision ruled that when the Attorney General advanced a facially legitimate reason to refrain from waiving the exclusion by statute of an alien, the court would not look behind those reasons.

128. *See Marczak v. Greene*, 971 F.2d 510 (10th Cir. 1992). *Marczak* concerned a Polish seaman who had appeared before the INS officials requesting entry. The INS officials refused, and subsequently put him in detention without parole. The INS's stated reason for refusing parole was that they feared Marczak would flee to avoid being sent back to Poland. *See id.* at 512. The Tenth Circuit Court interpreted the "facially legitimate and bona fide standard" as requiring an individualized facially legitimate reason for denying parole. *See id.* at 519. The court also, by looking at the practices of courts in the past, concluded that the INS officials should come up with some factual basis for their facially advanced reason for denying parole. *See id.*

129. 43 F.3d 1412 (11th Cir. 1995).

130. *See id.* at 1428.

justified.<sup>131</sup> The abuse of discretion standard has been described as a decision "whether the information relied on by the [decision maker] is sufficient to provide a factual basis for its reasons."<sup>132</sup> As the Tenth Circuit recognized, there is no real difference between the abuse of discretion and facially legitimate standards.<sup>133</sup>

The problem with the facially legitimate standard is that it gives the Executive Branch almost unlimited power to decide which aliens can enter the United States.<sup>134</sup> Under this facially legitimate standard, the Attorney General can advance reasons for excluding an alien that are not supported by the underlying record.<sup>135</sup> It has been the practice for courts to look at the underlying record in order to determine whether the facts justify the reason given for exclusion.<sup>136</sup> The fact that courts are not required to look at the underlying record is manifestly unfair to aliens who are excluded under § 1182(a)(1)(A)(iii). Hypothetically, the Attorney General can exclude a mentally ill alien by claiming the alien may pose a threat to others without there being any facts in the record to support this. Such an action would be allowable because the reason given is facially legitimate. The end result, however, would be the exclusion of a mentally ill alien who poses no threat to anyone. This possible result clearly circumvents the policy behind § 1182(a)(1)(A)(iii), which is to exclude only those aliens who may cause harm to others.<sup>137</sup>

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131. See *Marczak*, 971 F.2d at 516.

132. *Id.*

133. See *id.* at 517. The *Marczak* court conflated the two standards noting: "[b]oth require considerable deference to the decision of the district director; both nevertheless require a summary examination of the record." *Id.* The court supported this assertion by citing to *Jean v. Nelson*, 472 U.S. 846, 853 (1985) (using both standards as if they were synonymous) and *Moret v. Karn*, 746 F.2d 989, 993 (3d Cir. 1984) (reaching identical holdings under the two different standards of review).

134. See *Cuban Am. Bar Ass'n, Inc.*, 43 F.3d at 1427-28.

135. See *Kleindienst v. Mandel*, 408 U.S. 753, 777 (1972) (Marshall, J. dissenting).

136. See *Marczak v. Greene*, 971 F.2d 510, 517 (10th Cir. 1992). *Marczak* cited *Kleindienst*, for the proposition that the Attorney General denied Mr. Mandel entry into this country, claiming that Mandel had violated the terms of his earlier waivers of exclusion. See *id.* The *Kleindienst* Court looked at the record to determine whether Mr. Mandel had in fact violated these waivers, and thus satisfied itself that Mr. Mandel did. See *Kleindienst*, 408 U.S. at 756-58, n.5.

137. The statute specifically singles out only those mentally ill aliens who may pose a threat or have posed a threat in the past. See 8 U.S.C. § 1182(a)(1)(A)(iii) (1999).

Although we would like to think that the Attorney General would not give unsupported reasons for excluding an alien under § 1182(a)(1)(A)(iii), the possibility exists. Without the requirement that courts consider the underlying record, there are no adequate safeguards to prevent arbitrary decisions. Section 1182(a)(1)(A)(iii) should therefore be amended to provide for a more stringent standard of review.

### *B. History of the Constitutional Rights of Aliens*

Aliens used to be divided into two categories: 1) excludable aliens and 2) deportable aliens.<sup>138</sup> Excludable aliens have no substantive due process rights.<sup>139</sup> In fact, excludable aliens are considered to be not legally present within the United States, even if they are physically on U.S. soil.<sup>140</sup> Because excludable aliens have so few rights, it is often difficult for them to challenge those regulations that exclude them.<sup>141</sup> Courts have held that whatever procedure Congress uses to exclude an alien, "it is due process as far as an alien denied entry is concerned."<sup>142</sup> This

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138. See Christopher R. Yukins, *The Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 VA. L. REV. 1501, 1504 (1987).

139. See *Tam v. INS*, 14 F. Supp. 2d 1184, 1190 (E.D. Cal. 1998).

140. See Kathrin S. Mautino, *Entry: What Mama Never Told You About Being There*, 31 SAN DIEGO L. REV. 911, 912 (1994). Ms. Mautino describes the three groups of aliens physically within the United States as follow: "those who are here legally, those who are here illegally, and those who are 'not here at all.'" *Id.*

141. This difficulty is exacerbated by the fact that aliens do not have recourse to review under the Administrative Procedural Act. See *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992). The Administrative Procedural Act provides judicial review for persons who suffered wrongs caused by agency actions, however, review is not available if other statutes preclude it. See *id.* at 1505. Because the Immigration and Naturalization Act (INA) is meant to be the "sole and exclusive avenue for judicial review," excludable aliens are effectively precluded from other measures. *Id.* at 1506.

