Legal Incorporation and Cinematic Reflections on Psychological Conceptions of Homosexuality

Donald H Hermann, DePaul University
LEGAL INCORPORATION AND CINEMATIC REFLECTIONS OF PSYCHOLOGICAL CONCEPTIONS OF HOMOSEXUALITY

Donald H.J. Hermann*

I. INTRODUCTION

Throughout the twentieth century, male homosexuality has been treated by physicians, regulated by law, and critically depicted in popular culture. When asked why this is the case, many people initially will respond that this is because homosexual behavior is condemned by the Bible. For example, Chief Justice Burger in his concurring opinion in Bowers v. Hardwick1 observed, "Condemnation of these practices [sodomy] is firmly rooted in Judea-Christian moral and ethical standards."2 The suggestion is that religious ideas underlie attitudes toward and treatment of homosexuality. While religious condemnation of homosexuality continues to be significant, there has been a recognized effort from the late nineteenth century to establish a scientific understanding of homosexuality, particularly in medicine and psychology. This article will explore the nature and significance of these scientific efforts at understanding homosexuality: first, by tracing the transformation of medical and scientific conceptualizations of homosexuality; and second, by identifying the influences that these medical conceptualizations have had on the social institution of law and in depictions in popular culture, particularly in film. By revealing the effect of changing scientific (medical or psychological) conceptions of homosexuality on social treatment and popular understanding of homosexuality, this article will reveal the relativistic basis of prejudice and stereotyping of homosexuals. With equal significance, this article will also reveal the tremendous power of psychiatric conceptualizations of individual differences by showing the manner in which these formulations become embedded in popular consciousness and provide the basis for social action through such institutions as the courts and legislature.

While same gender sexual relations have been noted throughout recorded history, the concept of homosexuality is modern. The very term "homosexuality" was first used in the mid-nineteenth century.3 On the other

---


2 Id.
3 BERTRAM D. COHLER & ROBERT M. GALATZER-LEVY, THE COURSE OF GAY AND LESBIAN LIVES: SOCIAL AND PSYCHOANALYTIC PERSPECTIVES 19 (2000). "The term 'homosexuality' was first used by Prussian jurist Karl Maria Kertbeny in an 1869 letter to the ministry of justice urging abolition of provisions defining same-gender sexual contact as criminal conduct under the Prussian code." Id.
hand, the connection of religion to condemnation of same gender sexual relations can be observed in the early jurisdiction over such relations by ecclesiastical authorities in England, which continued until the mid-sixteenth century.\(^4\) When the civil authorities took over the adjudication of accusations of same gender relations, the English criminal statutes that were enacted were limited in their prescription to the longstanding Church condemnation of anal intercourse between males.\(^5\) This focus on a special kind of physical sexual act was rooted in the concept of sin founded on a religious condemnation of same gender sexual relations located in the Old and New Testaments. The shift from concern with prescribed acts to concern with the “homosexual” person that occurred at the end of the nineteenth century reflects an effort to establish a “scientific” basis for dealing with persons who were viewed as deviant. This article will explore the nature and significance of this shift from a religious rooted condemnation of acts of specific sexual conduct to an effort to diagnose and label persons as homosexual for purposes of treatment and therapy.

II. RELIGIOUS CONdemNATION OF sodOMY

In contemporary America, the various religious sects differ greatly in their attitude toward homosexuality. For example, the Unitarian Universalist Association not only opposes criminal prosecution but also condones homosexuality to the extent of ordaining as ministers openly homosexual individuals.\(^6\) By contrast, the American Lutheran Church’s position on human sexuality states that: “This church regards the practice of homosexual erotic behavior as contrary to God’s intent.”\(^7\)

Religious condemnation of homosexuality is often based on several Biblical texts including: *Genesis* 19:1-11 (the sexual abuse of male visitors to Sodom); *Leviticus* 20:13 (“The man who lies with a man in the same way as with a woman; they have done a hateful thing together; they must die”); 1 *Corinthians* 6:9-11 (condemning sodomites); 1 *Timothy* 1:8-11 (condemning immorality with boys or men); and *Romans* 1:22-27 (“[T]heir menfolk have given up natural intercourse to be consumed with passion for each other, men doing shameless things with men and getting an appropriate reward for their perversion”).\(^8\)

Perhaps the paradigmatic example on the continuation of traditional religious condemnation of same gender sexual relations is provided by the Roman Catholic Church. The formulation of the church’s position invokes a clear delineation between the homosexual or “the homosexual condition” and homosexual acts. The Catholic Church generally has taken the position that homosexuality is an involuntarily acquired psychological condition. Recently,

\(^5\) Id.
\(^7\) WILLIAM RUBENSTEIN, supra note 6, at 99.
however, the Catholic Medical Association has adopted the view that this is a condition, which can, in some cases, be altered by treatment.\(^9\) Nevertheless, the focus of the Vatican has been and continues to be condemnation of homosexual acts, which are viewed as "intrinsically disordered."\(^{10}\) In the Declaration on Certain Questions Concerning Sexual Ethics, the following observations are made:

At the present time there are those who, basing themselves on observations in the psychological order, have begun to judge indulgently and even to excuse completely homosexual relations between certain people. This, they do in opposition to the constant teaching of the magisterium and the moral sense of the Christian people.

According to the objective moral order, homosexual relations are acts which lack an essential and indispensable finality. In Sacred Scriptures they are condemned as a serious depravity and even presented as the sad consequence of rejecting God. This judgment of Scripture does not, of course, permit us to conclude that all of those who suffer from this anomaly are personally responsible for it, but it does attest to the fact that homosexual acts are intrinsically disordered and can in no case be approved of.\(^{11}\)

Although the Vatican has subsequently issued a statement on Non-Discrimination Against Homosexual Persons, the Church maintains the position that there is a distinction between discrimination against persons with a homosexual orientation, which discrimination the Church disapproves, and condemnation of homosexual acts, which the Church endorses.\(^{12}\) A distinction of this kind has worked its way into constitutional law. The United States Supreme Court has upheld the right of states to criminally punish homosexual acts of sodomy\(^{13}\) while prohibiting states from denying homosexuals protection against discrimination.\(^{14}\)

The religious condemnation of homosexuality is reflected in the development of the criminal law prohibition of sodomy; a relationship acknowledged by Chief Justice Burger in his opinion in Bowers v. Hardwick.\(^{15}\) The earliest known English legal text dealing with sodomy was the Fleta of 1300, which provides that those who "are guilty of bestiality or sodomy shall be buried alive in the

---

\(^{9}\) Homosexuality and Hope, Cathmed.org Catholic Medical Association, at http://www.cathmed.org/subpages/hh (last visited March 6, 2002).


\(^{11}\) SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS 8-9 (Dec. 29, 1975) (emphasis added).


\(^{15}\) See 478 U.S. at 196-98 (Burger, C. J., concurring).
The religious basis for condemnation of sodomy is revealed in another medieval legal treatise giving the clergy responsibility for identifying individuals to be prosecuted for sodomy: “The inquirers of the Holy Church shall make their inquests of sorcerers, sodomites, renegades and misbelievers, and if they find any such, they shall delivery him to the King’s court to be put to death.” The religious nature of these original ordinances is clear enough. Subsequently, following the English reformation, the civil courts assumed jurisdiction over sodomy offenses; in 1533, parliament passed penal legislation making sodomy a felony, which could be punished by death (the death penalty for sodomy was abolished in England in 1861). Sir William Blackstone in his Commentaries of 1769 acknowledged the religious origin of the penal provision on sodomy. Blackstone wrote that sodomy was a crime, which “the express law of God, determine[s] to be capital. Of which we have a single instance . . . by the destruction of two cities by fire from heaven.”

Legal challenges to penal laws in the United States, providing for punishment of sodomy, have been based in part on the assertion that such criminal statutes incorporate religiously based proscriptions in violation of constitutional barriers to the establishment of religion. For example, in Baker v. Wade, the plaintiff’s challenge to the constitutionality of the Texas sodomy statute included the claim that the provision violated the establishment clause of the First Amendment. A similar concern about enforcing religious proscriptions in the civil law can be observed in the Wolfenden Report, which recommended repeal of English sodomy law. The report specifically rejected the argument that the sodomy law should be retained because of its religious bases; the Commission noted:

Certain forms of sexual behavior are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religion or cultural tradition; and such actions may be reprobated on these grounds. But the criminal law does not cover all such action at the present time; for instance, adultery and fornication are not offenses for which a person can be punished by the criminal law.

A claim of constitutional right of privacy, however, has proved more successful than the claim of state establishment of religion in challenges to the constitutionality of state sodomy laws. Nevertheless, as of August 2000, nineteen states retain criminal statutes punishing sodomy.

17 The Gay Academic 70 (Louie Crew ed., 1978) (citing F.M. Nichols, Britton 35-36 (1901)).
18 Id. (citing Coke’s Institutes of the Laws of England (1797) which reported that the traditional English indictment for sodomy was “grounded upon the word of God”).
19 Id. (citing William Blackstone’s Commentaries (1769)).
21 Id. at 1125.
23 Id.
Perhaps the most visual consequence of the linking of sodomy to sin in popular culture is the absence of explicit depictions of homosexuals in American film from the 1930s to the 1960s. As a result of efforts to avoid governmental censorship and in response to criticism from religious groups, including the Catholic Church’s Legion of Decency, the Hollywood studios developed a scheme of self-censorship resulting in the Production Code of 1930, revised in 1934.24 Until 1968, the Production Code restricted the explicit or attractive depiction of a broad range of activities including homosexuality (as well as drug use, prostitution, miscegenation, childbirth, and obscene or profane speech).25 The Production Code prohibited the depiction of “illicit sex” and “sex perversion,” and included in its statement of general principle the rule that: “Law — divine, natural or human — shall not be ridiculed, nor shall sympathy be created for its violation.”26 A statement of reasons for the Code’s prohibition links the forbidden content to sin and immorality. In a statement of “Reasons Supporting the Code” the Motion Picture Association of America stated:

The motion pictures, which are the most popular of modern arts for the masses, have their moral quality from the intention of the minds which produce them and from their effects on the moral lives and reactions of their audiences. This gives them a most important morality.

1. They reproduce the morality of the men who use the picture as a medium for the expression of their ideas and ideals.

2. They affect the moral standards of those who, through the screen, take in these ideas and ideals.27

The linking of sodomy to sin within a scheme of censorship forbidding depiction of sinful conduct resulted in an absence of depiction of explicitly homosexual characters in American film.

In 1961, pressure within the film industry led the Motion Picture Association of America to revise its strictures on the depiction of homosexuality. The Association announced that in keeping with the culture, the mores and the nature of our time, homosexuality and other sexual aberrations may now be treated with care, discretion and restraints.28 Even as the restrictions on depiction of homosexuals was loosened, homosexuals were to be depicted as depraved and punished for their transgression.

In 1962, Otto Preminger directed Advise and Consent in which a homosexual encounter of the principal character, Brigham Anderson, plays a pivotal role.29 The film’s depiction of homosexuality suggests that it is marked by deviance and guilt which merits punishment and self abasement as reflected in the principal

26 Id. at 280.
27 Id. at 286.
29 ADVISE AND CONSENT (Columbia 1962).
character's suicide resulting from his being confronted with his past engagement in a homosexual act during his military service.

*Advise and Consent* involves a Senate consideration of the nomination of Robert A. Leffingwell (Henry Fonda) as Secretary of State by a U.S. President (Franchot Tone) dying of cancer. The President is supported by the Senate Majority Leader, Bob Munson (Walter Pigeon). The major opposition to the nomination comes from Senator Seab Cooley (Charles Laughton). Senator Cooley, nursing a grudge against Leffingwell, arranges for a mentally unbalanced witness, Herbert Gelman (Burgess Meredith), to testify before the Senate Committee that Leffingwell had once belonged to a Communist cell group while teaching at the University of Chicago. Leffingwell admits the truth of the accusation to the President who continues to support Leffingwell despite his denial of the charge under oath to the Senate committee chaired by Senator Brigham Anderson (Don Murray). Cooley arranges the disclosure of Leffingwell’s perjury resulting in Anderson’s demand that the President withdraw the nomination. When Anderson insists that the truth of Leffingwell’s communist past be revealed, Anderson begins receiving anonymous telephone calls threatening to expose his homosexual involvement with a man in the navy. Behind the blackmail is a supporter of the nomination, Senator Fred Van Ackerman (Gerald Grizzard). Ackerman warns Anderson that if he fails to approve the nomination, Ackerman will reveal Anderson’s wartime homosexual experience in Hawaii. Unable to deal with his past and afraid to confide in his wife, Anderson slashes his throat. Following Anderson’s death, a Senate vote on Leffingwell results in a deadlock. The Vice President, Harley Hudson (Lew Ayers), is posed to cast the deciding vote when he learns of the President’s death. The Vice-President announces he will select his own candidate to fill the position of Secretary of State. The majority leader laments the effort at blackmailing Anderson for his “tired old sin”; while Senator Van Ackerman is shunned by his colleagues compelling him to leave the Senate chamber in disgrace because of his blackmail activity.

One of the most significant scenes in the film representing homosexuality as depraved and degrading occurs when Senator Anderson flies to New York to talk with Ray Shaft, the man with whom the Senator had a homosexual experience while both were in Hawaii. Anderson learns Shaft is at the 602 Club in Greenwich Village in New York. Anderson enters a dimly lit crowded bar where he observes flamboyant and effeminate gesturing men talking over a Frank Sinatra song playing on a juke box. Anderson panics and rushes outside to a taxi. Shaft leaves the bar and approaches the taxi pleading a defense to Anderson of his having revealed information about their homosexual encounter stating, “I was drunk . . . . I needed money . . . . You wouldn’t see me, I kept calling.” In a symbolic gesture, Anderson pushes Shaft into a muddy gutter.

