
NOTES

COMING TO AMERICA: THE IMMIGRATION OBSTACLE FACING BINATIONAL SAME-SEX COUPLES

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INTRODUCTION

MARRIAGE-MINDED GWM/GAM couple (1 American, 1 foreign), seeks lesbian couple (1 American, 1 foreign) for marriages of mutual interests.¹

Classified Ad
The Washington Blade

European/American lesbian couple seeking foreign/American gay male couple for mutually beneficial arrangement. Must be willing to move to New York.²

Classified Ad
San Francisco Bay Times

Advertisements like those above appear every week in gay and lesbian newspapers all across the country. For many binational gay and lesbian

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1. WASH. BLADE (D.C.), Sept. 18, 1998, at 110 (emphasis removed).

2. S.F. BAY TIMES, Oct. 29, 1998, at 47. There were so many “marriage proposals” in this issue that the newspaper placed them in a “Marriage” category!

couples, arranging mutually beneficial “sham” marriages is a last desperate attempt to make a life together in America. Even though the consequences can be severe if they are caught, current American immigration law often leaves binational same-sex couples feeling that they have no other option. Under the family reunification provisions of the immigration laws, gay and lesbian Americans in relationships with foreign nationals have no legal way to bring their partners into the United States. The foreign partner would have to qualify independently, usually by demonstrating some special skill that is needed by employers in the United States. This is very difficult to do, as many people lack the specific skills sought by the Immigration and Naturalization Service (INS). Even if they possess these skills, they would still be subjected to the strict quota limits on legal immigration. U.S. immigration law would also tear apart a foreign same-sex couple if one of them were to get a job in the United States. Under current law, the spouse of a married heterosexual person would be permitted into the country, but the partner of a gay man or lesbian would have to be left behind.³

Some gay and lesbian Americans have chosen to relocate with their partners to a more welcoming country—often Canada.⁴ Bruce MacDonald and Suratin “Jeng” Rianpracha are one such couple. MacDonald says:

“I’m upset and angry that I have to leave my country to live with the man I love. This experience has alienated me from the U.S. political system. On the other hand, every individual American I know has been very supportive. My straight friends and colleagues are incredibly upset. I think the vast majority of people in this country are way ahead of the politicians on this issue.”⁵

3. See HAYDEN CURRY, DENIS CLIFFORD & ROBIN LEONARD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES, §§ 2-24 & 2-25 (Shae Irving ed., 9th ed. 1996).

4. See *Brit Loses Battle to Stay in US*, PLANETOUT NEWS (Mar. 15, 2000) <<http://www.planetout.com/news/article-print.html?2000/03/15/2>> (discussing a gay British man who must relocate from California to Canada because U.S. immigration law does not recognize his relationship with his American partner). Canada’s immigration policies are outlined *infra* Part V.C.

5. Dan Woog, *Til Uncle Sam Do Us Part*, THE ADVOCATE, Sept. 14, 1999, at 24, 31.

While heterosexuals in similar circumstances can marry and automatically gain residency rights for their spouses—even if the spouse entered the country illegally—gay men and women who would be willing to make a similar legal commitment to one another cannot.

....
“I feel like I’m dying,” Ms. Sousa said as the couple and their lawyers left the courtroom. The most harrowing thing, she said, was having to break the news to the child she had raised since infancy. “She won’t understand that I don’t have the proper papers, that I have to go far away,” she said.

Andrew Jacobs, *Gay Couples Split by Immigration Law; Under 1996 Act, Personal Commitments Are Not Recognized*, N.Y. TIMES, Mar. 23, 1999, at B1.

Today the United States is the only industrialized English-speaking country that does not grant same-sex partners immigration preferences.⁶ Legalizing same-sex marriages in the United States would eliminate the immigration hurdle facing binational same-sex couples, but there are other mechanisms through which this goal could be achieved.⁷ Indeed, Australia, New Zealand, Canada and the United Kingdom now all recognize the immigration rights of same-sex couples, yet none of those countries recognize same-sex marriage.⁸ The United States should not stand alone among the industrialized English-speaking world in continuing this discriminatory practice against gay and lesbian families.⁹ Congress should require the INS to establish a registry for same-sex couples so they may immigrate together as a family. As examples of how this might work, Congress could look to the policies enacted by the countries discussed in this Note, or to the domestic partner ordinances enacted in numerous

6. I have chosen to focus exclusively on English-speaking countries not just for practical reasons, but also because English-speaking countries have a shared tradition of “enormous hostility to homosexuality.” Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 972 (1997). Australia, New Zealand, Canada, and of course, the United States are all former English colonies. For a list of other countries with immigration preferences for same-sex partners, see *infra* note 8.

7. Legalization of same-sex marriages would obviously solve many legal problems facing gay and lesbian couples, but an argument for the case in favor of same-sex marriage is beyond the scope of this Note.

8. Other countries recognizing the immigration rights of same-sex couples are France, Belgium, Iceland, the Netherlands, Norway, and Sweden. See *Hearts and Borders*, THE ADVOCATE, Mar. 16, 1999, at 15. Denmark also grants immigration rights, and same-sex couples in that country may enter into civil marriage (these marriages, however, are not recognized by the INS because the Defense of Marriage Act (DOMA) signed by President Bill Clinton prohibits the recognition of same-sex marriages by the federal government). See *Denmark Parliament Legalizes Marriage Between Homosexuals*, TORONTO STAR, May 27, 1989, at A3. I have not included South Africa in this Note because it is not a First World Country that offers easy comparison with the United States. However, South Africa’s new constitution is the only one in the world that specifically prohibits sexual orientation discrimination. However, until February 1999 the government did not recognize the immigration rights of same-sex couples. The Cape High Court has ordered the government to change the immigration laws because lesbians and gay men and their immigrant partners should be free to live together as family. The court stated that the “‘Constitution seeks to promote a society in which diversity of identity is respected and protected. . . . The [Aliens Control] Act prefers certain forms of life partnership over others . . . this cannot be justified.’” *South African Gays Win Equality in Immigration*, FRONTIERS (L.A. ed.), Mar. 5, 1999, at 26.