142. *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). In *Knauff*, a German-born woman had married a naturalized U.S. citizen. See *id.* at 539. Before she was married, she had worked in various military-related jobs, including jobs at the Royal Air Force in England and the War Department of the United States in Germany. See *id.* Upon marriage, she sought entry into the U.S. to be naturalized. See *id.* The U.S. excluded her, for security reasons that it refused to divulge. See *id.* at 539-40. The statute that the government utilized to exclude her also did not provide her with a hearing. See *id.* at 540. The alien in *Knauff* probably would have been similarly excluded under the present due process rules regarding excludable aliens.

In *Fernandez-Santana v. Chandler*, No. 98-6453, 1999 WL 1281781, \*1 (6th Cir. Dec. 27, 1999), an excludable alien appealed a district court order dismissing his petition for a writ of habeas corpus. The alien is a Cuban national who came over on the Mariel boatlift, and is serving a charge for aggravated assault. See *id.* The Court held that the

standard partially stems from the belief that entry into the United States is not a right, but a privilege.<sup>143</sup>

Not everyone agrees with the theory that excludable aliens do not have due process rights. Justice Marshall, in his dissent in *Jean v. Nelson*, argues forcefully that excludable aliens possess due process rights.<sup>144</sup> One argument Marshall presents is that excludable aliens must have due process rights because such aliens charged with criminal offenses are afforded these rights.<sup>145</sup> It would therefore defy common sense to grant excludable aliens constitutional protections only when they have broken the law.<sup>146</sup> Justice Marshall also argued that the liberty interest of excludable aliens should be protected under the Fifth Amendment because the United States protects the property interests of foreign corporations.<sup>147</sup> It would therefore be unreasonable for the United States to place a higher value on

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petitioner had no Constitutional rights to due process, which is consistent with the Court's reasoning in *Knauff*. See *id.* at \*2. However, the court implied that the alien might have had procedural due process rights if he had alleged that the review panel failed to follow proper procedures. See *id.*

In *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999), the Third Circuit sent a mixed message about the due process rights of excludable aliens. *Chi Thon Ngo* was an alien seeking a writ of habeas corpus to challenge his prolonged detention. See *id.* at 392. The court stated that aliens are entitled to substantive due process rights, and in some cases are even entitled to procedural due process rights. See *id.* at 396. The actions of the court, however, imply that excludable aliens do not have procedural due process rights beyond what the law may give them. In other words, their due process rights are not constitutionally mandated. The court ended up allowing his continued indefinite detention because the INS made a few changes in their procedures providing for periodic review of the alien's detention. See *id.* at 398-99. However, these procedures could easily be perfunctorily performed, which almost makes it look like the alien has no procedural due process rights at all. See *id.*

Although both *Chi Thon Ngo* and *Fernandez-Santana* contain hints that excludable aliens should have due process rights, neither case is strong enough to lead to the conclusion that the alien in *Knauff* would have enjoyed a different outcome if she brought her case today.

143. See *Knauff*, 338 U.S. at 542.

144. See *Jean v. Nelson*, 472 U.S. 846 (1985). *Jean* concerned a group of undocumented and unadmitted Haitian aliens who challenged their continued detention by the INS without parole. See *id.* at 848. The aliens claimed that the INS's actions violated the Administrative Procedural Act and their equal protection rights. See *id.* at 849. Dissenting, Marshall vociferously opposed the majority's holding. He claimed that under the majority decision, INS officials were left with almost unbridled discretion to admit or deny parole to aliens. See *id.* Marshall expounded that the Constitutional issues must be decided so that the Haitian aliens would have some protection against this kind of discriminatory action. See *id.* at 858.

145. See *id.* at 873.

146. See *id.*

147. See *id.*

property than liberty.<sup>148</sup> Marshall also argued that excludable aliens must have some due process rights because otherwise the Attorney General would be able to take any action towards them that was in line with a justified goal.<sup>149</sup> For example, the Attorney General certainly could not stop feeding excludable aliens in detention in order to save money.<sup>150</sup> Marshall, however, is working against precedent. Historically, the majority of courts have held that excludable aliens do not have due process rights.<sup>151</sup>

Deportable aliens have significantly more rights and privileges than do excludable aliens.<sup>152</sup> Deportable aliens also enjoy substantive due process rights.<sup>153</sup> These rights include those Fifth Amendment rights that "No person shall . . . be deprived of life, liberty, or property without due process of law."<sup>154</sup> Deportable aliens have more rights because they have begun to develop ties with the United States.<sup>155</sup> Once an alien begins to develop ties with the United States "his constitutional status changes accordingly."<sup>156</sup>

In *Tam v. INS*,<sup>157</sup> a deportable alien was detained for three years. The alien filed a writ of habeas corpus, alleging that his continued detention violated his due process rights.<sup>158</sup> The court conceded that the alien was due some level of substantive and procedural due process rights, and granted him conditional release.<sup>159</sup>

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148. See *id.* (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)).