Although the film never uses the word “homosexual,” the film is explicit in offering the viewer a depiction of a gay bar as a subterranean world of lisping and mincing deviates. The pushing of the gay blackmailer, Shaft, into a muddy puddle, and the suicide of the seemingly reformed homosexual Anderson are
coded suggestions of the depravity and sinfulness of homosexual behavior. Vito Russo in the *Celluloid Closet* analyzed the message of the film’s judgment of homosexuality as involving feelings of sin and guilt in the following way:

The “tired old sin” for which Brig Anderson dies is never named in the film. His grieving wife (Inga Swenson) knows the truth because she has seen the blackmail notes and photos of Brig and Ray, but she withholds the information lest it harm her husband’s memory. His status as a hero depends on this because . . . he too, was once . . . guilty, and in the gay bar he realizes this. He kills himself not because he is being blackmailed in Washington, but because he has gone to New York and found people with whom he has something in common and is so repulsed that he has no alternative to the straight razor.30

*Advise and Consent* suggests an analogy between the secret of Leffingwell’s communist membership and Anderson’s homosexual relationship, which within the period the film was introduced, would suggest a parallel between treason and sodomy, between traitor and sinner. This suggested parallel was highlighted in the debate over the Wolfenden Commission’s recommendation to decriminalize homosexual relations between consenting adults. Opposing decriminalization, Lord Patrick Devlin in *The Enforcement of Morals* argued that “[t]he suppression of vice is as much the law’s business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.”31 The Oxford don. – H.L.A. Hart in a responding article entitled *Immorality and Treason* argued for decriminalization without rejecting the view that homosexual behavior was immoral.32 Hart argued: “[It] is grotesque, even where moral feeling against homosexuality is up to a concert pitch to think of homosexual behavior of two adults in private as in any way like treason or sedition either in intention or effect. We can make it seem like treason only if we assume that deviation from a moral code is bound to effect that code . . . .”33 Thus, even a proponent of decriminalization rejecting the analogy between treason and sodomy continued to accept the moral condemnation of sodomy rooted in the western religious tradition.

The linking of sodomy to sin continues in public discourse and popular culture. Nevertheless, the competing formulations of homosexuality in medicine, particularly psychiatry, have provided compelling alternative understandings of homosexuality, which have influenced public discourse and societal treatment through law, and have provided the basis for depictions of homosexuals in popular culture, most notably in film.

30 *Russo, supra* note 28, at 142.
33 *Id.* at 52.
III. EARLY SCIENTIFIC TREATMENT OF HOMOSEXUALITY

In the late nineteenth century, the development in science and medicine began to undermine the dominance of religious morality as the basis for understanding and dealing with socially disapproved human behaviors. While a shared sense of community morals continued to underlie standards of behavior, the concepts of disease and treatment were increasingly invoked as the basis for an appropriate response to what was regarded as deviate behavior. Typical of early medical writing on the matter is an article in which the author addressed the issue of "persons whose sexual feelings can only be aroused by intimacy with their own sex."\(^3\) Dr. Shady concluded: "[W]e believe it to be demonstrated that conditions once considered criminal [and sinful] are really pathological, and come within the province of the physician . . . . The profession can be trusted to sift the degrading and vicious from what is truly morbid."\(^4\)

European contributions to a growing body of scientific writing on homosexuality at the end of the nineteenth century was significant. Representative of this body of work are the writings of the German physician Karl Heinrich Ulrichs who was influenced by research that revealed the human embryo has both male and female sex organs, losing one of them as it develops in utero.\(^5\) A preference for a same sex partner was postulated as an error in differentiation of the fetus in relation to sexual orientation.\(^6\) Avoiding the religious connotations of the term sodomy, Ulrich coined the term "Uranians" drawing on Plato's *Symposium* 's reference to Aphrodite Uranus as a replacement for the term "sodomite."\(^7\) Ulrich urged the decriminalization of same sex behavior on the basis that such conduct was caused by cross-sex identification resulting from a congenital condition.\(^8\)

Carl Westphal, a professor of psychiatry in Berlin, has been credited as the first person to place the study of homosexuality on a clinical, scientific basis with his case history of a female homosexual in 1869, concluding that the subject's behavior was a result of a congenital condition rather than acquired.\(^9\) By contrast, Jean Martin Charcot, the director of the Salpêtrière in Paris, maintained homosexuality was inherited after studying the use of hypnosis as a possible cure.\(^10\)

Michael Foucault maintained that the medicalization of same sex behavior in the nineteenth century was a result of the social structuring of power and

\(^{34}\) George Shready, *Conditions Once Considered Criminal Are Really Pathological*,76 Medical Record 1884, 70-71 reprinted in JONATHAN N. KATZ, GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY 197-98 (1983).

\(^{35}\) See KATZ, supra note 34, at 198


\(^{37}\) *Id.*

\(^{38}\) *Id.*

\(^{39}\) *Id.* at 409.


\(^{41}\) *Id.*
knowledge over subjects by the educational, religious and medical systems, and was reflected in the legal treatment of these subjects. According to Foucault, the categorization of persons as homosexuals was created in the nineteenth century by medical researchers such as Westphal and Charcot. Foucault wrote:

As defined by the ancient or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than a juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history and a childhood. . . . The sodomite had been a temporary aberration, the homosexual was now a species.

A systematizing approach to sexuality is illustrated by the work of Richard von Krafft-Ebing who published *Psychopathia Sexualis* in 1882. This work involved a compilation of hundreds of cases of sexual behavior, and included cataloguing of sexual pathologies and dysfunctions. A distinction was made between the normal person who has a same gender sexual experience without lasting consequences, and the homosexual who is significantly affected by same gender sexual relations. Krafft-Ebing identified the latter category as involving the “psychic invert” who was viewed as assuming the psychological characteristics of the opposite sex preferring an inverted role in intercourse. This type of sexual inversion was denominated as a perversion by Krafft-Ebing who identified it as a pathological condition resulting from behavior, which affected the entire personality. Homosexuality occurred, according to Krafft-Ebing, when “feeling, thought, will and the whole character . . . correspond with the peculiar sexual instinct, but not with the sex [or gender] which the individual represents anatomically and physiologically.”

### IV. INVERSION AND DEGENERACY THEORY

The shift from a religious condemnation of sodomy to a medical understanding of homosexuality meant not simply that a focus on acts of sodomy were replaced with a consideration of the person or character of the homosexual, but also that a broader range of behavior became emblematic or characteristic of the homosexual person. Not only assuming an inverted sexual role, but inverted feelings or emotional response were seen as characteristic of the homosexual. Thus inverts or “crossing” persons were understood as performing acts and

---

42 *Michel Foucault, History of Sexuality: Volume I: An Introduction* 41-42 (Robert Hurley trans., 1978)
43 *Id*
44 *Id.* at 42-43 (emphasis added).
46 *See id.*
47 *See id.*
48 *See id.* at 66.
49 *Id.*
50 *See Krafft-Ebing, supra* note 45, at 286.
feeling emotions that were regarded by society as exclusively the domain of the other gender.

In an article published in the Medico-Legal Journal of 1894, Havelock Ellis reviewed the existing literature discussing “sexual inversion,” “homosexuality” and “homosexual love.”

Ellis maintained that most cases of homosexuality were inborn and involved gender inversion, but were not pathological. According to Ellis, sexual differentiation was a matter of degree since each gender had recessive traits of the other. Thus, sexual inverts were simply an extreme case of a condition latent in every human. Ellis maintained: “[I]n most the inverted tendency seems to be instinctive, and appears at a somewhat early age.”

Because of his belief that inversion was a congenital condition in the homosexual, Ellis opposed criminalization of homosexual behavior.

In his co-authored monograph Sexual Inversion, Ellis concluded, “legislation against homosexuality has no clear effect either in diminishing or increasing its prevalence. This must necessarily be so as regards the kernal of the homosexual group, if we are to regard a considerable proportion of cases as congenital.”

While Ellis’ approach to homosexuality and the invert was marked by tolerance, a much more negative approach was taken by most American physicians addressing the subject of homosexual inversion.

In a published lecture to the Chicago College of Physicians and Surgeons, appearing in the Medical and Surgical Reporter in 1889, Dr. G. Frank Lydston argued for the need to study a “large class of sexual perverts [that] are physically abnormal rather than morally leprous . . .” Lydston provided a set of physical criteria by which one could identify the invert:

There is in every community of any size a colony of male sexual perverts; they are usually known to each other, and are likely to congregate together. At times they operate in accordance with some definite and concerted plan in quest of subjects wherewith to gratify their abnormal sexual impulses. Often they are characterized by effeminacy of voice, dress, and manner. . . . Their physique is apt to be inferior — a defective physical make-up being general among them, although exceptions to this rule are numerous.

Lydston’s lecture linked homosexual behavior with a physical condition. Others focused on inversion as a form of degeneracy that needed to be addressed by

---

51 Havelock Ellis, The Study of Sexual Inversion, 12 MEDICO-LEGAL JOURNAL 47 reprinted in KATZ, supra note 34, at 248.
52 See id.
53 See id.
54 HAVELOCK ELLIS & JOHN SYMONDS, SEXUAL INVERSION XIV (1897).
55 See id. at 156.
56 Id. at 154.
57 Dr. G. Frank Lydston, Clinical Lecture: Sexual Perversion, Satyriasis and Nymphomania, 61 MEDICAL AND SURGICAL REPORTER 253 reprinted in KATZ, note 34, at 213.
58 ELLIS & SYMONDS, supra note 54, at 154.
some form of social control, which should be broader than a limited penal measure directed at acts of sodomy.\textsuperscript{59}

Social concern with a perceived increase in sexual perversion and the development of social congregation of sexual inverts in the larger metropolitan communities led to the development of community and governmental committees and commissions to assess the threat posed by perceived degenerates and to develop measures to contain this threat. One example is the Chicago Vice Commission, which issued its report \textit{The Social Evil in Chicago: A Study of Existing Conditions With Recommendation} in 1911.\textsuperscript{60} The Commission provided a detailed description of the behavior and appearance of a group of sexual inverts:

It appears that in this community there is a large number of men . . . who mostly affect the carriage, mannerisms, and speech of women; who are fond of many articles ordinarily dear to the feminine heart; who are often people of a good deal of talent; who lean to the fantastic in dress and other modes of expression, and who have a definite cult with regard to sexual life. They preach the value of non-association with women from various standpoints and yet with one another have practices which are nauseous and repulsive. Many of them speak of themselves or each other with the adoption of feminine terms, and go by girls' names or fantastic application of women's titles. They have a vocabulary and signs of recognition of their own, which serve as an introduction into their own society. The cult has produced some literature, much of which is incomprehensible to one who cannot read between the lines, and there is considerable distribution among them of pernicious photographs.

\ldots

Some of these men impersonate women on the cheap vaudeville stage, in connection with disorderly saloons. Their disguise is so perfect, they are enabled to sit at tables with men between acts, and solicit for drinks the same as prostitutes.

Two of these "female impersonators" . . . afterwards invited the men to rooms over the saloon for pervert practices.\textsuperscript{61}

In suggesting a social response to these circumstances, the Commission acknowledged the appropriateness of relying on the developed body of medical and scientific writing on sexual inversion. The Commission recommended that the law "should be altered . . . under the guidance of scientific men who understand these practices [to reveal that] society regards these abhorrent deeds as crimes."\textsuperscript{62} The response of prosecutors and legislators was not only to enforce the long-existing prohibitions of sodomy but also to develop a new body of law that explicitly incorporated medical or scientific understanding of homosexuality in terms of sexual inversion.

\textsuperscript{59} \textit{id.}
\textsuperscript{60} \textit{KATZ}, \textit{supra} note 34, at 334-36.
\textsuperscript{61} \textit{id.} at 335.
\textsuperscript{62} \textit{id.} at 336.
Perhaps the most significant legal response, in the form of legislation directed at the status of homosexuals as inverts, was the indirect criminalization of gender inversion exemplified by the Chicago ordinance making it an offense for a person to appear in public "in a dress not belonging to his or her sex." Such statutes and ordinances reflected a fear that the sexual invert, totally or partially attired as a female, might corruptly seduce the non-homosexual male. These laws permitted the arrest and prosecution of men wearing items of women's clothing. The St. Louis ordinance of 1864 is one of the earliest of these laws and the model for enactments throughout the county. The ordinance provided: "Whoever shall in this city, appear in any public place in a state of nudity, or in a dress not belonging to his or her sex, or in an indecent or lewd dress . . . shall be guilty of a misdemeanor." General provisions such as this one from St. Louis were seemingly directed at the homosexual to the extent that the status of invert was thought to be most clearly revealed by cross-dressing. Other statutes such as the San Francisco ordinance of 1903 focused more narrowly on sexual inverts who were likely to be engaged in homosexual acts to the extent that these provision required, in addition to evidence of cross-dressing, establishment of an intent to deceive another. The San Francisco ordinance provided: "It shall be unlawful for any person to appear in public, with intent to deceive, in the dress, clothing or apparel not belonging to or usually worn by persons of his own sex." Laws reflecting a societal interest in maintaining normative gender behavior and reflecting fear of the gender invert continued to be enforced as late as the 1960s. For example in 1968, the New York Supreme Court in People of the State of New York v. Mauricio Archibald, upheld the conviction of a defendant for the offense of vagrancy based on cross-dressing. The court reasoned that "[t]he defendant admittedly appeared in a public subway station dressed in female attire and concealed his gender. In doing so, the defendant was in violation of [the statute] which forbids a disguise in a manner calculated to conceal his [gender] being identified."

Contemporary challenges to cross-dressing statutes have survived the charge that they violate rights of free expression of transvestites, however, these laws have been susceptible to attack on the ground that the language of statutes dealing with gender specific dress are intrinsically vague in our contemporary culture of unisex dress. This contemporary view of cross-dressing is exemplified in the 1974 case of Cincinnati v. Adams, in which the defendant moved to dismiss a complaint under which he was charged with violating a city ordinance providing that, "no person within the city . . . shall appear in a dress or costume

---

63 Chicago, Ill., Code § 2012 (1911).
64 See id.
65 St. Louis, Mo., Ordinance. 5421, art. II § 2 (1864).
66 Id. (emphasis added).
67 San Francisco, Ca., Ordinance 819, § 1 (1903) (emphasis added).
69 Id. at 835.
not customarily worn by his or her sex, or in a disguise when such dress, apparel, or disguise is worn with the intent of committing any indecent or immoral act or of violating any ordinance of the city . . . or law of the state . . . . The court rejected the defense contention that a transvestite's mode of dress is an expression protected by the First Amendment. The court recognized that freedom of expression is not limited exclusively to speech, that it may encompass certain forms of conduct illustrative of ideas, and could include one's manner of dress or his personal grooming if truly representative of a philosophy, an ideology, or a point of view. The court, however, held there was no evidence in the record to support the defense assertion that transvestism represented a philosophy, or to establish the contention that the wearing of female dress by a man represented a philosophy or ideology.