9. On Valentine’s Day, 2000, Congressman Nadler of New York introduced the Permanent Partners Immigration Act of 2000, which would amend the immigration laws to allow Americans to sponsor their foreign permanent partners. See H.R. 3650, 106th Cong. (2000). The proposed legislation would define permanent partners as individuals who are over age 18, who are in a committed lifelong relationship, who are financially interdependent, who are unable to legally marry, and who are not closely related. See *id.* § 2. This legislation is not likely to pass out of the current Congress. See *Parity in Partnerships*, THE ADVOCATE, Feb. 29, 2000, at 18 (discussing the House Bill and its poor chances for success).

municipalities throughout the United States, or to the framework established by some state courts.¹⁰

In Part I this Note discusses the family reunification goal of U.S. immigration law. Part II presents examples of how discriminatory U.S. immigration laws have been used in the past to remove gays and lesbians from the country, and currently continue to tear apart gay and lesbian families. Part III discusses *Hill v. INS*¹¹ and the resulting statutory change that led to the end of per se exclusion of gays and lesbians from entering the country. Part IV visits the issue of sham marriages for immigration purposes, an unfortunately all too frequent alternative for many same-sex couples. Part V presents the paths taken by the English-speaking countries mentioned above and discusses their strong points as well as their shortcomings. Part VI calls for reform of American immigration law by establishing an INS registry for same-sex couples.

I. THE GOAL OF U.S. IMMIGRATION LAW: FAMILY (RE)UNIFICATION?

The U.S. Congress has traditionally claimed that the country's immigration policies are based on the desire to unify families.¹² A Select Commission appointed by Congress to study immigration policies recognized the family reunification goal in its recommendations.¹³ The Commission found that

reunification of families serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States. . . . In keeping with tradition and

10. For other perspectives on the issue of immigration rights for same-sex couples, see generally Amy R. Brownstein, Note, *Why Same-Sex Spouses Should Be Granted Preferential Immigration Status: Reevaluating Adams v. Howerton*, 16 LOY. L.A. INT'L & COMP. L.J. 763 (1994) (arguing that since the homosexual exclusion provision of the immigration laws has been repealed, the reasoning behind the *Adams* decision no longer holds water and same-sex spouses should be recognized by the INS for immigration preferences); Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97 (1996) (arguing that valid same-sex marriages performed in other countries should be recognized by the INS for immigration purposes).

11. 714 F.2d 1470 (9th Cir. 1983).

12. See Marshall L. Cohen, *Obtaining Permanent Resident Status Through Family Relationships*, in IMMIGRATION LAW: ALI-ABA COURSE OF STUDY MATERIALS 61, 63 (Study Course No. 38, 1998); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 729 (1996).

13. See U.S. SELECT COMM'N ON IMMIGR. AND REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 112 (1981).

humanitarian concerns, the Commission strongly supports the admission of the immediate family members of U.S. citizens without numerical restrictions.¹⁴

Later, in debating the Immigration Act of 1990, several members of Congress voiced their support for strengthening the family reunification provisions of the immigration laws. Representative Bonior supported strengthening the family unity policies: “The wait for family reunification can be long and painful. . . . Not only is it antifamily to allow such long separations, it is also counterproductive. For it only encourages illegal immigration as the best way to become united with loved ones.”¹⁵ Another member stated that “[f]amily unification is the cornerstone of immigration to the United States. Prolonging the separation of spouses from each other . . . is inconsistent with the principles on which this nation was founded.”¹⁶ Immigration policies that provide for family unification help stem the tide of illegal immigration.¹⁷

These desires to unify families and decrease illegal immigration are reflected in the selection system that grants some immigrants preference over others.¹⁸ Before the Immigration Act of 1990, eighty percent of available visas were allocated to family reunification preferences, and twenty percent to skilled workers needed for the domestic economy.¹⁹ Generally, “parents, sons and daughters, brothers and sisters, and spouses of U.S. citizens, and the spouses and unmarried sons and daughters” of legal permanent residents qualify as family relationships.²⁰

“Spouses” are not defined in the Immigration and Nationality Act (INA). However, immigration courts typically define a spouse “as a person who is married to a petitioner where the marriage was legally valid at the time performed, is still in existence, and was not entered into solely for

14. *Id.* at 112-13.

15. 136 CONG. REC. H8629 (daily ed. Oct. 2, 1990) (statement of Rep. Bonior).

16. *Id.* at H8631 (statement of Rep. McGrath).

17. *See id.*

18. *See* 8 U.S.C. § 1153(a) (1994) (ranking preferences for family-sponsored visa allocation in this order: unmarried sons and daughters of citizens, spouses and unmarried sons and daughters of permanent resident aliens, married sons and married daughters of citizens, and brothers and sisters of citizens); 8 U.S.C. § 1151(b)(2)(A)(i) (1994) (exempting immediate relatives (children, spouses, and the parents of a citizen (if the citizen is at least 21 years of age)) from direct numerical limitations).

19. *See Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1337 (1983) [hereinafter *Developments*].

20. Fernando Perez III & Timothy M. Spridgeon, *Family Immigration After Immact90*, FLA. B.J., May 1992, at 12, 14.

immigration purposes.”²¹ Homosexual “marriages” have specifically been held invalid for immigration purposes.²²

In light of these stated goals of U.S. immigration policy, it is interesting to see how Congress and the courts have ignored or rejected the existence of gay and lesbian families. Courts generally have no qualms about separating gay and lesbian citizens or aliens from their loved ones whether they are blood relatives or “spouses.” Despite the Select Commission’s recognition that family reunification psychologically and socially benefits the health and welfare of the nation, Congress denies these psychological and social benefits to gay and lesbian Americans. Apparently Congress has not realized how the country’s “humane” immigration laws affect gay and lesbian Americans. The next Part discusses the major gay immigration cases and shows how “humane” immigration laws have had profound impacts on the lives of gay men and lesbians.