149. See *id.* at 874.

150. See *id.*

151. See *Tam v. INS*, 14 F. Supp. 2d 1184, 1190 (E.D. Cal. 1998) (aliens seeking admission to the United States have no procedural due process rights regarding admission); *Knauff*, 338 U.S. at 544 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) (echoing the holding in *Knauff*), *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.").

152. See *Tam*, 14 F. Supp. 2d at 1190 (citing *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958)).

153. See *id.* at 1191.

154. *Id.* at 1191 (citing U.S. CONST. amend. V. and *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

155. See *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995).

156. See *id.* at 1428.

157. 14 F. Supp. 2d 1184, 1187 (E.D. Cal. 1998).

158. See *id.* at 1187.

159. See *id.* at 1193.



Both excludable and deportable aliens were affected by the enactment of § 1182(a)(1)(A)(iii). Excludable aliens were affected because they may be directly excluded from the United States on statutory grounds. Deportable aliens were affected because, in certain circumstances, they may be deported from the United States based on the exclusion criterion. For example, if a deportable alien wishes to adjust his status to that of a permanent resident, he must prove that he was admissible at the time he originally applied for entry into the United States.<sup>160</sup> Thus, if a deportable alien entered the country after 1990, and the INS determined that alien fell within § 1182(a)(1)(A)(iii) at the time of entry, that alien can be excluded. This can happen even if an alien has been present in the United States for years.<sup>161</sup> A deportable alien also runs the risk of being excluded every time he reenters the country after a trip for health-related reasons.<sup>162</sup> Although the INS will not look back to the laws in effect at the time of the alien's initial entry into the United States, they will look to see if the alien is excludable under any of the current laws, which includes § 1182(a)(1)(A)(iii).<sup>163</sup>

### *C. The 1996 IIRIRA Act Changed the Constitutional Rights of Aliens*

In 1996, there was a strong anti-immigration feeling in the United States.<sup>164</sup> Polls revealed that the majority of Americans wanted to lessen the number of immigrants coming to the United States.<sup>165</sup> In the midst of this politically charged atmosphere, the IIRIRA was enacted.<sup>166</sup> IIRIRA changed many immigration provisions relating to undocumented and legal aliens.<sup>167</sup> IIRIRA replaced the terms "exclusion" and "deportation" with the new terms of "admission" and "removal."<sup>168</sup> The effect is that an alien's status no longer hinges on whether he is excludable, but

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160. See Tetzeli, *supra* note 4, at 4.

161. See *id.* at 4.

162. See *id.* at 2.

163. See Levy, *supra* note 11, at 4-5.

164. See Tsesis, *supra* note 38, at 106.

165. See *id.*

166. See *id.*

167. See Inniss, *supra* note 37, at 177.

168. See B. John Ovink, *Why a Plea Bargain May No Longer Be a Bargain for Legal Permanent Resident Aliens*, 46 MAY FED. LAW 49, 51 (1999).

on whether he is admissible.<sup>169</sup> IIRIRA also consolidated deportation and exclusion proceedings into a single set of proceedings known as removal proceedings.<sup>170</sup> The result is that aliens seeking admission and aliens being deported now face many of the same removal procedures.

Although some groups of aliens had their rights reduced by IIRIRA, lawful permanent resident aliens still retained due process rights. This is because resident aliens have developed ties with the United States, which proportionally increases their Constitutional status.<sup>171</sup> According to the Supreme Court, procedures for deporting or excluding resident aliens must satisfy due process requirements.<sup>172</sup>

#### *D. Due Process, Void-For-Vagueness and Equal Protection Challenges to § 1182(a)(1)(A)(iii)*

Lawful permanent resident aliens are affected by § 1182(a)(1)(A)(iii). The government can deport a lawful permanent resident if the alien was excludable at his time of entry under § 1182(a)(1)(A)(iii).<sup>173</sup> The government can do this by classifying a lawful permanent resident as inadmissible, which gives the alien the same status as an alien who had never gained admission to the United States.<sup>174</sup> The government is then free to exclude the alien on the basis of any of the exclusionary rules,

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169. See Charles H. Kuck, *Window or Aisle: Removal and Expedited Removal Process and Proceedings*, in 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK, VOL. II, ADVANCED PRACTICE, 225 (1997). The article states that the issue of whether an alien's been admitted determines whether removal proceedings will be instigated. See *id.* at 228.

170. This set of proceedings is codified at 8 U.S.C. § 1229(a) (1999). This new INA statute instructs that removal proceedings "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." *Id.*

171. See *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995).

172. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

173. See Tetzeli, *supra* note 4, at 2.

174. See *Colunga-Reyes v. INS*, No. 91-70201, 1992 WL 175940, at \*1 (9th Cir. July 23, 1992). In *Colunga-Reyes*, the petitioner was charged with three drug-related felonies in 1986 (the charges were ultimately dismissed in 1988). Petitioner then left the United States and re-entered the country in 1987 as a lawful permanent resident. In 1989, the INS found that the petitioner had been excludable at the time of his entry because of the drug charges and therefore he was deportable. See also 8 U.S.C. § 1227(a)(1)(A) (Supp. III 1997) (specifying that any alien found to be inadmissible as his or her time of entry can be deported).

including § 1182(a)(1)(A)(iii).<sup>175</sup> Because lawful permanent resident aliens have constitutional rights, § 1182(a)(1)(A)(iii) may be challenged as being unconstitutional.