The court in Adams did, however, hold the ordinance to be unconstitutionally vague and violative of the defendant's right to due process, because it failed to provide a person of ordinary intelligence fair notice of what specific conduct was forbidden by the statute. Moreover, the court observed that the ordinance was not limited to one's dress in public, but that its prohibitions intruded into the privacy of the home. The court noted that the statute made suspect a woman who wore one of her husband's old shirts to paint lawn furniture, the trick-or-treater, guests at a masquerade, or an entertainer. Thus, the court concluded that the statute was purely subjective and materially fluctuated from person to person. The court also concluded that the element of intent to commit an "indecent" or "immoral" act while so dressed, represents an unascertainable standard, as both terms lack the precise definition necessary to withstand strict construction of a criminal ordinance under the requirements of contemporary American constitutional law.

The penetration of medical and psychological theories of gender inversion into popular culture, at the beginning of the twentieth century, can be observed in the 1914 film A Florida Enchantment directed by Sidney Drew. This comedy of gender reversal or cross gender impersonations was based on an 1891 novel by Archibald Gutner and Gergus Redmond which took the form of a stage adaptation in 1896. The film is set at a vacation resort hotel in St. Augustine, Florida, where a young northern heiress, Lilian Travers (Earth Storey), is shocked to find her fiance, Dr. Fred Cassadene (Sidney Drew), apparently romancing another woman. Overcome by jealous rage, Lilian remembers having an antique box from Africa which contains a note stating that the enclosed seeds,
harvested from the tree of sexual change, will change “men into women and vice versa.” Lilian impulsively swallows one of the seeds resulting in her transformation into a man, complete with moustache, which she quickly shaves off. Still appearing female and wearing women’s attire, Lilian is influenced by the drug to passionately kiss and dance with the women guests at the spa. The same thing happens when Lilian encourages her black maid, Jane (Ethel Lloyd), to consume one of the seeds, transforming her into a sex hungry valet. Time passes and Lilian and Jane return to New York where they assume male appearances and dress as men. Dr. Cassadene encountering the male appearing Lilian on her return to Florida becomes suspicious that Lilian has been killed and that the “new man” in Florida is her murderer. When confronted by her finance’s suspicion and to prove her story, the transformed Lilian urges the suspicious doctor to try the magical seeds. The finance is transformed into a woman, and while still dressed as a man pursues his male friends. The finance then acquires a dress, and is pursued by a hostile mob, leading the finance to dive into the sea and drown. Suddenly, Lilian awakens to find that the entire story has been a bizarre dream.

Vito Russo in The Celluloid Closet views this movie, not so much as a reflection of an interest in gender inversion as characteristic of homosexuality, but as a statement about the primacy given to males in opportunity for sexual expression in the society at the time of the making of the film.  

Although Russo does note that the film reveals “a higher tolerance for women who relate emotionally, or even sexually, to other women than for men who behave similarly toward other men.”

Contrary to Russo’s limited view of A Florida Enchantment, contemporary reaction to the stage version suggests that the subject of gender inversion was perceived to be at the heart of the work, and that the critics saw the non-judgmental depiction of gender inversion as a threat to the moral fiber of society. In an 1896 New York Times review of the play, the critic complained that it “shows us the lowest depth in which the theatrical stage can sink by tasteless speculations.” According to the reviewer, the play was “vile stuff.” The link to gender inversion as the manifestation of homosexuality and associated with homosexual behavior was clearly made by the reviewer’s statement that “there are a few of the most indecent ideas in the piece that mortal man has ever tried to communicate.” The reviewer went on to complain of the playwright that “[t]he story he tries to tell us is of a fool of a woman who finds a magic seed that will transform her into a man and swallows it.” Thereafter she says “damn,” smokes a cigarette, and makes violent love to girls” all of which were viewed as

---

82 Id. at 13.
84 Id. at 291.
85 Id.
86 Id.
emblematic of female gender inversion. The assumption of physical characteristics and mannerisms of the opposite gender and the subsequent pursuit of individuals of the same gender make *Florida Enchantment* an early film portrayal of gender inversion.

While contemporary understanding of cross-dressing and transvestism disassociates it from homosexuality as such, it is clear that at the beginning of the century physicians and psychologists not only associated these behaviors but conflated them. The view of homosexuality as gender inversion identified cross-dressing as a symptom and characteristic of the homosexual. In reaction to a view of homosexuality as a form of degeneracy taking the form of gender inversion, which was manifested in cross-dressing, legal authorities responded with prohibitions and film provided depictions of gender inversion and cross-dressing.

**V. FREUD AND HUMAN PSYCHOLOGICAL DEVELOPMENT**

An alternative to explanations of homosexuality in terms of congenital defect or degeneracy was offered by psychoanalytic theory, perhaps best represented by the publications of Sigmund Freud. Although no major work of Freud dealt exclusively with male homosexuality, his writings provide the basis for a psychodynamic understanding of homosexuality. Freud’s psycho-dynamic theory of human sexual development moved the understanding of homosexuality away from the view that it necessarily involves a pathological congenital degeneration. The view of homosexuality developed by Freud involved neither perversion nor fetishism, both of which were central to the views of those who linked gender inversion to cross-dressing as a manifestation of a degenerative condition and as a form of seductive disguise.

Freud was quite explicit in his rejection of an approach to homosexuality favored by the proponents of gender inversion which maintained that a homosexual could be identified by such behavior as wearing clothing associated with the opposite gender or by manifesting physical gestures typical of the opposite gender. In an essay Freud wrote:

> A man with predominantly male characteristics and also masculine in his erotic life may still be inverted in respect to his object, loving only men instead of women. A man in whose character feminine attributes obviously predominate, who may, indeed behave in love like a women, might be expected, from this feminine attitude, to choose a man for his love object; but he may nevertheless be heterosexual, and share no more inversion in respect to his object than an average normal man.

---

87 Id.
88 KATZ, supra note 34, at 291.
The same is true of women; here also mental sexual character and object choice do not necessarily coincide.\textsuperscript{89}

As this quotation suggests, despite a relatively accepting attitude toward homosexuality, Freud continued to maintain a notion of normality in both terms of sexual object and function of sexual relations.

While Freud offered several versions of the developmental experiences leading to homosexuality, he generally located the crucial aspects in the child's relation to the mother and fears of castration. However, Freud remained modest in his claims to have provided an explanation for homosexuality suggesting that it was likely the result of a complex of factors. In his monograph \textit{Leonardo da Vinci and a Memory of His Childhood}, Freud made clear the likely varied nature of the courses of homosexuality:

What is for practical reasons called homosexuality may arise from a whole variety of psychological inhibiting processes; the particular process we have singled out is perhaps only one among many, and is perhaps related to only one type of "homosexuality." We must also admit that the number of cases of our homosexual type on which it is possible to point to the determinants which we require far exceeds the number of those where the deduced effect actually takes place; so that we too cannot reject the part played by unknown constitutional factors, to which the whole of homosexuality is usually traced.\textsuperscript{90}

Thus Freud identified an important distinction between sexual behavior and gender associated behavior that was ignored by most of the proponents of a theory of homosexuality as gender inversion. Instead, Freud limited his use of the term invert to refer to a man or woman whose sexual objects were members of the same gender.

In \textit{Three Essays on the Theory of Sexuality}, Freud identified a spectrum of homosexual behaviors that included: persons whose sexual objects are exclusivity of the same gender; persons who relate sexually to individuals of both genders; and persons who under conditions limiting access for sexual relations to members of the opposite gender, find satisfaction in same gender sexual relations.\textsuperscript{91} Freud acknowledged that homosexuality occurred in individuals who were comfortable with their sexual orientation, who exhibited no other psychological deficiencies, and whose social functioning was unimpaired.\textsuperscript{92} He also viewed many homosexuals as living seemingly well adjusted lives, while others suffered from a pathology because of discomfort with their sexual

\textsuperscript{89} Sigmund Freud, \textit{The Psychogenesis of a Case of Homosexuality in a Woman}, in 18th STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 221-34 (James Strachey ed. 1966).

\textsuperscript{90} SIGMUND FREUD, \textit{LEONARDO DA VINCI AND A MEMORY OF HIS CHILDHOOD} 56 (A. Tyson, trans., 1964).

\textsuperscript{91} SIGMUND FREUD, \textit{THREE ESSAYS ON THE THEORY OF SEXUALITY} 2-3 (James Strachey trans., 1962).

\textsuperscript{92} \textit{Id.}
orientation. He wrote that “[s]ome of them [homosexuals] accept their inversion as something in the natural course of things, just as a normal person accepts the direction of his libido, and insist energetically that inversion is legitimate as the normal attitude; others rebel against their inversion and feel it as a pathological condition.”

Freud's model of sexual development posits the newborn child as ambisexual or polymorphous perverse deriving pleasure from a variety of bodily sensations. As the child develops, the center of pleasure shifts from the mouth, to the anus and finally to the genitals. With the shift of primary source of physical pleasure, the choice of love object moves from the self, to the mother, to the father and finally to a person of the opposite gender in the usual or normal process of development. However, this complex process of development can be halted at an intermediate stage or regress to an earlier stage.

The Oedipus complex played a pivotal role in Freud's understanding of homosexuality. According to Freud, the young male child forms an erotic bond with the mother who is assumed to have a genital apparatus similar to the child's. As the male child begins to develop a sense of separateness from the mother, feelings of castration anxiety begin to emerge. When the child discovers the mother lacks a penis, the mother is rejected as identification with the mother reinforces the castration anxiety. While Freud posits various formulations of the subsequent behavior of the male child, a typical homosexual rejects the mother, and subsequently all females, and seeks another male as his object of sexual preference. Alternatively, Freud suggests the young male may retreat back into an earlier stage and as a product of narcissism, and seek a sexual object that is similar to himself.

For Freud, same gender sexual relations are a natural aspect of human psychological development that results from a basic human bisexuality reflecting that at an early stage embryos have organs of both genders with one of them disappearing in the usual course of physical development. According to Freud, all children experience a homosexual phase in their psychological development as a part of the process of moving from bisexuality toward heterosexuality. Those individuals whose sexual object is restricted to a person of the same gender may be viewed as having deviated from the usual course of development

---

93 Id. at 3.
94 Id.
95 Id. at 45-63.
96 FREUD, supra note 91, at 51-55.
97 Id. at 88-96.
98 Id.
99 Id. at 92, n.1.
100 Id. at 61.
101 FREUD, supra note 91, at 61.
102 Id. at 88-98.
103 Id.
104 Id.
105 Id. at 7.
106 FREUD, supra note 91, at 6.
in terms of sexual object; thus, Freud describes these persons as having "contrary
sexual feelings," and categorizes them as "inverts." It should be noted that
regardless of the various psychodynamic explanations given by Freud for the
development of homosexuality, he regarded exclusive homosexuality as
involving an arrested psychological development in the form of an instinctual
fixation at a stage short of that of normal heterosexuality. Nevertheless, Freud
maintained that such persons should not be regarded as "degenerates," except in
extreme cases. According to Freud, inversion is found in persons otherwise
determined to be normal. He maintained that inversion is found in persons
with normal functioning ability, including those who are "distinguished by
specially high intellectual development and ethical culture." In Freud's view,
those homosexuals who have manifested pathology in treatment are only a part of
the total population of inverts. Moreover, he was of the view that sexual
inversion has occurred throughout history with apparent approval in ancient
societies, and that homosexuality often occurred in primitive societies without
any judgment of degeneracy.

Freud was not only an advocate for decriminalization of sodomy, but he was
an advocate for recognizing the legal rights of homosexuals. Freud maintained
that because homosexuals were neither pathological, nor a threat to society,
criminalization was entirely inappropriate. In response to a question posed to
him by the Viennese newspaper Die Zeit in 1903, Freud wrote:

I am . . . of the firm conviction that homosexuals must not be treated as
sick people, for a perverse orientation is far from being a sickness.
Would that not oblige us to characterize as such many great thinkers
and scholars of all times, whose perverse orientation we know for a fact
and whom we admire precisely because of their mental health?
Homosexual persons are not sick. They also do not belong in a court of
law!

Freud went even farther in a 1951 letter published in the American Journal of
Psychiatry in which he not only argued for decriminalization of homosexuality
but also for the view that homosexuality itself is not an illness requiring medical
treatment:

I gather from your letter that your son is a homosexual. I am most
impressed by the fact that you do not mention this term yourself in your
information about him. May I question you, why you avoid it?
Homosexuality is assuredly no advantage but it is nothing to be

107 Id. at 2.
108 Id. at 3.
109 Id. at 4.
110 Id.
111 FREUD, supra note 91, at 5.
112 Id. at 2-3.
113 Id. at 5.
115 Id. (quoting Sigmund Freud letter published in Die Zeit in 1903).
ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty, too.\textsuperscript{116}

Thus for Freud, there was no necessary connection between homosexuality and pathology. For this reason, he did not view homosexuality as an illness appropriate for treatment, nor a condition producing behavior that needed to be deterred or punished by the law.

While Freud’s ideas about the appropriate social responses to homosexuality were perhaps too progressive for western society at the time he originally expressed them, Freud’s views eventually did take hold in American law. In 1962, when the American Law Institute promulgated the Model Penal Code, which became the basis for the reform of most state criminal statutory codes, Freud’s views were cited as a basis for excluding sodomy as a crime.\textsuperscript{117} In the Institutes commentary accompanying the Model Penal Code provision excepting from criminal sanctions “deviate sexual intercourse” between consenting adults, Freud’s views were clearly reflected in the statement: “it [homosexuality] is neither a sin nor an abnormality but only a difference. The notion here is that homosexual conduct is simply a matter of personal preference and is devoid of any normative content whatever.”\textsuperscript{118}

As stated earlier, the Hollywood Production Code prevented the making of films that explicitly dealt with homosexuality, much less a depiction of homosexuality as a condition to be tolerated or accepted.\textsuperscript{119} However, the 1956 film, \textit{Tea and Sympathy}, although not explicitly dealing with a homosexual, depicted someone implicitly accused of being a homosexual, without the condition actually being named.\textsuperscript{120} The film embodies liberal notions of understanding and tolerance consistent with the position developed by Freud. While the film explicitly deals with non-conformity to gender expectations, the film can be read as a coded depiction of the lack of humanness in hostile societal reaction to homosexuality itself.