II. U.S. IMMIGRATION LAW CONTINUES TO DISCRIMINATE AGAINST GAY MEN AND LESBIANS

The statutes and cases discussed in this Part do more than simply describe the evolution of past and present American immigration policies; they provide a glimpse into the history of discrimination against gay men and lesbians in immigration law. In refusing to recognize the family relations and rights of gay men and lesbians, the laws show the determination of the U.S. government in attempting to keep gay men and lesbians out of the country. Before delving straight into the cases, however, it is important to know about some of the laws on which they were based.

The Immigration Act of 1917 excluded from admission into the U.S. “persons of constitutional psychopathic inferiority,” among others.²³ There was no mention of homosexuality then,²⁴ nor in 1952 when the INA was enacted. The INA of 1952 changed the language to exclude “aliens

21. *Id.* at 14 (citing *Matter of Garcia*, 16 I & N Dec. 623 (B.I.A. 1978)). DOMA would, of course, be a limitation to this definition. If a same-sex couple went to Denmark and legally married, that marriage would be valid in Denmark but not in the U.S.

22. *See generally* *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), discussed *infra* Part II.C.

23. Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 446 (1994).

24. Of course there was no mention of homosexuality. “This was undoubtedly an example of the *crimen innotatum* mentality,” or “[t]he nameless crime.” *Id.* at 445 & 445 n.46.

afflicted with psychopathic personality, epilepsy or a mental defect.”²⁵ The courts in the cases below made clear that this language was indeed intended to exclude homosexuals from admission into the country. *Rosenberg v. Fleuti*,²⁶ though not decided on the vagueness of the language of the INA of 1952, prompted Congress in 1965 to add persons afflicted with “sexual deviation” to the list of those the INS should exclude from the country.²⁷ This remained the law until 1990.

A. *ROSENBERG V. FLEUTI*: GAY IMMIGRANT OR PSYCHOPATHIC PERSONALITY?

George Fleuti, a Swiss national, was admitted into the United States on October 9, 1952, for permanent residence.²⁸ He remained in the country continuously except for a very brief day trip to Ensenada, Mexico, in 1956. In 1959, the INS, under the direction of George K. Rosenberg of the Los Angeles district, began deportation proceedings against Fleuti “on the ground that at the time of his return in 1956 he ‘was within one or more of the classes of aliens excludable by the law existing at the time of such entry.’”²⁹ As a gay man, Fleuti fell under the “psychopathic personality” category of the INA of 1952.³⁰ Fleuti fought his deportation, and the Ninth Circuit Court of Appeals enjoined enforcement of the “psychopathic personality” provision holding that, as applied to Fleuti, the law was unconstitutionally vague.³¹

The Supreme Court granted certiorari in order to determine the constitutionality of the law as applied to Fleuti, but then changed its mind.

25. *Id.* at 446 (quoting 66 Stat. 192 (1952), I.N.A. § 212(a)(4), 8 U.S.C. § 1182(a)(4) (repealed)).

26. 374 U.S. 449 (1963).

27. *See Foss, supra* note 23, at 455-56 (citing Pub. L. No. 89-236, §§ 10, 15, 79 Stat. 917, 919 (1965) (repealed by the Immigration Act of 1990)).

28. *See Fleuti*, 374 U.S. at 450.

29. *Id.* The *Harvard Law Review* provides an excellent explanation of the importance of “entry”: The concept of “entry” governs which procedure the INS will use to determine an alien’s status. Aliens who have “entered” the country are entitled to a deportation hearing; aliens who have not “entered” the country receive only an exclusion hearing, which is less favorable than a deportation hearing both substantively and procedurally. Although “entry” is defined in the immigration statute as “any coming . . . into the United States,” bare physical penetration of the United States border does not constitute an entry; otherwise, an alien stopped at a border checkpoint within the United States would be deemed to have entered the country and would qualify for a more elaborate deportation proceeding. Nevertheless, an alien discovered in the United States is presumed to have made entry unless the INS proves the contrary. Moreover, a lawful resident alien returning to the United States does not make an “entry” unless the alien’s absence was “meaningfully interruptive” of her presence in the United States.

Developments, supra note 19, at 1362-63 (citations omitted).

30. *See Fleuti*, 374 U.S. at 450-51; INA of 1952 § 212(a)(4), 8 U.S.C. § 1182(a)(4).

31. *See Fleuti*, 374 U.S. at 451.

Instead of deciding on the constitutionality of the law as applied, the Court decided that the real issue concerned statutory interpretation.³² In other words, the Court would not decide whether the law violated Fleuti's constitutional rights, but would determine whether his return from Mexico should be considered "entry." Perhaps the Court was afraid of the result it would have reached if it had gone ahead and examined the constitutionality of the statute, as it might have had to acknowledge that homosexuals have rights. It may also have been reluctant to hold that the government may not discriminate against gay men and lesbians because then the government might have to employ them, the military might have to enlist them, or any other number of reasons. Justice Goldberg's opinion, however, was not all bad news for Mr. Fleuti.

The INA of 1952 went into effect on December 24, 1952—more than two months after Fleuti gained permanent residence. The Court noted the importance of this because Fleuti could only be deported if he was "excludable by the law existing at the time of [] entry."³³ Therefore, he was not within an excludable class at the time of his October 1952 entry.³⁴ The Court went on to discuss various cases about "entry," but also looked at Congressional intent: "[W]e do not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple of hours.' Such a holding would be inconsistent" with the intent of Congress.³⁵ The Court vacated the Ninth Circuit's judgment and remanded the case for a decision consistent with the Court's view of the "entry" issue.³⁶ The Court skirted any discrimination issue here, but the Supreme Court would have another chance to decide a case about a gay immigrant. The Court's decision in the following case, however, would closely scrutinize the petitioner's sexuality—and would tear a family apart.

32. *See id.*

33. *Id.* at 453 n.2.

34. *See id.*

35. *Id.* at 461.