## 1. Procedural Due Process

The Fourteenth Amendment to the U.S. Constitution mandates against depriving "any person of life, liberty, or property, without due process of law."<sup>176</sup> Procedural due process—the right to have notice and an opportunity to be heard<sup>177</sup>—is not specifically protected by the Fourteenth Amendment.<sup>178</sup> Aliens, however, have traditionally enjoyed procedural due process rights.<sup>179</sup> Procedural due process rights are invoked when one's liberty or property interests are threatened.<sup>180</sup> Aliens have a liberty interest, and accordingly they must be afforded procedural due process rights.

Once rights to procedural due process are established, courts look to the *Mathews v. Eldridge*<sup>181</sup> test to determine what process is due.<sup>182</sup> The test looks at three factors: "First, the private interest affected by the government action; second, the risk that current procedures will cause an erroneous deprivation of the

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175. See 8 U.S.C. § 1182 (1999). This section is titled 'Inadmissible Aliens,' which implies that the exclusionary rules contained in the section only apply to these kinds of aliens.

176. U.S. CONST. amend. XIV, § 1.

177. See Laura Cullison, Note, *The Jurisdiction of Administrative Appeals in Nebraska: A One-Way Ticket, No Returns, No Transfers in Metro Renovation, Inc. v. Department of Labor*, 249 Neb. 337, 543 N.W.2d 715 (1996), 76 NEB. L. REV. 204, 215 (1997).

178. See WILLIAM B. LOCKHART ET. AL., CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS 582 (1996) (referring to William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORN. L. REV. 445, 450-52 (1977)).

179. See, e.g., *Reno v. Flores*, 507 U.S. 292 (1993) (supporting the determination that juvenile aliens have rights to procedural due process); *Jean v. Nelson*, 472 U.S. 846 (1985) (finding that undocumented aliens, who were challenging their continued detention without parole, should have access to the notice and procedures of court); *Graham v. Richardson*, 403 U.S. 365 (1971) (determining that resident aliens who had been denied certain governmental benefits were included within the definition of 'persons' covered by due process). See also Todd G. Cosenza, *Preserving Procedural Due Process for Legal Immigrants Receiving Food Stamps in Light of the Personal Responsibility Act of 1996*, 65 FORDHAM L. REV. 2065, 2068 (1997) (stating that aliens have traditionally enjoyed procedural due process rights).

180. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

181. 424 U.S. 319 (1976).

182. See *Van Eeton v. Beebe*, 49 F. Supp. 2d 1186, 1190 (D. Or. 1999).

private interest, and the extent to which the risk could be reduced by additional safeguards; and finally the Government's interest" in maintaining the current procedures.<sup>183</sup>

The interest at stake here is an alien's right to live in this country. The risk that § 1182(a)(1)(A)(iii) will erroneously deprive resident aliens of this right is substantial. If a resident alien is found to have a Class A condition (which makes her excludable under § 1182(a)(1)(A)(iii)), she has the right to an appeal.<sup>184</sup> However, the INS does not provide attorneys during these proceedings to indigent aliens.<sup>185</sup> This leads to the risk that an alien will be erroneously deprived of her rights because she will not have someone to help her navigate the appeals process.

Section 1182(a)(1)(A)(iii) can also lead to an erroneous deprivation of rights because it triggers removal procedures. In removal proceedings, a resident alien's status is reduced to that of an inadmissible alien.<sup>186</sup> Inadmissible aliens have far fewer rights than resident aliens normally do.<sup>187</sup> Because the resident alien's rights are reduced, she is left without access to procedures that she would normally be entitled to. That is what happened in *Vo v. Greene*.<sup>188</sup> In *Vo*, two resident aliens under final orders of deportation were being held in detention.<sup>189</sup> Because their status was reduced to that of inadmissible aliens, they were not guaranteed access to certain procedures.<sup>190</sup> The petitioners were "not guaranteed representation, a hearing, the right to testify, a neutral decision maker, or the right to appeal an adverse decision."<sup>191</sup> The court held that this denial was erroneous,<sup>192</sup> and

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183. *Mathews*, 424 U.S. at 335.

184. See 42 C.F.R. § 34.8 (1998).

185. See *id.*

186. See *Zadvydas v. Underdown*, 185 F.3d 279, 294 (5th Cir. 1999). In *Zadvydas*, a resident alien was ordered deported and was subsequently held in detention. The alien argued that, as a resident alien, he should have greater rights in these circumstances than an excludable alien would. The court found that there was no real difference between the rights of an excludable alien and those of a resident alien in this situation.

187. See *Tam v. INS*, 14 F. Supp. 2d 1184, 1190 (E.D. Cal. 1998) (citing *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958)).