\textit{Tea and Sympathy} sets the stage with the main character, Tom Robinson Lee (John Kerr), now a successful, married author with children, and opens with his return to his tenth annual school reunion. In flashback, Tom recalls his senior year at the private Chilton School, a New England prep school. At that time, his house master, an instructor and athletic coach, Bill Reynolds (Leif Ericson), was married to a cultured woman named Laura (Deborah Kerr). In one of the early scenes, Laura helps Tom hem a dress he is to wear in the school play, \textit{The School

\textsuperscript{116} Letter from Sigmund Freud (Apr. 9, 1905), in 107 AM. J. PSYCHIATRY 786 (1951).
\textsuperscript{118} MODEL PENAL CODE § 213.2, cmt. 2 (1962) (Comments Revised 1980).
\textsuperscript{119} See BLACK, supra note 24.
\textsuperscript{120} TEA AND SYMPATHY (Metro-Goldwyn-Mayer 1956).
for Scandal, in which he is to play Lady Teasle. Tom, raised without a mother, learned to cook and sew and take care of himself. However, when the boys in the dorm discover Tom sewing a button on a shirt, he is ridiculed and nicknamed “sister boy.”

Tom rooms with a sympathetic all-American type named Al (Darryl Hickman). Over time, Tom becomes the butt of jokes by his classmates, including Ralph (Tom Laughlin) and Ollie (Dean Jones), who refuse to accept Tom because of his ineptness at sports and lack of interest in chasing girls. Tom’s father, Herb Lee (Edward Andrews) visits the school and is humiliated upon discovering that Tom is being shunned by the other boys. Mr. Lee suggests that Tom “oughta get a crew cut like the other fellas.” This is a coded suggestion that Tom should follow gender appropriate conventions. The thought of Tom being homosexual (although the word is never used — recall the Production Code is in force) creates panic in both boys and men.

When Laura discusses her concern with her husband about the cruel treatment Tom is receiving, the house master reminds her that her only obligation is to provide the boys in the house “tea and sympathy.” However, Laura becomes increasingly concerned when she overhears Tom on the telephone making a date with a promiscuous town girl, Ellie Martin (Norma Crane), since such contact could get him expelled, while it could also establish his heterosexual status with his classmates. Laura tries to stop Tom who, nevertheless, keeps his date, which quickly becomes a failure in establishing his manliness. Revolted by the thought of sex with Ellie, Tom gets drunk and is thrown out by Ellie, and is then picked up by school authorities for truancy. At this point, shunned by his housemaster, his father, and his classmates, Tom attempts suicide. Laura, however, reacts sympathetically to Tom and seduces him in order to restore his self-respect and to give him confidence in his masculinity.

Back in the present, Tom observes the broken housemaster, Reynolds, who continues to teach at the Chilton School even though his wife has left him. Reading an old letter from Laura, Tom realizes the sacrifice she made on his behalf and the compassion she directed toward him. While the film never actually indicates that the sensitive student, Tom, might actually prefer boys to girls, the film does suggest that Tom has difficulty in relating to girls. On the other hand, while Tom is implicitly accused of homosexuality, the most homoerotic scenes of the film involve sports activities and hazing among the other boys. The film also employs the canard of the love of a good woman as a classic cure of homosexuality.

Despite Tea and Sympathy’s avoidance of the word “homosexual,” and given that the main character may not be a homosexual, the film can still be read as embodying a sensitive and tolerant attitude toward homosexuality. At minimum, the film shuns the cruelty of intolerance of persons who do not meet gender expectations. In The Celluloid Closet, Vito Russo adopts the limited view that the film is not about a homosexual but about a person not meeting gender expectations. According to Russo,
The film pleads tolerance, therefore, not for sexual deviation but for unfortunate heterosexuals who happen to be less than 'masculine.' At no time [in the film] is homosexuality seen as a valid option for a real man. The message is that one cannot assume that a young man is homosexual just because he doesn't knock himself out playing football.\textsuperscript{121}

However, taking into account the presence of the Production Code, the homosexual nature of the story may have been watered down by mid-fifties censorship and the rooted ethos of the nineteen fifties. This view of the film may be supported by the Tom's father's embarrassment of Tom's career goals, not the stereotypical homosexual occupations of hairdresser or ballet star, but as a folk singer. Thus, it is possible to view \textit{Tea and Sympathy} as an early effort by 1950s Hollywood, despite the Production Code, to deal with homosexuality through the use of tolerance and understanding urged by Freud.

\textbf{VI. HOMOSEXUALITY AS PSYCHOPATHOLOGY}

Development of a view of homosexuality as pathological drew both on the theory of homosexuality as a form of degeneracy, as well as on an understanding of homosexuality as a form of arrested development. Attention to effeminate inverted was complemented by concerns about aggressive predatory men, and with a belief that homosexuality was linked to child predation. Ultimately, these concerns forged a link between homosexuality and psychopathology. This position is well illustrated by the views of Dr. Paul Bowers expressed in a report of a study involving homosexual sex offenders conducted in the 1920s:

\begin{quote}
Not all expressions of homosexuality are to be regarded as evidence of insanity, yet it may be safely said that the majority of sexual perverts are psychopathic individuals. Sexual perverts of the most disgusting types are found among the psychopaths. Whether these anomalies of the sexual instinct are always congenital or not has not been settled, and it does seem that inverse and perverse sexual habits may be acquired early in life by the association with vicious and depraved individuals. The sexual perverts are at any rate an exceedingly dangerous and demoralizing class which should be permanently isolated to prevent their mingling with others.\textsuperscript{122}
\end{quote}

As a psychopathological condition, homosexuality was understood as involving the blocking of normal sexual relations, thus reflecting an intrinsic perversion. The combination of degeneracy with psychopathology led to a view of the homosexual as a sexual predator, posing a threat to heterosexual men, and especially to male youth.

\textsuperscript{121}Russo, supra note 28, at 112-14.
Fritz Wittels described the psychopath as fixated at an infantile stage of limitless bisexual energy.123 Other writers such as Eugene Kahn in *Psychopathic Personalities* placed overt homosexuals in a class that included exhibitionists, sadists, masochists and voyeurs.124 Perhaps the most prominent advocate of these views was Benjamin Karpman, chief psychotherapist at St. Elizabeth's Hospital in the District of Columbia. Karpman linked habitual criminality to arrested sexual development, identifying psychopaths by their incapacity to repress or sublimate overly active sexual impulses.125 With the identification of the homosexual as psychopath, the homosexual was sexualized; homosexuals were viewed as oversexed, uninhibited, compulsive and predatory.126

From 1920 to the 1950s, much of American law was based on an understanding of homosexuality as pathology or mental disorder. Criminal law developed with the concept of the homosexual as a sex offender and a sexual psychopath, that is, a person who could not control his sexual impulses and victimized others. Special concern was directed to homosexuals as child molesters; concern was focused on deviate males who were thought to attack children thus threatening sexual innocence, gender roles and social order. The adoption of this view of the homosexual can be seen incorporated into American criminal law beginning in the 1930s with sexual psychopath laws that were enacted in conjunction with widespread media coverage of a number of cases of child molestation and rape.

Between the late 1930s and 1960, twenty-six state legislatures and Congress, for the District of Columbia, adopted sexual psychopath laws.127 These statutes provided for the transfer of authority over offenders charged with sexual offenses from the corrections system to psychiatric institutions with indeterminate sentences for therapeutic treatment.128 One of the first states to adopt such a law was Illinois whose statute applied to “persons suffering from a mental disorder . . . coupled with criminal propensities to the commission of sex offenses.”129 The Michigan statute was more direct in its reference to homosexuality providing for special procedures for identifying people who were convicted of disorderly conduct or sex offenses, who “appear to be psychopathic, or a sex degenerate [or a] sex pervert.”130 The foundation for these laws was expressed by an Ohio judge in the 1922 case *Barnett v. State*131 where the judge stated:

> It is more or less a matter of common knowledge, among those who have made a study of sexual perversion as it manifests itself in human

---

126 *Id.* at 60-61.
128 *Id.* at 224-27.
129 *Id.* at 215, n.7 (quoting 38 ILL. ANN. STAT. § 820 (1940)).
131 135 N.E. 647 (Ohio 1922).
PSYCHOLOGICAL CONCEPTIONS OF HOMOSEXUALITY

degenerates, that each sexual pervert follows some habitual, unnatural method of gratifying his perverted passion. It may be unnatural commerce with one class of beasts or another class of beasts; it may be by one mature male upon another mature male; and it may be, which is to-day of too frequent occurrence, a degenerate sexual commerce with little boys or little girls.132

Under these laws, a person charged with a criminal offense was to be evaluated to determine if he was a "criminal psychopathic person."133 Expert psychiatric evidence along with a record of past sexual offenses provided a basis for the determination that the person was a sexual psychopath who could be institutionalized for treatment "until fully and permanently recovered from such psychopathology."134 These laws reflected beliefs of medical experts and the general society, that homosexuals were mentally diseased men who could not control their sexual desires, engaging in aggressive promiscuous and compulsive behavior.135 While the laws were enacted out of a concern to protect children from molesters, the actual enforcement of the laws suggest that they were also applied to conventional same gender sex acts between adult men.136 For example, Paul Tappen reported in that almost half of the first one hundred persons arrested as sexual psychopaths in New Jersey were males convicted of homosexual solicitation, consensual sodomy, or fellatio with another adult male.137

The view that homosexuality constituted a pathological mental disorder had substantial influence on the immigration law of the United States in the 1950s. The Immigration and Nationality (McCarren-Walter) Act of 1952 incorporated the concept of the psychopathic homosexual into its category of persons to be prevented from immigrating to the United States.138 The statute provided that a category of medical exclusions was to be developed by the Public Health Service (later the Secretary of Health & Human Services) in coordination with the Immigration and Naturalization Service.139 Moreover, a subcommittee of the Senate Judiciary Committee reporting on the Immigration Act made it clear that homosexuals were meant to be excluded.140 The subcommittee’s report stated “that the purpose of the provision against [admission of] ‘persons with constitutional psychopathic inferiority’ will be more adequately served by changing that term to ‘persons afflicted with psychopathic personality’ and that ‘the class of mental defectives should be enlarged to include homosexuals and

132 Id. at 649.
133 See Swanson, supra note 127, at 215.
134 ILL. ANN. STAT. § 824 (1940).
135 See generally Swanson, supra note 127, at 117 (discussing the sexual psychopath statutes).
136 Id.
139 Id.
140 SENATE COMM. ON JUDICIARY, A RESOLUTION TO MAKE AN INVESTIGATION OF THE IMMIGRATION SYSTEM, S. REP. NO. 1515, 81st Cong. (2d Sess., 1952).
The United States Supreme Court in *Boutilier v. Immigration & Naturalization Service*, held that the terms “psychopathic personality” used in the statute clearly meant that “homosexuals and sex perverts” were to be excluded entry into the United States despite the fact that exclusion of homosexuals was not included explicitly in the language of the immigration statute.

The view that homosexual conduct is evidence of pathology had the effect of transforming the sexual life of a homosexual into evidence of character disorder. This process is evinced by the *Boutilier* decision, which authorized the deportation of a person because of homosexual behavior. The dissenting judges noted that “[d]eportation is the equivalent to banishment or exile.” The case involved a Canadian national who was first admitted to the United States at age twenty-one in 1955. His mother, stepfather and three siblings lived in the United States. In 1963 Boutilier applied for citizenship and submitted to the Naturalization Examiner an affidavit in which he admitted that he was arrested in New York in 1959, on a charge of sodomy, which was subsequently reduced to simple assault and, thereafter, dismissed for non-prosecution as a result of default of the complainant. At the request of the Immigration and Naturalization Service, Boutilier subsequently provided a full history of his homosexual encounters, these included: an initial experience at age 14 in which he was a passive participant; an experience at age 16 in a public park in Halifax, Nova Scotia, in which he was an active participant; and an average of three or four homosexual encounters during the five years immediately proceeding his entry into the United States (during this period he also reported three or four heterosexual experiences). Following his entry into the United States, Boutilier reported having homosexual experiences three or four times a year; and since 1959 (since age 25) he shared an apartment with another man with whom he had homosexual relations.

The Public Health Service reviewed Boutilier’s history and labeled him as having a “psychopathic personality, sexual deviate.” The Immigration and Naturalization service found Boutilier subject to deportation and rejected his psychiatrist’s assertion that although he was a homosexual, he was not by reason of that fact a psychopathic personality. After reviewing the facts of the case

---

141 *Id.* at 345 (emphasis added).
142 387 U.S. 118 (1967).
143 *Id.* at 122.
144 *Id.*
145 *Id.* at 132 (Douglas, J. and Fortas, J., dissenting).
146 *Id.* at 119.
147 *Boutilier*, 387 U.S. at 119.
148 *Id.*
149 *Id.* at 119-20. The court opinion in *Boutilier* uses the terms “homosexual experience” and “homosexual encounter” without further specification.
150 *Id.* at 120.
151 *Id.*
152 *Boutilier*, 387 U.S. at 120.
and the history of the Immigration law, the Court concluded that “[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include homosexuals.”\(^{153}\) It is significant that the Court found it unnecessary to consider Boutilier’s conduct after he entered the United States, including the dismissed New York criminal charge of sodomy, as providing the basis for his deportation.\(^{154}\) Rather, it was his youthful conduct before he was twenty-one that was the basis for the Court’s finding that Boutilier was a psychopath.\(^{155}\) According to the Court,

> “[t]he petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed at the time of his entry. Here, when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality. The pattern was cut, and under it he was not admissible.”\(^{156}\)

While the majority of the Supreme Court in Boutilier upheld exclusion of homosexuals as persons with a “psychopathic personality,”\(^{157}\) a dissenting opinion by Justice Douglas, joined by Justice Fortas, revealed a completely different understanding of homosexuals that rejected the equating of homosexuality with psychopathology.\(^{158}\) The dissent made an effort to determine the nature of psychopathology as understood among psychiatrists at the time.\(^{159}\) Among the publications on psychopathology considered, the Court cited Hervey Cleckley’s *The Mask of Sanity*\(^ {160}\) in which the characteristics of a “psychopathic personality” are described as follows:

1. Superficial charm and good “intelligence.”
2. Absence of delusions and other signs of irrational “thinking.”
3. Absence of “nervousness” or psychoneurotic manifestations.
4. Unreliability.
5. Untruthfulness and insincerity.
6. Lack of remorse or shame.
7. Inadequately motivated antisocial behavior.
8. Poor judgment and failure to learn by experience.
10. General poverty in major affective reactions.
11. Specific loss of insight.
12. Unresponsiveness in general interpersonal relations.
13. Fantastic and uninviting behavior with drink and sometimes without.
14. Suicide rarely carried out.
15. Sex life impersonal, trivial and poorly integrated.