36. *See id.* at 463. (There is no direct history for this case. It is possible that the INS decided to drop the case after reading Goldberg's opinion.) Justices Clark, Harlan, Stewart and White dissented. They felt that the entry issue was settled and that the Court should only address the question of whether the "psychopathic personality" exclusion provision was unconstitutionally vague. *See id.* at 468 (Clark, J., dissenting).

B. *BOUTILIER V. INS*: TEARING A FAMILY APART

In 1967 the Supreme Court decided another case about a gay immigrant.³⁷ Twenty-one-year-old Canadian citizen Clive Michael Boutilier was admitted into the United States on June 22, 1955. In 1959 he took a brief trip to Canada. His mother, stepfather, and three of his siblings resided in the United States. Boutilier applied for U.S. citizenship in 1963. In his application he submitted a statement that he had been arrested for sodomy in 1959. The charge was later reduced to assault and eventually dismissed. In 1964, at government request, Boutilier submitted another affidavit detailing his “sexual deviate” history.³⁸ Both the Supreme Court and the Second Circuit Court of Appeals seemed to oddly relish detailing the young man’s sexual past. They did not simply state that he was gay, but described when, where, how, and with whom he had sex.³⁹ They appeared to be attempting to present him as a pervert of some sort, making it easier for them to make their eventual (and inevitable) decision to uphold his deportation, a decision that would separate him from his entire family—including his partner of eight years.

Based on Boutilier’s 1964 affidavit, the Public Health Service (PHS) certified him as “‘afflicted with a class A condition, namely, psychopathic personality, sexual deviate’ at the time of his [first] admission [in 1955].”⁴⁰ The INS found that “[n]o serious question’ . . . [had] ‘been raised either by [Boutilier], his counsel, or [his] psychiatrists who [had] submitted reports . . . as to his sexual deviation.’”⁴¹ Both of Boutilier’s psychiatrists conceded that he was gay, “‘but conclude[d] that by reason of such sexual deviation [that he was] not a psychopathic personality.’”⁴² The questions presented to the Court, then, were whether the term “psychopathic personality” included homosexuals, and whether or not the law was void

37. See *Boutilier v. INS*, 387 U.S. 118 (1967).

38. *Id.* at 119.

39. Both courts describe how Boutilier’s first same-sex experience occurred when he was 14. The Supreme Court notes that he was “evidently a passive participant in this encounter,” *id.*, but the Circuit Court also noted that this experience was “involuntary.” *Boutilier v. INS*, 363 F.2d 488, 490 (2d Cir. 1966). The Supreme Court went on to describe subsequent sexual encounters: At age 16 he had his next same-sex encounter. He was the active participant in an incident in a public park in Halifax, Nova Scotia. During the five years prior to his entry into the U.S., Boutilier had sex with men three or four times a year. He also stated that he had sex with women with about the same frequency. Up until the time of his second affidavit, Boutilier continued to have sex with men about three or four times a year. He had been sharing an apartment with his lover since 1959, five years before the submission of the second affidavit. See *Boutilier*, 387 U.S. at 119-20.

40. *Boutilier*, 387 U.S. at 120.

41. *Id.*

42. *Id.*

for vagueness.⁴³ The Court looked to the legislative history of the INA of 1952 to discern Congress' intent in its use of the term "psychopathic personality." That history is examined next.⁴⁴

In 1950, a subcommittee of the Senate Judiciary Committee began a study of the immigration laws. It concluded that the phrase "'persons with constitutional psychopathic personality' [would] be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mentally defectives should be enlarged to include *homosexuals and other sex perverts*."⁴⁵ When introduced, the new bill included the phrase "psychopathic personality," but also included a provision excluding "aliens 'who are homosexuals or sex perverts.'" Before the bill was enacted, however, the provision pertaining to homosexuals and sex perverts was deleted. Apparently, the PHS had advised the Senators that the "psychopathic personality" or "mental defect" exclusion laws were broad enough to "provide for the exclusion of homosexuals and sex perverts."⁴⁶ The House version of the bill followed a similar path.⁴⁷

The Supreme Court did not feel that this change in semantics obviated the fact that the Senate intended to exclude all homosexuals from entry into the United States.⁴⁸ The Court found that Boutilier's homosexuality "over a continuous and uninterrupted period prior to and at the time of [his] entry clearly [supported] the ultimate finding upon which the order of deportation was based."⁴⁹ The majority of the Court concluded that it was better for a man to be separated from his family, including his partner of eight years, than to allow another homosexual to enter the country.

When considering Congress' purported intention of using immigration policy to keep families intact, this case, as well as *Adams v. Howerton*,⁵⁰ discussed next, implies that neither Congress nor the courts are really concerned with the effects their decisions have on real families. It also shows their willingness to completely disregard the basic goal behind U.S.

43. *See id.*

44. For a description of the legislative history of homosexual exclusion, see Foss, *supra* note 23, at 451-54.

45. *Boutilier*, 387 U.S. at 121 (emphasis added).

46. *Id.* (citing S. REP. NO. 82-1137, at 9 (1950)).

47. *See id.* at 122.

48. *See id.* at 121-22.

49. *Id.* at 123.

50. 673 F.2d 1036 (9th Cir. 1982).

immigration policy—family unification.⁵¹ In *Adams*, not even a marriage license and a religious wedding ceremony were strong enough evidence for the INS and the courts to conclude that two gay men could form a family.

C. *ADAMS V. HOWERTON*: NOT A FAMILY AFTER ALL

Richard Frank Adams and Anthony Corbett Sullivan were a gay couple residing in Colorado. Adams was an American citizen; Sullivan was Australian. When Sullivan's visitor's visa expired, they went to the county clerk in Boulder and obtained a marriage license.⁵² They were then married in a religious ceremony. Claiming Sullivan as his legal spouse, Adams petitioned the INS to classify Sullivan as an immediate relative of a U.S. citizen. The INS denied the request and the Board of Immigration Appeals (BIA) affirmed the denial. The couple then filed suit in district court in California challenging the decision on constitutional and statutory grounds.⁵³ The district court entered summary judgment for the INS.⁵⁴

The Circuit Court purported to decide two issues: "whether a citizen's spouse within the meaning of [the statute] must be an individual of the opposite sex; and . . . whether the statute, if so interpreted, is constitutional."⁵⁵ The court first looked at the definition of spouse.