188. No. 98-WM-2427, 1999 WL 689301, \*1 (D. Colo. Aug. 31, 1999). *Vo* is slightly different from the situation here because the petitioners in *Vo* were removable for having committed aggravated felonies. See *id.* However, *Vo* is still analogous to this comment because the government felt free to reduce their status to that of "inadmissible aliens." Aliens excludable under § 1182(a)(1)(A)(iii) are also in danger of this happening to them.

189. See *id.*

190. See *id.*

191. *Id.*

that the aliens should have been accorded the same rights that resident aliens normally receive.<sup>193</sup>

The lack of adequate representation for resident aliens, combined with the reduction of their constitutional rights, makes it easier to remove them from the country under § 1182(a)(1)(A)(iii). It is a reasonable inference that this could be the government's interest in maintaining the current procedures.<sup>194</sup> The United States could also wish to keep the current procedures for financial reasons. Because the current procedures do not provide attorneys to indigent aliens during certain appeals, they are arguably cheaper than procedures that would. However, neither of these interests can outweigh the minimum costs of additional safeguards. It is true that providing resident aliens with access to more procedures under § 1182(a)(1)(A)(iii) would cost money. However, it would also save money because it would lessen the number of aliens wrongly placed in removal proceedings. An alien found removable under § 1182(a)(1)(A)(iii) could potentially be incarcerated.<sup>195</sup> This incarceration can be continued indefinitely.<sup>196</sup> Incarceration costs money and additional procedures under § 1182(a)(1)(A)(iii) would help reduce this cost. Until these additional procedures are enacted, § 1182(a)(1)(A)(iii) will continue to violate the procedural due process rights of resident aliens.

## 2. The Void for Vagueness Doctrine

If a statute is too unclear, it can be successfully challenged under the void-for-vagueness doctrine.<sup>197</sup> Courts generally look at

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192. *See id.*

193. *See id.*

194. Early American immigration policy has a long history of preferring immigrants who are young, strong and healthy, over immigrants who are disabled. *See Stanton, supra* note 34, at 444-45. The more aliens America can exclude under § 1182(a)(1)(A)(iii), the more disabled immigrants it can keep out. *See id.*

195. *See* 8 U.S.C. § 1231(a)(2) (1999). When an alien is in removal proceedings, the INS is authorized to incarcerate that alien for up to 90 days. *See id.*

196. *See* 8 C.F.R. § 241.4(a) (1998). This section specifically gives the INS permission to indefinitely incarcerate aliens deemed inadmissible under § 1182(a)(1)(A)(iii). To be released from incarceration, an alien must be able to show by "clear and convincing evidence" that he no longer poses a threat to the community. *Id.* It is within the district director's discretion whether or not to release the alien. *See id.*

197. *See Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962) (holding that the term 'psychopathic personality' was too vague to give adequate notice that this phrase included 'homosexuality,' and was thus void under the void-for-vagueness doctrine); *Kolender v.*

two factors to determine whether a statute complies with the void-for-vagueness doctrine.<sup>198</sup> A statute will comply if 1) it defines the offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited" and 2) it does so in "a manner that does not encourage arbitrary and discriminatory enforcement against those who must comply with the statute."<sup>199</sup> The rationale behind rendering vague statutes void is to protect citizens, both from harsh consequences stemming from actions they could not have known were illegal, and from the discriminatory enforcement of the laws by government officers.<sup>200</sup>

Although the void-for-vagueness doctrine is typically applied to criminal statutes,<sup>201</sup> it can also be used to challenge immigration statutes.<sup>202</sup> The rationale behind this is that many immigration statutes provide for deportation, and deportation is closely analogous with punishment.<sup>203</sup> Aliens facing deportation are oftentimes separated from close friends and family in the United States, and if that is not punishment, it is hard to imagine what is.<sup>204</sup> Section 1182(a)(1)(A)(iii), on its face, is not a

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Lawson, 461 U.S. 352 (1983) (holding that California statute requiring persons found loitering to produce 'credible and reliable' identification was void-for-vagueness).

198. See *Armuchi Alliance v. King*, 922 F. Supp. 1541, 1547 (N.D. Ga. 1996).

199. See *id.* at 1547 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

200. See *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1201 (C.D. Cal. 1998) (listing three distinct reasons for rendering vague statutes to be void: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms.") (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998)).

201. See *Armuchi Alliance*, 922 F. Supp. at 1547.

202. See *Le v. Waters*, 863 F. Supp. 1104, 1108 (N.D. CA 1994). *Le* concerned a father and daughter who had left the country temporarily while their application to become lawful permanent residents was pending. See *id.* at 1105. When they returned, they were refused admission due to a statutory provision that provided that any "abandonment" of the United States while a resident application was pending would be grounds for terminating such application. See *id.* at 1106. This immigration statute was examined under the void-for-vagueness doctrine, and was not found to be unconstitutionally vague. See *id.* at 1108-09. See also *Jordan v. DeGeorge*, 341 U.S. 223 (1951). In *Jordan*, an alien who had been twice convicted of defrauding the U.S. on taxes from distilled spirits was ordered deported under a statute which required deportation for all aliens who had been convicted and sentenced twice for "crimes involving moral turpitude." See *id.* at 223-34. The statute was examined under the void-for-vagueness doctrine, and was not found to be unconstitutional for vagueness. See *id.* at 232.