\(^{153}\) *Id.*
\(^{154}\) *Id.* at 122-23.
\(^{155}\) *Id.*
\(^{156}\) *Id.* at 123.
\(^{157}\) *Boutilier*, 387 U.S. at 118-19.
\(^{158}\) *Id.* at 125-35 (Douglas, J. and Fortas, J., dissenting).
\(^{159}\) *Id.*
\(^{160}\) HERVEY CLECKLEY, THE MASK OF SANITY (1941).
Failure to follow any life plan.\textsuperscript{161}

The authority cited by the dissent included not only consideration of contemporary psychological research that rejected an understanding of homosexuality as psychopathological, but also referenced the writings of Freud and his accepting approach to homosexuality.\textsuperscript{162} Significantly, the dissenting Justices cited approvingly, Freud's 1935 letter to the mother of a homosexual, particularly noting that the passage in which Freud stated that homosexuality "is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development."\textsuperscript{163}

The dissenting Justices in \textit{Boutilier} were particularly persuaded by various empirical psychological studies that undermined the view of homosexuality as a pathology or mental disorder.\textsuperscript{164} For example, the Justices quoted with approval the Kinsey report on the \textit{Sexual Behavior in the Human Male} including the following observation:

\begin{quote}
It is unwarranted to believe that particular types of sexual behavior are always expressions of psychoses or neuroses. In actuality, they are more often expressions of what is biologically basic in mammalian and anthropoid behavior, and of a deliberate disregard for social convention. Many of the socially and intellectually most significant persons in our histories, successful scientists, educators, physicians, clergymen, business men, and persons of high position in governmental affairs, have socially taboo items in their sexual histories, and among them they have accepted nearly the whole range of so-called sexual abnormalities.\textsuperscript{165}
\end{quote}

Not only did the dissenting Justices in \textit{Boutilier} note the existence of serious challenges in the psychiatric and psychological literature to the view of homosexuality as a psychopathological condition as a general matter, but they also cited reports of examining psychiatrists who found Boutilier not to be a psychopath even though he had engaged in homosexual behavior.\textsuperscript{166} One psychiatrist reported:

\begin{quote}
The patient's present difficulties obviously weigh very heavily upon him. He feels as if he has made his life in this country and is deeply disturbed at the prospect of being cut off from the life he has created for himself. He talks frankly about himself. What emerged out of the interview was not a picture of a psychopath but that of a dependent, immature young man with a conscience, an awareness of the feelings of others and a sense of personal honesty. His sexual structure still
\end{quote}

\textsuperscript{161} \textit{Boutilier}, 387 U.S. at 125-26 (Douglas, J., dissenting) (citing HERVEY CLECKLEY, THE MASK OF SANITY 238-55 (1941)).
\textsuperscript{162} 387 U.S. at 130 n.3 (Douglas, J. and Fortas, J., dissenting).
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.} at 129-30.
\textsuperscript{165} \textit{Id.} at 128-29 (quoting ALFRED KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 201-02 (1948)).
\textsuperscript{166} \textit{Id.} at 132-33.
appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality.\textsuperscript{167}

The dissenting Justices concluded that the evaluations of the subject finding no evidence of psychopathology, along with a recognition of the high level of achievement of other homosexuals, constituted a lack of showing of any necessary dysfunction as a result of homosexual behavior.\textsuperscript{168} The dissenting Justices could not agree to exclude Boutilier in particular, and homosexuals as a class, from entry into the United States under the country’s immigration laws.\textsuperscript{169}

Explicit depiction of homosexuals as compulsive and predatory was common in American films with the decline of the Production Code, which previously had limited depiction of homosexuals to indirect portrayal.\textsuperscript{170} The conjunction of pathology and invisibility was perhaps best represented in the 1959 film, \textit{Suddenly Last Summer}, the screenplay written by Gore Vidal that was based on a play by Tennessee Williams.\textsuperscript{171} The film dealt with the mental health treatment of Catherine Holly (Elizabeth Taylor), who viewed the cannibalistic homicide of her homosexual cousin Sebastian Venable. Sebastian, who is only seen from behind, and thus facially invisible to the viewer, is devoured by his former homosexual prey at a public beach. Despite the implicit theme of homosexuality (which is never named in the film) the Catholic Church Legion of Decency gave the movie a special classification, explaining, “[s]ince the film illustrates the horrors of such a lifestyle, it can be considered moral in theme even though it deals with sexual perversion.”\textsuperscript{172}

A 1968 film, \textit{The Sergeant}, provides a fuller depiction of the homosexual as having a psychopathological personality manifesting sexual compulsiveness and predatory behavior.\textsuperscript{173} The film provides a depiction of a military officer who is aroused by and reacts to young men under his supervision. The ultimate reaction to his homosexuality is suicide, which is the characteristic fate of homosexuals in 1960s Hollywood films.

\textit{The Sergeant} was set in 1952 and is centered around Master Sergeant Albert Callan (Rod Steiger) who is assigned to peacetime duty at a petroleum supply depot in France. Sergeant Callan, who is forceful and controlling, takes effective command away from a weak and ineffective Captain Loring (Frank Latimore). Callan, who was once married, becomes sexually attracted to the handsome and naive Private First Class Tom Swanson (John Philip Law). Wanting the young soldier near-by, Callan makes Swanson his clerk orderly. When the Private

\textsuperscript{167} \textit{Boutilier}, 387 U.S. at 133 (Douglas, J., and Fortas, J., dissenting).

\textsuperscript{168} \textit{Id.} at 134-35.

\textsuperscript{169} \textit{See id.}

\textsuperscript{170} \textit{Russo, supra} note 28, at 115.

\textsuperscript{171} \textit{Suddenly Last Summer} (Columbia 1959).

\textsuperscript{172} \textit{Russo, supra} note 28, at 116.

\textsuperscript{173} \textit{The Sergeant} (Warner Bros. 1968).
UMKC LAW REVIEW

attempts to spend time with his French girlfriend, Solange (Ludmila Mikael), the jealous Callan refuses to give the Private the required passes. Swanson initially interprets Callan’s action to be the result of the Sergeant’s loneliness leading the Private to spend a lot of his free time with the superior officer. Only after Callan effectively drives Solange away, does Swanson realize the underlying pathology of Callan’s behavior. Swanson reacts with defiance with which the Sergeant is unable to cope. Callan becomes drunk and publicly tries to kiss the young Private. The following day, Captain Loring relieves Callahan of his duties. Subsequently, the Sergeant takes a rifle from the company arsenal and shoots himself in a near-by woods.

Given the conventions of contemporary Hollywood film, the attempt to kiss the young private can be understood as a homosexual attack by Callahan. The devious behavior in situating the young Private near-by, and the hostility towards the young men’s girlfriend suggest a psychopathic personality willing to abuse his authority in pursuit of satisfying his homosexual lust. The attack on the young soldier can be understood as evidencing the kind of compulsive action and predatory behavior thought to be associated with homosexuality viewed as psychopathology. The portrayal of homosexuals as suffering from a psychopathic personality, doomed to suffering and suicide, continued to be the stock depiction of homosexuals in American films until the 1970s.

VII. HOMOSEXUALITY AS MENTAL DISORDER

Development of the view of homosexuality as a mental disorder was given impetus by two distinctive influences. One such influence was a result of the decision to limit or eliminate homosexuals from the United States military during World War II. This involved another example of reconceptualizing homosexuality viewed not primarily as a subject of penal prosecution for proscribed behavior but as a matter of personality involving mental illness or personality disorder. The other major development involved the work of a number of psychiatrists who rejected the notion that homosexuality was rooted in a fetal bisexuality, but who instead adopted the view that homosexuality was rooted in faulty family dynamics and corrupting experiences resulting in skewed psycho-sexual development. This view ultimately involved linking of homosexuality to mental illness that could be treated by psychotherapy.

Wartime mobilization in the early 1940s created concern about possible high costs of treatment of mentally ill inductees and conscripts based on the coast of treating military personnel during and after World War I.\(^{174}\) The American Psychiatric Association’s Military Mobilization Committee assisted in the development of procedures that could be used to evaluate the more than eighteen million men who were examined for induction during World War II.\(^{175}\)


result of these concerns was Medical Circular No. 1 issued by the Selective Service on November 7, 1940, which set out criteria of mental illness that was to serve as a basis for exclusion from military service. The Service revised the Circular in 1941 to include "homosexual proclivities" among the list of disqualifying conditions. The premises were that the homosexual personality could be identified, that homosexuality was a disorder, and that persons who were homosexual should be excluded from military service. Moreover, the development of a policy of exclusion of homosexuals from the military ultimately resulted in acceptance of the view that homosexuality should be treated as an illness and medical condition rather than as a crime or moral fault.

The implementation of this military policy fostered the development of psychiatric screening and psychological testing related to homosexuality, because the policy required that every recruit be evaluated for mental disorder. As a result of psychological screening under the Selective Service Act of 1940, a total of 2.5 million individuals were rejected or discharged from the military for neuropsychiatric reasons. In addition to efforts to develop criteria for assessing whether a person was a homosexual, the psychiatric research conducted during World War II reformulated homosexuality as a serious psychological disturbance resulting from faulty psychological development, requiring diagnosis and professional clinical treatment.

An account of the operation of U.S. Army policy toward homosexuals was provided by Dr. William Menninger who served as chief consultant in Neuropsychiatry to the surgeon general of the U.S. Army from 1943 to 1946. Menninger provided a basic description of the assessment of homosexuality used for rejecting recruits:

The standards for admission to the Army as outlined ... specifically state that "persons habitually or occasionally engaged in homosexual or other perverse sexual practices are unsuitable for military service and will be excluded. Feminine bodily characteristics, effeminacy in dress or manner, or a patulous rectum are not consistently found in such persons but where present should lead to careful psychiatric examination. If the individual admits or claims homosexuality, or other sexual perversion, he will be referred to his local board for further psychiatric and social investigation. If an individual has a record as a pervert, he will be rejected." Since total effective screening eliminating all homosexuals from military service proved impossible, the military was faced with the need to develop policies to deal with homosexuals found serving in the military. Where proof of actual homosexual conduct, especially sodomy, occurred, the court martial

177 Id.
178 ELLEN HERMAN, PSYCHIATRY, PSYCHOLOGY AND HOMOSEXUALITY 36 (1994).
179 Id.
180 WILLIAM C. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD: YESTERDAY'S WAR AND TODAY'S CHALLENGE 222, 228 (1948).
process was often invoked. Otherwise, determination that a person was homosexual because of behavior or associations could be given a “blue discharge” which was a medical discharge or “a discharge without honor.” However, the recognition of homosexuality as a mental disorder or medical illness also led to the view of treatment as an alternative to punishment or discharge. Menninger provided an account of treatment alternative to the homosexual soldier:

Some progress in the handling of the problem came with the publication of War Department Circular 3, dated January 3, 1944. This directive applied only to those who were discovered or reported to have performed homosexual acts . . . . It provided hospitalization of those who were deemed reclaimable. It permitted the giving of a blue discharge to an offender who was deemed not reclaimable, in lieu of court-martial. Included in the category of “reclaimable” were those who were guilty of first offenses, those who acted as a result of intoxication or curiosity, or “those who acted under undue influence, especially when such influence was exercised by a person of greater years or superior grade.”

This rudimentary approach to treating homosexuals was complemented by extensive studies by the military of individuals determined to be homosexuals.

During the war, over fifteen studies of male homosexuality were published by military psychiatrists based on evaluation of more than 2,000 male subjects. In these studies, researchers administered psychological tests, developed family and sexual histories, and conducted physical evaluations to develop an understanding of the causes of homosexuality and its possible treatment. The results of this work was praised in the Journal of the American Medical Association where the view was expressed that, “[t]he crude methods of the past have given way to more humane and satisfactory handling of the problems of the homosexual. No longer is it necessary to subject cases that are so definitely in the medical field to the routine of military court-martial.”

Sandor Rado has been viewed as setting down the basis for the principal work that established homosexuality as a mental disorder subject to treatment. Rejecting Freud’s view that the origins of homosexuality arise in the presence of attributes of sex organs of both genders in the human zygote, Rado located the basis for homosexuality in the human psyche, attributing a central role to phobia of the opposite gender.
gender. Rado's understanding that there was a psychological basis for homosexuality led him to assert the possibility of effective therapy being developed.

One proponent of effective therapy for homosexuality was Edmund Bergler whose position that homosexuality was a mental disorder involved a psychoanalytic approach that drew heavily on Rado's suggestion of a pre-Oedipal basis for homosexuality. According to Bergler, homosexuals who are seeking "some substitute of the pre-Oedipal mother" are "persons [who] are so angry with the disappointing breast or breast-substitutes that they disregard the whole disappointing sex of women: They run in life after the 'reduplication' of their own defense mechanisms — the penis." The psychodynamics of homosexuality were understood by Bergler in quite mechanistic terms:

[H]omosexuality denotes genetically a stabilization on the unconscious defensive level: "I cannot be masochistically attached to Mother; I have nothing in common with her and am not even interested in a woman." He singles out the disappointing organ (breast or breast equivalent), finds on his own body (in his penis) a replica of it, and throughout his life runs after the copy of the replica — the penis of the other man.

Bergler asserts, "[e]very analysis of homosexuals (the writer [claimed he] has analyzed dozens of them) confirms the fact that behind their frantic chase after the male organ the disappointing breast is hidden." The well-adjusted or contented homosexual is an impossibility according to Bergler who wrote:

There are no happy homosexuals; and there would not be, even if the outer world left them in peace. The reason is an internal one: Unconsciously they want to be disappointed, as does every adherent of the "mechanism or orality." A man who unconsciously runs after disappointment can not be consciously happy. The amount of conflict, of jealousy for instance, between homosexuals surpasses everything known even in bad heterosexual relationships.