The court discussed the fact that American immigration law contains preferences for admissions based on family unity that are outside the normal quota limits and that immediate relatives, including the spouses of American citizens, are included in the quota exception. The term "spouse" is not defined in the statute.⁵⁶ The court decided that an eligible spouse is one who is married to a U.S. citizen, and turned to an analysis of what constitutes a valid marriage.

For a marriage to be recognized for immigration purposes, it must be a valid marriage under state law. It also must qualify under the INA of

51. Webster's Dictionary defines "family" as "all the people living in the same house." WEBSTER'S NEW WORLD DICTIONARY 489 (3d ed. 1986).

52. No state currently recognizes same-sex marriage. Courts in Hawaii, Alaska, and Vermont that have confronted the issue, however, have responded favorably to the plaintiff same-sex couples. Voter referenda in Alaska and Hawaii have prevented equal rights in those states; however, the Hawaii legislature has adopted sweeping domestic partnership legislation (partly in an attempt to prevent the Hawaii Supreme Court from legalizing same-sex marriages). In Vermont, the supreme court recently ruled that the state must grant same-sex couples the right to marry or must construct some equivalent institution. See discussion *infra* Part VI.C.

53. See *Adams*, 673 F.2d at 1038.

54. See *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980).

55. *Adams*, 673 F.2d at 1038.

56. See *id.* at 1038 & 1038 n.1 (citing INA of 1952 § 201(b), 8 U.S.C. § 1151(b)).

1952.⁵⁷ The court had to determine whether, under Colorado law, the Adams-Sullivan marriage was valid since the BIA had held that “the validity of a marriage [was] governed by the law of the place of celebration.”⁵⁸ The court ultimately failed to determine the validity of the marriage under Colorado law, but admitted that the answer was unclear: “Colorado statutory law . . . neither expressly permits nor prohibits homosexual marriages.”⁵⁹ The State Attorney General did issue an unpublished opinion three days after the Adams-Sullivan marriage stating that marriages between members of the same sex were to have no legal effect in Colorado.⁶⁰ But instead of focusing on Colorado law, and indeed the constitutionality of the statute, the court looked to whether the marriage would be valid under the INA of 1952—which was different from the BIA standard. If the court had used the BIA standard, it might have had to recognize Adams and Sullivan as spouses under Colorado law, a decision the court probably did not want to reach.

In examining the INA of 1952, the court looked to congressional intent concerning the “conferral of spouse status.”⁶¹ As in the cases discussed above, Congress’ discriminatory intent to keep gay people out of the country would not lead the court to a decision favorable to a gay couple. The court then cited a sham marriage case:

[V]alid marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes. Therefore, even though two persons contract a marriage valid under state law and are recognized as spouses by that state, they are not necessarily spouses for purposes of section 201(b).⁶²

The court did not think that Congress intended same-sex spouses to have the same preferential treatment as opposite-sex spouses because in the “same amendments adding that section, it mandated [homosexual] exclusion.”⁶³ The court’s reasoning here is logical. How could the court say that same-sex spouses deserve the same preferential treatment as opposite-sex spouses when it was very clear from both the statutes and previous cases that Congress did not intend to allow gay or lesbian people into the country at all? Of course, the court could have declared the statutes unconstitutional, but it declined to do so.

57. *See id.* at 1038.

58. *Id.* at 1038-39.

59. *Id.* at 1039.

60. *See id.*

61. *Id.*

62. *Id.* at 1040 (citations omitted).

63. *Id.* at 1040-41.

The court dismissed the couple's constitutional arguments quickly, contending that the Equal Protection Clause is not implicated in such cases because "Congress has almost plenary power to admit or exclude aliens, and the decisions of Congress are subject only to limited judicial review."⁶⁴ The court noted that the "[Supreme] Court has upheld the broad power of Congress to determine immigration policy in the face of challenges based upon the first amendment, the Due Process clause, as well as the equal protection component of fifth amendment due process and constitutionally-implied fundamental rights."⁶⁵ The court acknowledged that Congress often makes laws that would be unconstitutional if applied to citizens.⁶⁶ However, when the foreign partner of a gay or lesbian American is not allowed to enter the country, is that not an application of the law to a U.S. citizen? The exclusionary law does not just discriminate against the non-U.S. citizens, it also discriminates against American citizens by denying them the right to live with the partner of their choice.⁶⁷

The court also decided against applying strict scrutiny to the statute. Instead the court applied the rational basis test, the weakest standard for determining the constitutionality of a law.⁶⁸ What was the rational basis in this case? The court somewhat dismissively speculated that Congress denied preferential immigration status to same-sex couples perhaps because they "never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores."⁶⁹ Perhaps if the court had really decided to look at these rationales to determine whether or not they were legitimate rational bases for denying immigration rights for same-sex couples it might have come to a different conclusion.⁷⁰

64. *Id.* at 1041 (citations omitted). Of course, to support this point the court cites the *Chinese Exclusion Case*, 130 U.S. 581 (1889), one of the most notorious examples of the Court upholding a blatantly discriminatory law. *See Adams*, 673 F.2d at 1041.

65. *See Adams*, 673 F.2d at 1041-42 (citations omitted).

66. *See id.* at 1042.

67. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court held that U.S. citizens did not have any First Amendment freedom of association claims in seeking entry of aliens to personally communicate with them. This case, however, can be distinguished from the immigration situation facing same-sex couples. In the case of immigration, the U.S. citizens are not seeking academic exchange with the aliens, they are seeking to be reunited with their family, one of the purported goals behind U.S. immigration laws.

68. *See Adams*, 673 F.2d at 1042.

69. *Id.* at 1042-43.