203. See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 98 (1998).

204. See *id.* at 102 (quoting Judge Sarokin's concurrence in *Scheidemann v. INS*, 83

deportation statute but rather a statute that can prevent an alien from being admitted into the United States.<sup>205</sup> However, legal permanent resident aliens can be deported under § 1182(a)(1)(A)(iii).<sup>206</sup> Because deportation, which is analogous to punishment, is the result of this statute, the statute may be examined to see if it complies with the void-for-vagueness doctrine.

The first issue is whether § 1182(a)(1)(A)(iii) defines the offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited."<sup>207</sup> Here, the prohibited conduct is having a disorder that may pose a threat to others.<sup>208</sup> Section 1182(a)(1)(A)(iii) does not define the term threat<sup>209</sup> nor does it list which disorders fall within the term threat.<sup>210</sup> Therefore, the statute appears to fail the sufficient definiteness test.

In *Fleuti v. Rosenberg*,<sup>211</sup> the district court upheld the INS's determination that Fleuti, a homosexual alien, was deportable under a statute that excluded people afflicted with a "psychopathic personality." The Ninth Circuit held that the statute failed the void-for-vagueness test because the statute did not convey "sufficiently definite warning" that the term psychopathic personality encompassed homosexuals.<sup>212</sup> Just as in

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F.3d 1517 (3rd Cir. 1996)). Judge Sarokin discussed the plight of a man who had lived in the United States for thirty-six years, who had close family in the United States, and who was being forced because of a deportation sentence against him to leave the United States. See *Schneidmann*, 83 F.3d at 1527.

205. See 8 U.S.C. § 1182(a)(1)(A)(iii) (1999). Section 1182(a) instructs that aliens who fall under this section "are ineligible to receive visas and ineligible to be admitted to the United States."

206. See Tetzeli, *supra* note 4, at 2.

207. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

208. See 8 U.S.C. § 1182(a)(1)(A)(iii) (1999).

209. See discussion *supra* Part IV.C.

210. The relevant PHS Technical Instructions also do not list all the disorders that could possibly fall under the statute, as it has a dangerous catchall provision under which almost any disorder could fall. See *Levy*, *supra* note 11, at 7-8. See also *Morell-Acosta v. INS*, 86 F.3d 1162 (9th Cir. 1996) (implicitly using mental retardation as a § 1182(a)(1)(A)(iii) disorder, even though the PHS technical instructions do not list it).

211. 302 F.2d 652 (9th Cir. 1962).

212. *Id.* at 658. Two of the doctors connected with Fleuti's case disagreed as to the meaning of "psychopathic personality." One doctor felt that Fleuti's homosexuality did not fit the definition. See *id.* at 657. Because even the doctors cannot agree as to what the term means, the term is too vague under the statutes. The *Fleuti* Court noted that PHS also felt that the term "psychopathic personality" was vague and indefinite. See *id.* at 658.

*Fleuti*, § 1182(a)(1)(A)(iii) fails to sufficiently warn people of what conditions will satisfy the definition of the term threat. Threat can encompass anything from committing a crime to merely causing psychological harm to someone.<sup>213</sup> Because the term threat is not defined, § 1182(a)(1)(A)(iii) is too vague to pass the void-for-vagueness test.

Section 1182(a)(1)(A)(iii) is distinguishable from cases where the relevant statute passed void-for-vagueness scrutiny. *Jordan v. DeGeorge*<sup>214</sup> concerned an alien who had conspired to defraud the United States of taxes on alcoholic beverages. The court deported the alien, utilizing a statute that allowed such actions against aliens who twice committed "crimes of moral turpitude."<sup>215</sup> The alien challenged this statute on the grounds that the phrase "crimes of moral turpitude" rendered the statute void-for-vagueness.<sup>216</sup> The Supreme Court disagreed, reasoning that courts have used the phrase "crimes of moral turpitude" for over sixty years, and thus its meaning could be determined by looking at other cases.<sup>217</sup> Unlike the statute in *Jordan*, § 1182(a)(1)(A)(iii) has only been around for ten years<sup>218</sup> and thus there is very little case law interpreting it.<sup>219</sup> Because of this lack of interpretive case law, there is no yardstick to measure exactly what "threat" means, or what disorders are included under the statute. Therefore, § 1182(a)(1)(A)(iii) continues to lack sufficient definiteness.

The next issue under void-for-vagueness analysis is whether § 1182(a)(1)(A)(iii) encourages "arbitrary and discriminatory enforcement" against those who must comply with the statute.<sup>220</sup> Common sense dictates that if neither "threat" is defined nor the relevant disorders provided under the statute, then immigration officials will be left with enormous discretion to determine which persons fall within the statute's confines. The end result of this discretion could be the arbitrary enforcement of the statute.

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213. See H.R. REP. NO. 101-723, at 6734 (1990). See also Tetzeli, *supra* note 4, at 8.

214. 341 U.S. 223 (1951).

215. *Id.* at 223.

216. See *id.* at 229.

217. See *id.* at 230. *Jordan* cites, for example, the case of *United States v. Smith ex rel. Volpe*, 289 U.S. 422 (1933), where the court concluded the crime of counterfeiting was a "crime involving moral turpitude."