The mentally disordered homosexual was seen to indulge in endless self-pity, unconsciously enjoyed psychic masochism. Positing a feeling of a life filled with suffering injustice, Bergler was led to label the homosexual as an "injustice collector." Bergler asked, "[i]magine a baby wanting to prove that its mother is unjust; imagine further a pathologic mother wanting to harm and refuse the

188 See id.
189 Id. at 173-88.
191 Id. at 232.
192 Id. at 237.
193 Id. at 232.
194 Id. at 237.
195 Bergler I, supra note 190, at 237.
196 Id. at 237.
baby's demands — there one has in a nutshell the basic conflict of every homosexual relation. The homosexual is sick inwardly.”

Despite the deep-seated nature of the psychic experience that Bergler saw at the root of homosexuality, he expressed optimism that homosexuality is a mental disorder susceptible to treatment. Unequivocally, he stated, “[t]he fact remains that today homosexuality is a curable neurotic disease, requiring specific therapeutic techniques and prerequisites.” In a 1944 article, Bergler set out his view of the prerequisites for the psychoanalytic treatment of homosexuality. Bergler asserted, “[t]oday, psychiatric-psychoanalytic treatment can cure homosexuality [so long as that treatment is] of one to two years’ duration, with a minimum of three appointments each week — provided the patient really wants to change.”

Perhaps the most influential advocate of the view that homosexuality involves mental disorder susceptible to treatment was Irving Bieber, a Clinical Professor of Psychiatry at New York Medical College, who with his associates authored Homosexuality: A Psychoanalytic Study. The monograph was based on research, undertaken by the New York Society of Medical Psychoanalysis in the 1950s, that consolidated case studies of 106 homosexuals and 100 heterosexuals by nine psychiatrists. All of the homosexual subjects were in psychoanalysis, and sixty-four percent reported a desire not to be homosexual. Just as Bergler asserted, “there were no happy homosexuals.” Bieber accepted the view that homosexuality is abnormal and disordered; he asserted, “[a]ll psychoanalytic theories assume . . . adult homosexuality is psychopathologic.” Bieber and his associates assumed “heterosexuality is the biologic norm . . . unless interfered with all individuals are heterosexual.” Bieber also invoked the authority of Rado to support his claim that the origins of homosexuality lie in childhood experiences, which lead to incapacitating fears of the opposite gender.

Bieber and his associates believed the origins of homosexuality arise from the perverse effects of parental relationships involving either or both a controlling, possessive, seductive, and overly intimate mother and a distant or hostile father. Thus, homosexuality is viewed as the effects of maladjusted family relationships on the male psyche. Close-binding, intimate mothers were

197 Id.
198 Id. at 247.
199 See Edmund Bergler, Eight Prerequisites for the Psychoanalytic Treatment of Homosexuality, 31 PSYCHOANALYTIC REVIEW 286 (1944) [hereinafter, Bergler II].
200 Id.
201 See IRVING BIEBER, ET AL., HOMOSEXUALITY: A PSYCHOANALYTIC STUDY (1962).
202 Id. at viii.
203 Id. at 29.
204 Id. at 29.
205 BIEBER, ET AL., supra note 201, at 18.
206 Id. at 319.
207 Id. at 10.
208 Id. at 310-11.
identified with seventy-three of the homosexuals studied, and with only thirty-two of the control group. Not one of the homosexual subjects had a relationship with his father, which could be considered “normal”; while only eight of the individuals in the control group reported normal father-son relationships. Beiber concluded that homosexuality originates from a family relationship where the mother both overstimulated and restricted her son who, at the same time, suffered emotional or physical deprivation and harm from the father. According to Bieber:

The classical homosexual triangular [family] pattern is one where the mother is [close-binding-intimate] and is dominant and minimizing toward a husband who is a detached father, particularly a hostile-detached one. From our statistical analysis, the chances appear to be high that any son exposed to this parental combination will become homosexual or develop severe homosexual problems.

The emerging picture in Bieber’s report is that homosexuality results from unhelathy family relationships.

Bieber posited that underlying homosexuality, a biologic drive to normality can be encouraged through effective therapy. He was led to an optimistic view of the possibility of effective therapy as a cure for homosexual mental disorder. Bieber concluded:

We are firmly convinced that psychoanalysts may well orient themselves to a heterosexual objective in treating homosexual patients rather than “adjust” even the more recalcitrant patient to a homosexual destiny. A conviction based on scientific fact that a heterosexual goal is achievable helps both patient and psychoanalyst to take in stride the inevitable setbacks during psychoanalysis.

It is, however, difficult to find the basis in his own work for Bieber’s seeming optimism about the possibility of an effective therapy that would “cure” homosexuality. Of the homosexuals studied, seventy-two began psychoanalytic treatment exclusively as homosexuals. Of these seventy-two subjects, fifty-eight (eighty-one percent) remained exclusively homosexual, and fourteen (nineteen percent) had become exclusively heterosexual.

Perhaps the strongest early champion of therapy curing homosexuality was Charles Socarides, a Clinical professor of Psychiatry at the State University of New York. His monographs The Overt Homosexual and Homosexuality

209 Id. at 84.
210 BEIBER, ET AL., supra note 201, at 114.
211 Id. at 314-16.
212 Id. at 172.
213 Id. at 319.
214 Id.
215 BEIBER, ET AL., supra note 201, at 319.
216 Id.
217 Id. at 301.
218 CHARLES W. SOCARIDES, THE OVERT HOMOSEXUAL (1968) [hereinafter, SOCARIDES I].
remain influential texts for those who view homosexuality as a disorder susceptible to treatment. Socarides rejected labeling homosexuality as a psychopathology, a neurosis or an addiction. Instead, homosexuality was to be viewed as indicative of a psychological mechanism to cope with psychic conflict and struggle by producing some level of marginal sexual functioning. Socarides posited a threat posed by the mother to a child’s ego giving rise to a defensive effort to avoid the mother’s threat of incorporation. In reaction to the perceived threat posed by the mother, the homosexual achieves sexual satisfaction by substitution, displacement and other defense mechanisms. According to Socarides:

The homosexual is fixated on his wish for, and dread of, the mother-child unity. Consequently, he is prone to regression to earlier stages of development. He experiences a threat to ego destruction in union with the mother, an event to be avoided at all costs. The homosexual’s life and development are designed to forestall and prevent the realization of this powerful affective state. Homosexual behavior is the solution to the intolerable anxiety connected with the pull to this earlier less differentiated phase of ego development.

In Socarides’ view, the homosexual fails to establish a psychological identity separate from the mother. Remaining psychologically bound to the mother, the male child fails to develop the appropriate gender identity. Profound separation anxiety occurs when the homosexual attempts a sexual relationship with a woman. To avoid the dread of female engulfment and subsequent loss of a sense of self, the male seeks sexual release with a person of the same gender. In the Overt Homosexual, Socarides suggests homosexual behavior is disordered because it can never lead to authentic pleasure, love or stability:

Homosexuality is based on fear of the mother, the aggressive attack against the father, and is filled with aggression, destruction and self-deceit. It is a masquerade of life in which certain psychic energies are neutralized and held in a somewhat quiescent state. However, the unconscious manifestation of hate, destructiveness, incest and fear are always threatening to break through. Instead of union, cooperation, solace, stimulation, enrichment, healthy challenge and fulfillment, there are only destruction, mutual defeat, exploitation of the partner and the self, oral sadistic incorporation, aggressive onslaughts, attempts to

219 CHARLES SOCARIDES, HOMOSEXUALITY (1978) [hereinafter, SOCARIDES II].
220 Id. at 3.
221 Id. at 3-4.
222 Id. at 86-87.
223 Id. at 87.
224 SOCARIDES II, supra note 219, at 87.
225 Id. at 86.
226 SOCARIDES I, supra note 218, at 74.
227 See id. at 122.
228 See id.
alleviate anxiety and a pseudo-solution to the aggressive and libidinal urges which dominate and torment the individual.  

Homosexuality is seen as a condition that is experienced as disturbing and painful. Any apparent normal functioning is fragile and threatened by disruption. Because of the view that homosexuality is experienced as a threatening and unsatisfactory condition, Socarides denominated it to be a mental disorder. On the other hand, Socarides expressed optimism about the prospect for a psychiatric cure for this type of disorder, claiming that over fifty percent of the strongly motivated homosexuals he treated in intensive therapy became exclusively heterosexual. The work of Socarides continues to have significant influence on advocates of reparative therapy such as Joseph Nicolosi whose publications include Healing Homosexuality: Case Studies of Reparative Therapy and Reparative Therapy of Male Homosexuality. These works are based on case reports of homosexual men who become dissatisfied with their homosexuality and are reported to have benefited from a directive form of psychotherapy, which has reportedly freed them of their homosexuality.

For many years the publications of researchers such as Rado, Bieber and Socarides represented the accepted view of homosexuality as a mental disorder. This is reflected by the action of the American Psychiatric Association, in cooperation with the Public Health Service, in including homosexuality as a diagnosis in the first edition of the Diagnostic and Statistical Manual: Mental Disorders (DSM) published in 1952. The manual listed homosexuality, along with other sexual deviations, in the category sociopathic personality. This type of disorder was characterized by the absence of subjective experience of distress or anxiety despite the presence of significant pathology. Thus, the basis for the classification was a pattern of sexual behavior by homosexuals that was considered pathological rather than involving any discomfort or other dysfunction to the homosexual himself.

In 1968, the revised Diagnostic and Statistical Manual of Mental Disorders (DSM-II) reclassified homosexuality. Homosexuality was removed from the category of sociopathic personality disturbance and identified as a mental disorder classified under the category of sexual deviations. This category

229 Id. at 8.
230 SOCARIDES II, supra note 219, at 2.
231 Id. at 406.
233 JOSEPH NICOLOSI, REPARATIVE THERAPY of MALE HOMOSEXUALITY (1991) [hereinafter, NICOLOSI II].
234 See id. at xviii.
236 Id. at 7, 39.
237 Id. at 34.
239 Id. at 44.
placed homosexuality alongside fetishism, pedophilia, transvestism, exhibitionism, voyeurism, and sexual sadism.\textsuperscript{240} Classified as a psychological disorder, the underlying premise was that homosexuality was a deviant condition susceptible to mental health treatment.

The legal incorporation of understanding homosexuality as a mental disorder occurred when legal consequences followed from a determination that someone was a homosexual rather, than because one had engaged in homosexual acts. With this view of homosexuality, the primary significance of evidence of a homosexual act is that it establishes that an individual is a homosexual. Thus it is the status of one being a homosexual, which provides the basis for legal consequences. However, in American law there are some barriers to taking legal action simply on the basis of a person's status. The most significant barrier is the constitutional prohibition on subjecting a person to criminal punishment because of their status. For example, while a person may be jailed for possessing a controlled substance, that person may not be incarcerated for being a drug addict.\textsuperscript{241} Thus, it is permissible to criminally punish a person for an act of sodomy, even if that act occurs in private; however, a person cannot be criminally sanctioned for being a homosexual.

Perhaps the best example of a non-penal law providing for official action based on the status of an individual who is a homosexual involves an area of governmental activity where the understanding of homosexuality as mental disorder was developed. Namely, in the military, exclusion of an individual from military service on the basis that the individual is a homosexual without a requirement of evidence that the individual had ever engaged in a criminal act of sodomy is tolerated because the sanction is not criminal.

A focus on the homosexual, rather than the sodomist, provided the basis for exclusion of homosexuals from military service. The Department of Defense (DOD) policy for the exclusion of homosexuals states: "Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Services [should] be mandatory."\textsuperscript{242} Even if no sexual activity has occurred, Army policy provides that homosexual personnel can be identified, and that such persons are to be barred from military service at induction or separated from the service upon discovery.\textsuperscript{243}

Another area of discrimination against homosexuals on a \textit{per se} basis, based on the medical view that homosexuality involved a mental disease or disorder, was the law governing security clearances required for some government employment. The Department of Defense considered homosexuals to be security risks under a number of criteria used in processing security clearance

\begin{thebibliography}{99}
\bibitem{240} \textit{Id.} at 45.
\bibitem{241} Robinson \textit{v.} California, 370 U.S. 660 (1962) (holding unconstitutional a statute making it a crime for a person to "be addicted to the use of narcotics").
\bibitem{242} \textit{See RAND, supra note 174, at 6.}
\bibitem{243} \textit{WILLIAM RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW} 587 (1997).
\end{thebibliography}
applications.\textsuperscript{244} The DOD position placed a significant reliance on the psychiatric categorization of homosexuals as suffering from a mental disorder or evidencing a condition of deviance. For example, Edmund Bergler stated without qualification that as a class, homosexuals evidenced an "amazing degree of unreliability."\textsuperscript{245} Similarly, Irving Bieber reported that "[c]hronic underlying depressive states [are] a frequent characteristic of homosexuals."\textsuperscript{246} On the basis of such medical diagnosis of the homosexual personality, the DOD Clearance Office cited a number of concerns in its refusal to grant security clearances to homosexuals that reflected an understanding of homosexuality itself as a mentally disordered condition.\textsuperscript{247} Among the concerns identified by the Clearance Office were homosexuals' purported disregard of public law, conduct indicating poor judgment, unreliability or untrustworthiness, and defects in judgment.\textsuperscript{248} Thus, the DOD accepted the view that homosexuality itself constituted a mental disorder amounting to an impairment precluding employment that required a security clearance. As late as 1990, a United States Court of Appeals in the case of High Tech Gays v. Defense Indus. Security Clearance Office, upheld the denial of security clearance on the premise that there continues to be a view that homosexuality is tied to mental disorder.\textsuperscript{249} The court noted, "the KGB is not primarily interested in homosexuals because of their presumed susceptibility to blackmail. In its judgment, homosexuality is often accompanied by personality disorders that make the victim potentially unstable and vulnerable to adroit manipulation."\textsuperscript{250}

Perhaps no film captured the view of homosexuality as mental disorder and the depiction of homosexuals as subjects for psychotherapy more than the 1970 film Boys in the Band.\textsuperscript{251} The psychological perspective of the film, in particular echoing the view of Edmund Bergler that "there are no happy homosexuals," is reflected in a quip of the principal character in the film who declares: "You show me a happy homosexual and I’ll show you a gay corpse." The film can almost be read as an illustration of Charles Socarides litany of the harmful and debilitating symptoms of homosexuality, including "destruction, mutual defeat, exploitation of the partner and the self, oral-sadistic incorporation, aggressive onslaught, attempts to alleviate anxiety and pseudo-solutions to the aggressive and libidinal urges which dominate and torment the [homosexual] individual."\textsuperscript{252}

\begin{thebibliography}{299}
\bibitem{244} Notes, Security Clearances for Homosexuals 25 Stan. L. Rev. 403 (1973).
\bibitem{245} Bergler I, supra note 190, at 233.
\bibitem{246} BIEBER ET AL., supra note 201, at 318.
\bibitem{247} Id. at 409.
\bibitem{248} High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 566-67 (9th Cir. 1990) (citing "disregard for public law . . . criminal or dishonest conduct . . . acts . . . indicat[ing] poor judgment, unreliability or untrustworthiness . . . mental condition . . . [that] may cause defect in judgment . . . [v]ulnerability to coercion [and] . . . [a]cts of sexual misconduct or perversion") (quoting 32 C.F.R. § 154.7 (g)-(k), (q) (1987)).
\bibitem{249} See id.
\bibitem{250} Id. at 577 (quoting \textsc{John Barron}, \textsc{KGB: The Secret Work of Soviet Secret Agents} (1974).
\bibitem{251} The Boys in the Band (National General Pictures 1970).
\bibitem{252} SOCARIDES I, supra note 218, at 8.
\end{thebibliography}
The film is set in the Manhattan apartment of Michael (Kenneth Nelsen) a
guilt-ridden Catholic who is joined by his friend Donald (Frederic Combs) in
making last minute preparations for the birthday party of their mutual friend
Harold (Leonard Frey). Donald has arrived early because his psychiatrist
canceled his Saturday evening appointment. Discussing his situation, Donald
laments: "It's just today I finally realized that I was raised to be a failure. I was
groomed for it." Michael retorts, "Christ, how sick analysts must get of hearing
how mommy and daddy made their darlin' into a fairy."