70. The reasons given were not rational because they all could be applied to opposite-sex couples as well: Some opposite-sex couples never have children; some states perform marriages that would not be performed in other states (either because the couple is closely related, or because one or both persons is a minor), although those marriages would be recognized as valid in other states if the couple were to

III. THE END OF PER SE HOMOSEXUAL EXCLUSION

In 1983, the Ninth Circuit Court of Appeals decided *Hill v. INS*⁷¹ and sparked a change in U.S. immigration law. The court looked to the Surgeon General's policy announced on August 2, 1979, which stated that the PHS should no longer issue medical certificates solely on the suspicion that an alien was homosexual.⁷² The Surgeon General reasoned that the policy should be revised because "homosexuality per se is no longer considered to be a mental [or medical] disorder."⁷³ The INS did not like the new policy, but allowed "suspected homosexuals" to enter the U.S. under "parole status" until its dispute with the PHS was resolved.⁷⁴ In 1980, the INS adopted the *Guidelines and Procedures for Inspection of Aliens Who Are Suspected of Being Homosexual*. Under the new guidelines, no medical certification of homosexuality would be required, thus making the Surgeon General's new policy irrelevant. The guidelines stated that an alien would no longer be asked questions regarding sexual orientation, but that if one admitted to being gay, or if another party who was also under inspection at the same time volunteered that another alien was gay, then the alien would be asked to "sign a statement declaring he or she is homosexual."⁷⁵ This statement would be used at a hearing before an Immigration Judge so that the alien could be excluded based on his or her own admissions.⁷⁶

On November 5, 1980, a British man named Carl Hill arrived at San Francisco International Airport with a tourist visa. He told the immigration inspector that he was gay, and the inspector gave him a form "notifying him that he appeared to be excludable under 28 U.S.C. § 1182(a)(4) (1976)."⁷⁷ At his exclusion hearing, Hill reaffirmed that he was gay, but the judge held that he could not be excluded without medical certification. The INS appealed that decision to the BIA, which declared that Hill could

relocate. At one time interracial marriages were illegal, but the Supreme Court rejected those laws in defiance of traditional social mores. In fact, one-third of voters in South Carolina recently voted *not* to repeal its law against interracial marriage even though such laws have had no effect since the Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1966). See Phillip W. D. Martin, *Devoutly Dividing: U.S. Opponents of Interracial Marriage Say God Is on Their Side*, BOSTON GLOBE, Nov. 7, 1999, at D1; Brent Staples, *The Last Gasp of Official Bigotry on Race-Mixing*, STAR-TRIB. (Minneapolis-St. Paul), July 14, 1999, at 17A.

71. 714 F.2d 1470 (9th Cir. 1983).

72. See *id.* at 1472.

73. *Id.* at 1472-73.

74. *Id.* at 1473.

75. *Id.*

76. See *id.*

77. *Id.*

be excluded without the certificate. The district court then granted Hill a writ of habeas corpus finding that he could not be excluded without a medical certificate. When the INS failed to produce one, Hill was admitted into the country as a tourist. The INS then appealed to the Ninth Circuit Court of Appeals.⁷⁸

The Ninth Circuit found that Congress intended to require medical examination and certification of aliens excluded on medical grounds.⁷⁹ Since only the PHS had the authority to make medical examinations and certifications—and the Surgeon General’s new policy against issuing the certificates based on sexual orientation governed the PHS—the circuit court upheld the district court’s ruling and allowed Hill to remain in the country. The court, in disposing of *Lesbian/Gay Freedom Day Committee, Inc. v. INS* (consolidated with *Hill*), summed up the new policy in the Ninth Circuit:

Because the PHS refuses to issue medical certificates on the basis of homosexuality *per se* and because we today hold that the INS may not exclude homosexual aliens without such certificates, it is completely speculative that any aliens will be excluded in the future on the basis of their homosexuality *per se*. Federal courts may not issue injunctions on such conjecture.⁸⁰

Although this would be the policy within the jurisdiction of the Ninth Circuit, the rest of the country would have to wait several more years before the Immigration Act of 1990 put an end to homosexual exclusion.

Congress began examining immigration reform in 1990. “The Immigration Act of 1990 . . . completely re-wrote the exclusion section of the INA. In the process, Congress completely abandoned the provision excluding homosexuals.”⁸¹ The new exclusion rules make no reference to “psychopathic personality or mental defect, words that in the past had been construed to include homosexuality.”⁸² Continuing in the tradition of previous exclusion provisions, the new rules make no reference to homosexuality at all.⁸³ The end of *per se* exclusion is a step forward for equality, but there are still no provisions allowing for same-sex couples to immigrate together or for a U.S. citizen or legal permanent resident to sponsor his or her partner as an immediate relative. Many same-sex

78. *See id.* at 1473-74.

79. *See id.* at 1480.

80. *Id.* at 1481.

81. Foss, *supra* note 23, at 460-61 (citations omitted).

82. *Id.* at 461-62.

83. *See id.* at 462.

couples still must resort to arranging sham marriages for immigration purposes.

IV. ENCOURAGING SHAM MARRIAGES

Without INS recognition of same-sex relationships, many couples have resorted to what the INS considers sham marriages. “A marriage is a sham ‘if the bride and groom did not intend to establish a life together *at the time they were married.*’”⁸⁴ If caught, the penalties for participating in such a marriage are up to five years imprisonment, or fines up to \$250,000, or both.⁸⁵ Despite these severe consequences, many binational same-sex couples arrange for such marriages because U.S. immigration law has no provisions for them. The INS takes such cases very seriously as can be seen in the sham marriage case discussed next.

Rodolfo Garcia-Jaramillo (“Garcia”) was an immigrant the INS suspected was gay and sought to deport. Like Boutilier, the INS discovered that under the law, Garcia was “an alien excludable at the time of entry.”⁸⁶ By this time, the INA of 1965 was in effect and Garcia was excludable as a “sexual deviant.”