218. Section 1182(a)(1)(A)(iii) was enacted as part of the Immigration Act of 1990.

219. Searches on Westlaw and Lexis revealed very little under the statute, outside of the case of *Morell-Acosta v. INS*, 86 F.3d 1162 (9th Cir. 1996).

220. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).



This was exactly the problem confronted in *Kolender v. Lawson*.<sup>221</sup> *Kolender* concerned a statute that required loitering persons to provide "credible and reliable identification" to police officers.<sup>222</sup> However, the statute did not adequately define the meaning of "credible and reliable identification."<sup>223</sup> Consequently, police officers had almost unlimited discretion when it came to enforcing the statute.<sup>224</sup> The court ultimately found the statute to be unconstitutionally vague.<sup>225</sup>

Section 1182(a)(1)(A)(iii) lacks sufficient definiteness, and according to the reasoning in *Kolender*, leaves far too much discretion in the hands of immigration officials. As a result, the statute must fail the void-for-vagueness test.

### 3. Equal Protection

#### *a. The Rational Basis Standard*

Under a rational basis standard of review, a statute will be upheld if it is supported by "any rational basis."<sup>226</sup> Rational basis is a difficult way to attack a statute, as a challenger has the "burden to negative every conceivable basis which might support it."<sup>227</sup> However, the fact that § 1182(a)(1)(A)(iii) targets the mentally disabled gives us the ammunition to prove that it has no rational basis.

In *City of Cleburne, Texas v. Cleburne Living Center*,<sup>228</sup> an operator of a group home for the mentally retarded challenged a zoning ordinance that prohibited such group homes. The operator claimed that this ordinance violated the mentally

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221. 461 U.S. 352 (1983).

222. *Id.* at 352.

223. *See id.* at 358.

224. *See id.*

225. *See id.* at 361.

226. LOCKHART, *supra* note 178, at 18 (referring to *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938)). *Carolene Products* upheld the constitutionality of a statute prohibiting the shipment of filled milk, on the grounds that the product posed a danger to the public. *See Carolene*, 304 U.S. at 147. The court decided this was a "rational basis." *See id.* at 152-53.

227. *Bannum, Inc. v. City of Fort Lauderdale*, 996 F. Supp. 1230, 1236 (S.D. Fla. 1997) (quoting *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)).

228. 473 U.S. 432 (1985).

retarded persons equal protection rights.<sup>229</sup> The district court held that the basis for this ordinance was rooted in the "safety and fears of residents in the adjoining neighborhood."<sup>230</sup> The Supreme Court, however, believed that the zoning ordinance was based on irrational prejudice against the mentally retarded.<sup>231</sup> The Court struck down the ordinance because there was no rational basis for assuming that the group home "would pose any special threat to the city's legitimate interests."<sup>232</sup>

Section 1182(a)(1)(A)(iii) presents a similar situation because it also targets the mentally disordered. The government's basis for this statute is to ensure the safety of all persons within the United States from violence and threats of violence.<sup>233</sup> However, new research points to the lack of a connection between mental disorder and violence.<sup>234</sup> Because there is little evidence of a link between mental illness and violence, there is not a rational basis to believe that these aliens could pose a threat to others. Therefore, § 1182(a)(1)(A)(iii) does not meet the rational basis standard, and cannot be upheld.

#### *b. The Heightened Scrutiny Standard of Review*

If a statute targets a suspect or quasi-suspect class of people, courts should apply a more heightened standard of review.<sup>235</sup> It is more difficult for a statute to pass muster under this heightened standard of review than under a rational basis standard of review.<sup>236</sup> Heightened standards of review are applied to classes of people who have historically been discriminated against.<sup>237</sup>

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229. *See id.*

230. *Id.* at 437.

231. *See id.* at 448.

232. *Id.*

233. *See* 8 U.S.C. § 1182(a)(1)(A)(iii) (1999).

234. *See* MacArthur Research Network on Mental Health and the Law, (visited Mar. 24, 2000) <<http://ness.sys.virginia.edu/macarthur/violence.html>>.

235. *See* *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a heightened standard of review is required for a statute that uses a gender-based differential for drinking ages). *But cf.* *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993) (treating a class of persons with mental retardation as a quasi-suspect class such as to warrant a heightened level of scrutiny for their Equal Protection claim).

236. In order to pass a heightened level of scrutiny, a statute has to bear a substantial relation to the achievement of an important governmental objective, *see* *Craig*, 429 U.S. at 197, or be "substantially related to a legitimate state interest," *Martin*, 840 F. Supp. at 1210.

237. *See* *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 470 (1985).