Michael receives a telephone call from a former Georgetown classmate, Alan
(Peter White) who asks to come and talk to Michael about his situation. Michael,
who has not admitted his homosexuality to his classmate, is concerned about the
reaction of Alan, a married conservative Washington attorney, to the variety of
gay guests Michael is hosting at his apartment. In Michael's own words the
foray consists of "six tired screaming fairy queens and one anxious queer."

The party guests arrive including Emory (Cliff Gorman), an effeminate
decorator who refers to the other guests by feminine names, Bernard (Reuben
Greene), a sensitive Afro-American employed at Double Day Books on Fifth
Avenue, Hank (Laurence Luckenbell), an athletic divorced school teacher, and
his lover Larry (Keith Prentice), a fashion photographer. Also arriving is a
vacuous male hustler dressed as a cowboy (Robert La Tourneaux) who reveals
that he is Emory's birthday gift for Harold.

Alan, who may or may not have had some homosexual experiences while at
college, unexpectedly arrives as the party progresses. Alan is repulsed by
Emory's effeminate behavior, and the two become engaged in a scuffle. Harold
belatedly arrives in the midst of chaos at which point the hustler sings a verse of
"Happy Birthday."

Michael proceeds to get drunk and engages in a nasty exchange with Harold
about his tardiness in arriving at the party as symptomatic of a significant
neurosis. Harold responds suggesting that Michael's neurosis is revealed in his
compulsive shopping for which he is in debt. Michael then insists that everyone
play a "truth game" in which each player must call the individual he loves most;
winning points for dialing, for connecting, and for revealing the love the caller
has for the person called. The purpose of the game is humiliation. Michael
forces Alan to join in the game. Reluctantly, Alan joins the game and declares
his love over the phone. Michael believes the call was directed to another former
classmate whom Michael knows to be gay. However, Alan has called his wife
whom apparently he was on the verge of divorcing.

Harold who refuses to play the game denounces Michael in terms derived
directly from the view of homosexuality as mental disorder:

You are a sad and pathetic man. You're a homosexual and you don't
want to be. But there is nothing you can do to change it. Not all your
prayers to your God, not all the analysis you can buy in all the years
you've got left to live. You may very well one day be able to know a
heterosexual life if you want it desperately enough — if you pursue it
with the fervor with which you annihilate — but you will always be a homosexual as well. Always, Michael. Always. Until the day you die.

As the party disperses, Michael breaks down crying with an “anxiety attack” and says: “If we . . . if we could just . . . not hate ourselves so much. That’s it you know. If we could just learn not to hate ourselves quite so very much.” Donald, who sees a therapist on a weekly basis, offers Michael a more optimistic view about the benefits of therapy for his homosexuality. He comforts Michael by explaining that as “[i]nconceivable as it may be, you used to be worse than you are now. Maybe with a lot more work you can help yourself some more — if you try.” The Catholic Film Newsletter interpreted the movie as a depiction of the view that homosexuality is a painful mental disorder, describing the film’s depiction as, “with wit and passion on the desolation and waste which chill this way of life . . . with all its anxiety, bitterness, depression and solitude.”

VIII. NORMALIZATION OF HOMOSEXUALITY

The work of Alfred Kinsey and his associates, including the 1948 publication of Sexual Behavior in the Human Male had a significant influence in producing a new understanding of homosexuality as involving a spectrum of same gender sexual orientation, rather than as a singular pathological condition or mental disorder of men who have or desire sexual relations with men instead of woman. Kinsey’s work challenged a binary view of human sexuality by which people can be divided into two readily identifiable groups, homosexual and heterosexual. Of significance, Kinsey’s work challenged the view that sexual orientation is established by engagement in sodomy or any particular sexual acts. Kinsey’s approach to sexual orientation considered a person’s self-identification and fantasies, as well as actual sexual acts, in the defining of one’s sexual orientation. Moreover, Kinsey’s research suggested that an individual’s self-defined sexual orientation may change over time. The various individuals who were studied identified periods in their lives when their sexual orientation was different from how they presently identify themselves. According to Kinsey:

Males do not represent two discrete populations, heterosexual and homosexual. . . . It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separate pigeon holes. The living world is a continuum in each and every one of its aspects.

Kinsey’s research also demonstrated that the inadequacy of the dual dichotomy of sexual orientation can be salvaged by adding the third category of bisexuality. According to Kinsey, sexuality cannot be resolved into discrete

---

253 The Catholic Film Newsletter (April 1970).
254 A.C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).
255 Id. at 615-17.
256 Id. at 623-31.
257 Id. at 639.
categories, no matter what the number. Rather, a continuum is the accurate way to understand sexual orientation. Kinsey emphasized gradations between exclusive heterosexual behavior and exclusive homosexual behavior by providing a seven point scale involving sexual identification, fantasy or sexual activity:

- **0** - No physical contacts resulting in erotic arousal or orgasm and no psychic response to individuals of own sex. Sociosexual contacts and responses are exclusively with other sex. [Exclusive Heterosexual]

- **1** - Only incidental homosexual contacts which have involved physical or psychic response, or incidental psychic responses without physical contact. The great preponderance of sociosexual experience and reaction is with the opposite sex.

- **2** - More than incidental same-sex experience and/or respond rather definitely to homosexual stimuli. Heterosexual experience and/or reactions still surpass homosexual, although both might be frequent. Usually recognize quite specific arousal by homosexual stimuli, but heterosexual responses are still stronger.

- **3** - About equally heterosexual and homosexual in overt experience and psychic reactions. Accept and equally enjoy both types of contacts, and have no strong preference for one or the other. Actual experience in one category or the other may predominate, but psychic reactions indicate that both forms of contact are equally desired.

- **4** - More overt activity and/or psychic reaction to the same-sex stimuli, while also experiencing a fair amount of heterosexual activity and/or psychic response. (The reverse of 2.)

- **5** - Almost entirely homosexual in overt activities and/or psychic reactions. Incidental physical experience with the opposite sex and sometimes reacts psychically to the other sex. (The reverse of 1.)

- **6** - Exclusive homosexual, both in regard to overt experience and in regard to psychic reactions. (The reverse of 0.)

Kinsey's continuum does not involve seven discrete categories but is a seven-point continuum, ranging from exclusive homosexuality (6 on a Kinsey scale), through varying degrees of bisexuality or ambisexuality (scores of 5 to 1) to exclusive heterosexuality (0 on the scale). While Kinsey's discussion of

---

258 *Id.* at 656.
259 *Kinsey, supra* note 254, at 639.
260 *Id.* at 636-50.
261 *Id.*
262 *Id.* at 664-66.
the appropriate response of the law to homosexuality did not go so far as to suggest total decriminalization or elimination of all discrimination against homosexuals, he did suggest that past homosexual acts should not be viewed as a per se basis for prosecution or discrimination.\textsuperscript{263}

Army and Navy officers and administrators in schools, prisons, and other institutions should be more concerned with the degree of heterosexuality or homosexuality in an individual than they are with questions of whether he has ever had an experience of any sort. . . . Even courts of law might well consider the totality of the individual’s history, before passing judgment on the particular instance that has brought him into the hands of the law.\textsuperscript{264}

A significant element of Kinsey’s work was his emphasis on the multidimensional aspects of sexual orientation rather than defining sexual orientation by sexual activity alone.\textsuperscript{265} Building on the work of Kinsey, Fritz Klein and his associates specified a number of components of an individual’s sexual orientation beyond sexual behavior.\textsuperscript{266} These additional components include: emotional preference; sexual fantasies; sexual attraction; social preference; life style, social world and community; and self-identification.\textsuperscript{267} Such a multi-dimensional understanding is important, because some individuals identify themselves as gay or homosexual without ever having had a same-gender sexual experience.

The research of Kinsey and his associates was complemented by the work of psychologist Evelyn Hooker who developed an analysis of homosexuality based on persons in the general population, rather than on patients in clinical treatment.\textsuperscript{268} In the mid-1950s, Hooker, a professor at the University of California at Los Angeles, set out to investigate the adjustment of the overt homosexual. By focusing on individuals in the general population, Hooker sought to identify a representative sample of the homosexual population as a whole.\textsuperscript{269} She also strove to obtain a comparable control group of heterosexuals, to provide a standard of comparison and help avoid any theoretical preconceptions.\textsuperscript{270} Two groups of individuals were paired for age, education, and intelligence quotient.\textsuperscript{271} The comparative study of personality structure and adjustment of the two groups of men consisted of a battery of projective

\begin{thebibliography}{9}
\bibitem{263} Id.
\bibitem{264} Kinsey, supra note 254, at 664-65.
\bibitem{265} Id. at 664.
\bibitem{267} Id. at 38.
\bibitem{268} Evelyn Hooker, The Adjustment of the Overt Homosexual, 21 JOURNAL OF PROJECTIVE TECHNIQUES 18 (1957) [hereinafter Hooker I]; Male Homosexuality in the Rorshack, 22 JOURNAL OF PROJECTIVE TECHNIQUES 33 (1958) [hereinafter Hooker II].
\bibitem{269} Hooker I, supra note 268, at 18.
\bibitem{270} Id.
\bibitem{271} Id. at 19.
\end{thebibliography}
techniques, attitude scales and life history interviews. Professional psychologists were employed to make assessments of personality structures and to evaluate the sixty sets of records. The evaluators knew that some of the subjects were homosexual and some were heterosexual, but they did not know which.

The finding of Hooker's study was that there was no significant difference between the number of homosexuals and heterosexuals having a rating of average or better psychological functioning. Furthermore, the evaluators were not able to identify the homosexual and heterosexual men on the basis of their test results. Two-thirds of each of the groups of subjects received an adjustment rating of average or better. In 42 out of the 60 cases, the evaluators agreed exactly or differed in only a small degree. No single pattern of homosexual adjustment emerged. Some homosexual individuals proved to be quite ordinary, indistinguishable, except in their sexual orientation and behavior, from other ordinary individuals who were heterosexual. Some homosexuals even attained a superior rating, not only devoid of any pathology, but capable of functioning at a superior social level.

Hooker found that homosexuality as a clinical entity does not exist, and that its forms are as varied as those of heterosexuality. In addition, Hooker, concluded that homosexuality may be a deviation in sexual orientation that is within the normal psychological range. Finally, she determined that the role of particular forms of sexual desire and expression in personality structure and development might be of limited significance because homosexuality does not suggest any maladjustment in non-sexual areas of behavior.

Evelyn Hooker served as chairperson of a National Institute of Mental Health Task Force on Homosexuality that issued its Final Report in 1972. The report largely reflected the conclusions reached by such researchers as Kinsey and Hooker. The Task Force laid out a proposed broad range program of research relating to homosexuality including the study of personality factors, genetic factors, family dynamics, social behavior and etiology. However, it was the Task Force's recommendation for legal changes that were of great significance.

---

272 Id. at 20.
273 Id. at 21.
274 Hooker I, supra note 268, at 21.
275 Id. at 22.
276 Id. at 23.
277 Id. at 22.
278 Id.
279 Hooker I, supra note 268, at 23.
280 Id.
281 Id.
282 Id. at 30.
283 Id.
285 JOHN M. LIVINGOOD, M.D., NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPER, 76-357 (1972).
286 Id. at 3-4.
The Task Force recommended de-criminalization of homosexual behavior, citing lack of evidence of any underlying pathology in homosexual behavior, the harmful distress and opprobrium that necessarily accompanies criminal prosecution of homosexual behavior, and the lack of any showing of a deterrent effect of criminal prosecution of sodomy or other homosexual behavior. The report concurred that "statutes covering sexual acts should be recast in such a way as to remove legal penalties against [homosexual] acts in private among consenting adults." The Task Force's recommendations for legal change significantly impacted areas such employment law, as well, with recommendations that other areas law be revised to eliminate discrimination based on homosexuality.

The groundwork laid by researchers such as Kinsey and Hooker and the declarations of such bodies as the National Institute of Mental Health Task Force on Homosexuality contributed to the creation of an environment that led to a change in the classification of homosexuality by the American Psychiatric Association (APA). Beginning in 1970, gay activists began demonstrating and arguing for the elimination of the classification of homosexuality as a mental disorder. However, opposition was developed by Irving Bieber and Charles Socarides who organized an Ad Hoc Committee Against the Deletion of Homosexuality. Nevertheless, in 1973 a proposal was presented and discussed at the APA convention to eliminate homosexuality as a psychiatric disorder from inclusion in the revised version of Diagnostic and Statistical Manual of Psychiatric Disorders (DSM-II). On December 15, 1973, the Nomenclature Committee for the APA voted to eliminate the classification of homosexuality as a mental disorder from DSM-II. This action survived a referendum organized by the Ad Hoc Committee Against Deletion, and a narrow majority of the total membership of the APA voted to sustain the decision to delete homosexuality from the list of mental disorders.