On March 27, 1973, Garcia married an American woman. They separated on August 1, 1973, and Garcia was granted a visa two days later. They never lived together as husband and wife.⁸⁷ On February 26, 1976, Garcia and his wife divorced. An immigration judge ordered him to be deported on May 17, 1977, “on the grounds that his marriage was a sham from its inception and entered into solely for immigration purposes.”⁸⁸

The court held that it is within the power of the INS to investigate marriages “to the extent necessary to determine if it was entered for the purpose of evading the immigration laws.”⁸⁹ Garcia’s ex-wife testified that he offered her \$200 to marry him. “He told her they would not have to live together” and that they would get a divorce later. She testified that he paid her about \$150 and that she never lived with him, but continued to live with her roommate. Garcia and his wife never had sexual relations.⁹⁰

84. *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (citing and quoting *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975)).

85. *See* 8 U.S.C. § 1325(b) (1994).

86. *Garcia-Jaramillo*, 604 F.2d at 1237.

87. *See id.* at 1238.

88. *Id.*

89. *Id.* at 1238 (citing and quoting *Bark*, 511 F.2d at 1201).

90. *See id.*

The court affirmed the order of deportation. Garcia's plan to obtain a visa by marrying a U.S. citizen backfired. This case is typical of the INS' willingness to investigate sham marriages and to deport the offenders. In 1986, Congress passed the Immigration Marriage Fraud Amendments.⁹¹ The Amendments impose a two-year waiting period for immigration applicants if the marriage was entered into less than two years prior to the application. If the Attorney General determines during this time that the marriage was entered into to obtain immigration benefits, resident status may be revoked.⁹² At the end of the waiting period, the couple must file a petition reaffirming the validity of their marriage. They must also appear before an INS official for a personal interview. If the INS official is satisfied that the couple is in an authentic marriage, the alien's conditional resident status becomes permanent. If the marriage appears to be a sham, the alien may be deported.⁹³

Such strict policies seem appropriate for identifying true opposite-sex couples. It is difficult to see, then, why the INS could not establish similar policies for identifying genuine same-sex couples as well. Indeed, same-sex couples applying to the INS may be even more likely to be authentic considering the social stigma placed on homosexuality. An INS investigation would involve interviews with family members who may not be aware of the applicants' sexual orientation. It could also make the applicants' homosexuality public record, a discouraging notion for those planning to live or work in a city or state without antidiscrimination laws. In any case, several other countries have established policies that allow binational same-sex couples to stay together. These policies provide examples of the different directions the INS could take in establishing fairer immigration policies. The next Part examines the policies in the industrialized English-speaking countries.

V. IMMIGRATION POLICIES IN THE OTHER INDUSTRIALIZED ENGLISH-SPEAKING COUNTRIES

Every other industrialized English-speaking country recognizes immigration preferences for same-sex couples. Australia and New Zealand were among the first to do so, and their policies will be discussed first, followed by a discussion of the current policies in Canada and the United Kingdom.

91. See 8 U.S.C. § 1186(a) (1994).

92. See David Moyce, Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CAL. L. REV. 1747, 1750-51 (1986).

93. See *id.* at 1751.

A. AUSTRALIA

Same-sex partners of Australian citizens, permanent residents, or eligible New Zealand citizens may migrate to Australia as “interdependent partners.”⁹⁴ There are three requirements necessary for a relationship to qualify as interdependent. First, both partners must be at least eighteen years old. Second, the partners must “have a mutual commitment to a shared life.”⁹⁵ In other words, the relationship must be exclusive of any other spousal or interdependent relationships. Finally, the couple must have been in the relationship for the entire year immediately preceding their application.⁹⁶ The Department of Immigration and Multicultural Affairs (DIMA) adopted the one-year cohabitation requirement in May 1997 to help prevent immigration fraud by people who had no intention of forming a long-term relationship with an Australian partner.⁹⁷ DIMA considers the cohabitation requirement to be the most important factor in determining whether or not the couple has a genuine commitment to each other. Some factors about the relationship that DIMA will take into consideration include:

- knowledge of each other’s personal circumstances;
- financial aspects of the relationship, such as any joint ownership of real estate, joint bank accounts or other major assets;
- the nature of the household including living arrangements such as joint residential receipts or joint household accounts;
- the social aspects of the relationship, provided in statements (i.e., statutory declarations) by parents, family members, relatives, friends and other interested parties;
- joint membership of organisations or joint participation in sporting, social or other activities; and
- joint travel.⁹⁸

These requirements are not always easy to meet, and DIMA may waive the cohabitation requirement if “compelling or compassionate circumstances” apply.⁹⁹ DIMA defines such circumstances as those where

94. Department of Immigr. and Multicultural Aff., *Family Stream Migration—Interdependent Partner* (visited Apr. 14, 2000) <<http://www.immi.gov.au/allforms/f-inter.htm>> [hereinafter *Interdependent Partner*].

95. *Id.*

96. *See id.*

97. *See* Department of Immigr. and Multicultural Aff., *Fact Sheet 33: One-Year Relationship Requirement* (visited Apr. 14, 2000) <<http://www.immi.gov.au/facts/33oneyear.htm>>.

98. *Id.*

99. *Id.*

applicants can establish that cohabitation was not legally permitted in the country in which they lived during the previous year.¹⁰⁰ For instance, if an Australian lesbian has an American partner living in the United States, DIMA will take into account that the couple may not have been allowed to be together for a full year. Discriminatory American immigration laws would prevent the Australian woman from obtaining anything more than a temporary tourist visa.

Although Australian laws would allow an immigrant and her Australian partner to live together, the application process is not an easy one. The application process has two stages. After a possible medical examination, character clearance, and interview, the successful applicant will be granted a provisional visa until a final decision is made.¹⁰¹ Stage 2 begins two years after the application for a provisional visa.¹⁰² During Stage 2, DIMA will ask for evidence from the couple that the relationship remains “genuine and ongoing.” DIMA will also seek declarations from two people who know the couple well who will attest that the relationship is “genuine and ongoing.” Australian police clearance is also necessary to prove that the applicant has lived in Australia for more than a year. An interview with the couple may also be required.¹⁰³ Upon successful completion of Stage 2, a permanent visa will be granted.¹⁰⁴

Although Australian immigration policies are far more progressive than those in the United States, there is still one major stumbling block. The policies only apply if one of the partners is Australian (or, in some cases, a New Zealander). If a gay man in Boston were required to relocate to Sydney for a job, he would not automatically be allowed to bring his partner with him. The same criticism also applies to New Zealand’s policies, which are discussed next.