The rationale is that statutes, which target a suspect or quasi-suspect class of persons, are more likely to single out persons for discriminatory reasons.<sup>238</sup> Thus, closer judicial scrutiny is needed.<sup>239</sup>

Under the Supreme Court's analysis in *Cleburne*, laws concerning the disabled have historically been examined under the rational basis standard of review.<sup>240</sup> However, in recent years there has been a movement to provide disabled persons with more rights.<sup>241</sup> One example of this is the Americans with Disabilities Act of 1990,<sup>242</sup> which gave substantially more rights to the disabled.<sup>243</sup> This Act also classified the disabled as a "discrete and insular minority" who have historically been discriminated against.<sup>244</sup> According to this definition, the disabled should therefore be entitled to the heightened scrutiny protection that other "discrete and insular minorities" have traditionally had access to.<sup>245</sup>

The Connecticut Constitution supports this theory. The Connecticut Constitution contains a much more expansive equal protection clause than the federal constitution currently does.<sup>246</sup> It provides heightened scrutiny when classifications are based on mental or physical disorders.<sup>247</sup> Taken together, these factors

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238. *See id.*

239. *See id.*

240. *See id.*

241. *See Osuna, supra* note 1.

242. 42 U.S.C. § 12101-213 (Supp. II 1990).

243. *See, e.g.*, 42 U.S.C. § 12183(a)(1) (the right to access to public accommodations and commercial facilities), § 12162(a)(1) (the right to access at least one passenger car per train), § 12142(a) (the right to access bus and rail vehicles).

244. 42 U.S.C. § 12101(a)(7) (Supp. II 1990)). The statute specifically states:

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .

*Id.*

245. *See Nirej Sekhon, A Birthright Rearticulated: The Politics of Bilingual Education*, 74 N.Y.U. L. REV. 1407, 1442 (1999) ("[T]he Supreme Court would be willing to review legislation with more exacting scrutiny in the interest of protecting 'discrete and insular minorities' from majoritarian tyranny.").

246. *See State v. Hodge*, 726 A.2d 531, 569, n.14 (Conn. 1999) (involving a criminal defendant who was convicted of murder, first-degree manslaughter, and carrying a pistol without a permit).

247. The Connecticut constitution provides: "No person shall be denied the equal

indicate a possible change in the law that could eventually apply heightened scrutiny to the disabled. One case, *Martin v. Voinovich*,<sup>248</sup> has already applied the heightened scrutiny to a class of disabled persons despite the Supreme Court's decision in *Cleybourne*.

Because § 1182(a)(1)(A)(iii) targets the mentally disordered, we can examine it under this heightened scrutiny standard. *Martin* applied a heightened standard of review to a class of mentally retarded persons bringing an equal protection claim.<sup>249</sup> Using a heightened standard of review, the court held that the classifications in dispute had to be "substantially related to a legitimate state interest."<sup>250</sup>

Section 1182(a)(1)(A)(iii) cannot withstand this test. In *Craig v. Boren*,<sup>251</sup> the court assessed whether there was a substantial relation to a legitimate state interest by referencing statistical data. The plaintiffs in *Craig* challenged an Oklahoma statute that proscribed different legal drinking ages for men and women.<sup>252</sup> The state's interest in the statute was to promote traffic safety, and the court looked at the statistics to see if they justified this goal.<sup>253</sup> The statistics did not indicate a significant difference between traffic incidents amongst men and women of the targeted age group.<sup>254</sup> Therefore, the court found the statute failed to meet this heightened review test.<sup>255</sup>

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protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." CONN. CONST. art. 1, § 20. See also Robert I. Berdon, *Connecticut Equal Protection Clause: Requirement of Strict Scrutiny When Classifications are Based Upon Sex, Physical Disability or Mental Disability*, 64 CONN. B.J. 386, 387 (1990).

248. 840 F. Supp. 1175 (S.D. Ohio 1993). In *Martin*, a class of persons with either mental retardation or developmental disabilities brought suit against various governmental organizations claiming that they were being denied community housing and other services in violation of their Constitutional rights. The decision in *Martin* was rendered eight years after the Supreme Court's decision in *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

249. See *Martin*, 840 F. Supp. at 1175.

250. *Id.* at 1210. In denying the defendant's motion to dismiss, the court never reached the question of whether the *City of Cleybourne* satisfied this heightened standard of review.

251. 429 U.S. 190, 200 (1976).

252. See *id.* at 192.

253. See *id.* at 199.

254. See *id.* at 200.

255. See *id.* at 204.

Similar to the statistics in *Craig*, statistical evidence regarding mental disorders fails to show a substantial relation between § 1182(a)(1)(A)(iii) and the government's goals of protecting people from threat. The probability that a mentally ill person will be violent is likely no more than ten percent, and may be as low as less than three percent.<sup>256</sup> Mental illness is also a poorer predictor of violent behavior than other factors such as age or gender.<sup>257</sup> Taken together, this evidence indicates that there is not a substantial relation between the statute's exclusion of the mentally ill and the government's goals of protecting people from threat. Therefore, it does not meet the *Martin* test and fails the heightened scrutiny standard of review.

## VI. CONCLUSION

There has been a growing trend towards ending discrimination against the mentally ill. The legislature has attempted to sympathize with the plight of the mentally disabled by enacting laws to help them.<sup>258</sup> Section 1182(a)(1)(A)(iii), however, is a step in the wrong direction because it reinforces the notion that the mentally disordered should be kept away. If this section is not altered, the real threat will be the continuing stigmatization of the mentally ill.

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256. See VIOLENCE IN HOMES AND COMMUNITIES, *supra* note 84, at 185.

257. See *id.* at 188.

258. See Osuna, *supra* note 1, at 5. See also Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-213 (Supp. II 1990).

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