While the deletion of homosexuality as a mental disorder was significant in its effect on legal development and among the public at large, a debate continued about whether homosexuality was a normal variant of human sexuality or whether heterosexuality was to remain the privileged form of sexuality from a psychiatric perspective. The removal of homosexuality per se from the DSM-II classification of mental disorders was accompanied by the development of a new category of mental disorders labeled Sexual Orientation Disturbance. This
new category of mental disorder applied to “individuals whose sexual interests are directed primarily toward people of the same sex who are either disturbed by, in conflict with, or wish to change their sexual orientation.”

In drafting a new edition of the DSM, renewed attention to the subject of homosexuality was raised by psychiatrists who wanted a special classification for those homosexuals distressed by their sexual orientation. The term that was settled upon for DSM-III was “ego-dystopia homosexuality.” The nature of this disorder was set out in the Manual as: “The essential features are a desire to acquire or increase heterosexual arousal, so that heterosexual relationships can be initiated or maintained, and a sustained pattern of overt homosexual arousal that the individual explicitly states has been unwanted and a persistent source of stress.”

DSM-III included assurance that the disorder did not refer to all homosexuals, stating “[t]his category is reserved for those homosexuals for whom changing sexual orientation is a persistent concern.” With the revision of DSM-III, “ego-dystopia homosexuality” came under review and was eliminated in 1986 in DSM-III-R. However, a residual category, “Sexual Disorders Not Otherwise Classified” was added to cover those with “persistent distress or confusion about one’s sexual orientation.”

The protracted debate about persons who may wish to change sexual orientation persists in the current controversy over reparative therapy, conversion psychotherapy and claims about “cures” of homosexuality.

An example of the type of study of the adjustment of homosexuals done since its declassification as a mental disorder is Bertram Cohler and Robert Galatzer-Levy’s monograph, The Course of Gay and Lesbian Lives: Social and Psychoanalytic Perspectives. Cohler and Galatzer-Levy maintain that there is no evidence of a necessary relationship between homosexuality and psychopathology or immaturity. Significantly, the authors conclude that sexual desire is not fixed; but, rather, it often varies across the course of an individual’s life as the individual reacts to changes in personal and social circumstances. Cohler and Galatzer-Levy directly challenged the work of researchers such as Bieber and Socarides who maintained that the particular family constellation of the over-involved mother and cold distant father produce a homosexually disordered child. Similarly, Cohler and Galatzer-Levy

296 See AMERICAN PSYCHIATRIC ASSOCIATION, supra note 238, at 45.
300 Id.
301 BAYER, supra note 40, at 19.
302 Id. at 217.
303 COHLER & GALATZER-LEVY, supra note 3.
304 Id. at 310-11.
305 Id. at 248-51.
306 Id. at 288.
challenge the conventional view that male homosexuality represents an arrested psychological-sexual development.\textsuperscript{307} Instead, Cohler and Galatzer-Levy maintain that there are various developmental paths to same gender-sexual orientation.\textsuperscript{308} Finally Cohler and Galatzer-Levy challenge the legitimacy and effectiveness of directed efforts at changing sexual orientation finding them to be unsuccessful.\textsuperscript{309} They also suggest that such therapeutic programs are an inappropriate response to distress about sexual orientation since the proper goal of therapy should be enhanced personality integration, not the achievement of a certain outcome determined prior to therapy.\textsuperscript{310}

The elimination of homosexuality as a mental disease has had a profound effect on the legal status of homosexual treatment in both immigration laws and the legal rules governing security clearances, which were revised to reflect the new understanding of homosexuality as not having any necessary connection to mental disorder.

On July 17, 1974, the President of the American Psychiatric Association wrote the Immigration and Naturalization Service (INS), informing the agency of the APA’s action of no longer listing homosexuality as a mental disorder or sexual deviance.\textsuperscript{311} Subsequently, the United States Surgeon General notified the INS that the Public Health Service would no longer furnish the medical certification required for the exclusionary procedure, and instructed Public Health Service medical officers that they should not certify homosexual aliens as psychopathic personalities or sexual deviates solely on the basis of their homosexuality.\textsuperscript{312} While the INS initially resisted changing its policy of excluding homosexuals, the agency eventually adopted a policy under the 1952 Immigration Act of informing “self proclaimed homosexual aliens” that they could apply for a “waiver of excludability” which had the effect of deferring any action to exclude the alien during his stay in the United States.\textsuperscript{313} With the enactment of the Immigration Act of 1990, the Congress entirely omitted the deviate/psychopathic exclusion.\textsuperscript{314} The legislative history of the 1990 Act includes a statement in the Congressional Record by a sponsoring Senator that the revisions in the immigration statement were meant to override the United States Supreme Court ruling in \textit{Boutilier} and to revoke the policy of excluding persons on the basis of their homosexuality.\textsuperscript{315}
The elimination of homosexuality as a recognized psychiatric disorder directly affected the federal law governing granting of security clearances. As described earlier, federal agencies used criteria of "sexual perversion" to categorize homosexuals as security risks and separate them from government services. Agencies could deny homosexual men and women employment because of their sexual orientation until 1975, when the Civil Service Commission issued guidelines prohibiting the government from denying employment on the basis of sexual orientation.316 While enforcement of these guidelines initially was not uniform, in 1995, an Executive Order of the President made clear that security clearance denial could not be based merely on the fact that an individual was homosexual.317 In prohibiting discrimination based on sexual orientation in the granting of security clearances, the Executive Order provides a clear recognition that homosexuality by itself does not involve any pathology or impairment that prevents an individual from being given employment responsibility involving matters of the most sensitive nature. The Executive Order declared, "[t]he United States government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information . . . . No inference concerning the standards in this section may be raised solely on the basis of the sexual orientation of the employee."318

The influence of normalization of homosexuality by eliminating its classification as a medical disorder can be observed in a dissenting opinion to the Supreme Court's 2000 decision in Boy Scouts of America v. Dale319 in which the Court held that the First Amendment prohibited New Jersey through its public accommodations law to require that the Boy Scouts accept a homosexual scout leader in violation of the Boy Scouts' freedom of expressive association.320 The Court accepted the Boy Scouts' assertion that homosexuality is inconsistent with the values the organization seeks to instill in its members.321 The majority acknowledge that the public perception of homosexuality in the United States has resulted in homosexuals gaining greater acceptance; nevertheless, the court concluded that the First Amendment protected the rights of those in private organizations, like the Boy Scouts of America, who wish to voice a different view.322

However, Justice Stevens joined by Justices Souter, Ginsberg and Breyer expressed a different view. The dissenting Justices invoked an understanding of the normalization of homosexuality in medicine and law.323 This led the dissenting Justices to the view that New Jersey law was designed to protect

318 Id. (emphasis added).
320 Id. at 656-57
321 Id. at 651.
322 Id. at 660.
323 Id. at 699-701 (Stevens, J., dissenting).
homosexuals from discrimination and was meant to give access to homosexual to membership in the Boy Scouts.\(^{324}\) Significantly, Justice Stevens suggested that religious opposition to homosexuality should not influence the law, and that the normalization of homosexuality by psychiatry should be a guide to the law:

Unfavorable opinions about homosexuals “have ancient roots.” Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association’s and the American Psychological Association’s removal of “homosexuality” from their lists of mental disorders . . . \(^{325}\)

While homosexuals still do not have full protection from discrimination and although several states continue to maintain criminal statutes prohibiting sodomy, the views expressed by Justice Stevens increasingly are reflected in the actions of courts and legislatures in recognizing the legal rights of homosexuals. The elimination of the stigma of mental disease has had a significant influence on these legal developments. Yet, one can identify in the majority’s decision in the Boy Scouts case a residue of antipathy towards homosexuals, a situation that led Justice Stevens to observe, “[t]hat such prejudices are still prevalent and that they have caused serious and tangible harm . . . are established matters of fact . . .”\(^{326}\)

The best evidence of the influence of the normalization of homosexuality in film is the depiction of homosexuals in roles where their sexual orientation is known but does not interfere with their functioning or hamper their relationship with other individuals without regard to their sexual orientation. An example of such films is the 1994 production, *Four Weddings and a Funeral*.\(^{327}\) This heterosexual romantic comedy includes a gay couple, Gareth and Matthew (Simon Callow and John Hannah), who are comfortable in an otherwise strictly heterosexual retinue of sophisticated young adults who come together to celebrate a series of weddings. Significantly, there is no gay commitment ceremony which would have been forced and would preclude the characterization of this film as a non-gay movie. Instead the film offers a depiction of two gay men who are cherished by their friends. The sexual orientation of the couple is treated as coincidentally as might be done with any other supporting characters. Actually, the film holds up the relationship of the homosexual couple as an example to which the neurotic and romantically dysfunctional heterosexual characters aspire.

The 1997 film, *Love! Valor! Compassion!* provides a depiction of homosexuals free from the stigmatism of mental disorder or neurosis supposedly caused by a homosexual orientation.\(^{328}\) Unlike *Boys in the Band*, this film is

---

\(^{324}\) *Boy Scouts of America*, 530 U.S. at 698 (Stevens, J., dissenting).

\(^{325}\) Id. at 699 (citations omitted).

\(^{326}\) Id. at 700.

\(^{327}\) *FOUR WEDDINGS AND A FUNERAL* (Working Title Productions 1994).

\(^{328}\) *LOVE! VALOR! COMPASSION!* (New Line Features 1997).
about homosexuals, not about homosexuality. The film provides a frank treatment of the lives of uncloseted homosexuals addressing universal issues of people in relationships. The film does not depend on the sexual orientation of its characters, although the sexual orientation of the characters is a significant aspect of their identity.

*Love! Valor! Compassion!* begins with the narrator, Gregory (Stephen Bogardus), taking the viewer on a tour of his rambling Victorian summer home which is the site of a series of summer parties involving a set of characters. Gregory is a successful choreographer who lives with his blind lover, Bobby (Justin Kirk). A series of guests arrive who attend all of the summer parties, including the acerbic lonely British composer, John Jeckyll (John Glover).

John has a new boyfriend, Ramon (Randy Becker) who is a handsome and promiscuous dancer. Other guests include Buzz (Jason Alexander), the most flamboyant character in the group, who has memorized countless Broadway musicals and quotes them compulsively. Buzz has been diagnosed with AIDS. Also there is Perry (Stephen Spinella) and Arthur (John Benjamin Hinckley), an accountant and a lawyer, who are celebrating their fourteenth anniversary as a couple.

Ramon quickly makes an approach to Bobby, who initially resists but later becomes involved in a passionate encounter late at night in the kitchen. Tension is raised when Bobby confesses his infidelity to Gregory.

The relationship between John and Ramon is merely sexual. John is revealed as a bitter misanthrope who constantly broods. In midsummer, John gets a call from his twin brother James (also played by John Glover) who has AIDS. James is loved by everyone while John has spent a lifetime resenting his brother. Buzz and James fall in love and commit to caring for each other as they face the ravishing effect of AIDS. Through a series of four holiday weekends, friendships are formed, personal lives challenged and strengthened.

This tragic comedy is about the friendship and sex among a group of individuals who happen to be homosexual. The film deals compassionately with issues of commitment, promiscuity, AIDS, and aging. The only character who has problems relating to others is John Jeckyll whose difficulties seem to have more to do with sibling rivalry than his sexual orientation. Otherwise, there is no suggestion of pathology or mental disorder that interferes with or disturbs the lives of the characters in *Love! Valor! Compassion!* While the film can be contrasted to *Boys in the Band*, it perhaps bears a strong comparison to the *Big Chill.*, *The Big Chill* involved aging baby boomers, while *Love! Valor! Compassion!* involves characters who happen to be gay. Both films deal with groups of friends who gather at parties at which they address personal issues of loneliness, friendship, jealousy, mortality and coping. *Love! Valor! Compassion!* is not so much about homosexuality as it is about a group of friends who are gay, who fight loneliness, find, lose and keep friends while attempting to maintain a sense of humor and balance in their lives.

---

329 THE BIG CHILL (Columbia Pictures 1983).
IX. CONCLUSION

A survey of psychiatric and psychological literature reveals that the replacement of a religious condemnation of same-gender sexual acts with a psychological conception of the homosexual person has changed over time. A progression of theories including gender inversion, impaired psycho-sexual development, pathology and mental disorder have determined the way in which homosexuals were viewed and treated by physicians and therapists. In the last quarter of the twentieth century there has been an increasing normalization of homosexuality.

This article attempts to demonstrate that the legal response to homosexuality and the depiction of homosexuals in popular culture has reflected the understanding of homosexuality by psychiatry and psychology. This relationship between psychological theories of homosexuality and the law and popular culture reveal the great significance such psychological theories have on the lives of all homosexuals, not just those individuals who find themselves in therapy or treatment. To the extent that homosexuality was conceptualized as a pathology or mental disorder, courts and legislatures found it easy to continue criminal prosecution, discrimination and denial of legal protections. The view that homosexuals were psychopaths or sick led to depictions in film of homosexuals living miserable lives, preying on the innocent and young, and doomed to self destruction. Since that time, a more accurate and empirically based understanding of homosexuals and their social functioning has emerged. Psychiatry has increasingly rejected the categorization of homosexuality as pathology or mental disorder. With this change in psychiatry's view of homosexuality, the law has changed and positive images of homosexuals have emerged on the screen. Decriminalization, protections against discrimination, and the recognition of basic rights of homosexuals are legal developments that to a great extent not only reflect, but are based on, the normalization of homosexuality within the judgment of official psychiatry and the support of empirical psychological research. As psychiatry has rejected the view of homosexuals as sick or pathological, popular culture has increasingly incorporated positive images of homosexuals leading fulfilling lives as they cope with problems endemic to all people in society.

Continuing disputes in psychiatry and psychology about some aspect of homosexuality will likely be a part of the ongoing consideration of legal treatment of homosexuals and their depiction in various forms of popular culture. However, the strong consensus that homosexuality itself is neither pathological nor a mental disorder provides a basis for continuing legal reform that should extend equal protection, freedom from discrimination, and recognition of the basic rights of homosexuals. It is clear, of course, that there continues to be significant criticism of homosexuality and social hostility, including condemnation by some segments of organized religion. This criticism and condemnation represents the forceful objection to the realization of protection from discrimination and guarantee of basic rights of homosexuals. Nevertheless,
the normalization of homosexuality by psychiatry eliminates significant obstacles
to full extension of legal rights to homosexuals and to positive portrayal of
homosexuals in popular culture.