100. *See id.* These “compelling or compassionate circumstances” are similar to the “humanitarian and compassionate grounds” that are used to allow same-sex couples to immigrate to Canada. *See* discussion *infra* Part V.C.

101. *See Interdependent Partner, supra* note 94.

102. The two year wait may be waived if at the time of application the couple has been together for at least five years, or if after having been granted a provisional visa, the relationship ends. Even if the relationship ends before the two year waiting period is up, DIMA may still award a permanent visa if the relationship was determined to be genuine. *See id.*

103. *See id.*

104. *See id.* In 1997-98 and 1998-99, the number of interdependent visas granted was 390 and 300, respectively. The planning level for 1999-2000 is 300 visas. *See* Department of Immigr. and Multicultural Aff., *Fact Sheet 20: 1999-2000 Migration Program Planning Levels* (visited Apr. 14, 2000) <<http://www.immi.gov.au/facts/20progra.htm>>.

B. NEW ZEALAND

Same-sex partners of New Zealand citizens or permanent residents may immigrate to that country under the New Zealand Immigration Service's (NZIS) Family Category, the same category that includes married couples and common law spouses.¹⁰⁵ According to the NZIS, one of the purposes of the Family Category is to "allow individuals to maintain and be a part of, a family unit."¹⁰⁶ Many of the NZIS requirements, such as interviews, are similar to those in Australia, but there is one significant difference. The NZIS will grant residence status if the couple has been in a "genuine and stable" relationship for the two years immediately preceding the application.¹⁰⁷ The NZIS requirements are slightly more strict than those in Australia, and appear to be even more strict when compared to the evolution of immigration policy in Canada.

C. CANADA

The problem facing binational same-sex couples in Canada first came to the nation's attention in 1992. Todd Layland, an American, and Pierre Beaulne, his Canadian partner, were seeking a way for Layland to remain in Canada where he worked as a legal secretary. In January 1992, the couple went to Ottawa city hall seeking a marriage license. Although no Canadian law prohibits same-sex marriages, judges traditionally have recognized only opposite-sex marriage and the couple was denied a license. They decided to sue the government under the Charter of Rights and Freedoms. Beaulne expressed his feelings to a reporter from *The Toronto Star*:

"The problem that we face is that the Department of Immigration will not recognize that we're in love. Our friends know, our family knows, everyone we work with knows that we're in love, that we want to live together. But this government will not recognize that we even exist."¹⁰⁸

Indeed, Immigration Minister Bernard Valcourt refused to extend Layland's work permit until the issue was resolved.¹⁰⁹ Layland chose not to enter into a fraudulent marriage.¹¹⁰ He ended up returning to Seattle,

105. See New Zealand Immigr. Serv., *Family Category* (visited Apr. 14, 2000) <www.immigration.govt.nz/migration/family.html>.

106. *Id.*

107. *Id.*

108. Stephen Bindman, *Gay Lovers Forced to Split*, TORONTO STAR, June 29, 1992, at D2.

109. See *Gay Man Denied Right to Remain in Canada*, TORONTO STAR, July 27, 1992, at D25 [hereinafter *Denied*].

110. See Bindman, *supra* note 108, at D2.

and Beaulne moved from Ottawa to Vancouver so that they could live closer together.¹¹¹ Beaulne's last words on the situation may have been prophetic: "I know that one day we'll be together again."¹¹²

Of all the countries discussed in this Note, at present, Canada may have the fairest immigration policies with regard to same-sex couples. Not only may the same-sex partner of a Canadian citizen or permanent resident qualify for residence, but so may the same-sex partner of any qualifying immigrant.¹¹³ Canada is unique in this respect. Even more interesting is the fact that the changes have come without changing the law—only the way in which it is applied.

Although same-sex partners do not qualify for immigration sponsorship under the traditional spouse category, the government has nevertheless allowed same-sex partners to enter the country.¹¹⁴ Canadian visa officers have the discretion to admit same-sex partners on "humanitarian and compassionate grounds."¹¹⁵ Between early 1993 and late 1994, more than sixty same-sex partners were granted such visas.¹¹⁶ A telex sent to immigration missions in 1994 (after increasing pressure from the courts, the media, and gay activists) instructed the visa officers on how to process same-sex immigration cases. The telex stated that "undue hardship would often result from separating or continuing the separation of a bona fide same sex or common law couple."¹¹⁷ In such cases, a visa could be granted on humanitarian and compassionate grounds.¹¹⁸ In order to determine whether an undue hardship would exist if the couple were separated, the visa officers may look at whether the relationship is one of convenience and whether it is bona fide in terms of duration and stability. The telex also stated that an otherwise unqualified visa applicant may qualify if the same-sex partner qualifies independently.¹¹⁹ There is even more good news from Canada.

111. See *Denied*, *supra* note 109, at D25.

112. *Id.*

113. See Partners Task Force for Gay and Lesbian Couples, *Immigration Roundup: A Survey of Welcoming Countries* (visited Apr. 14, 2000) <<http://www.buddybuddy.com/immigr.html>>.

114. See Joe Serge, *Gay Partners Are Considered for Visas*, TORONTO STAR, Nov. 12, 1994, at K10.

115. *Id.*

116. *See id.*

117. E-mail Letter from Timothy Ross Wilson, a Canadian lawyer, to Author (Jan. 19, 1999) (on file with author).

118. *See id.*

119. *See id.*

The Department of Citizenship and Immigration recently released a publication that proposes new directions for Canadian immigration policy and legislation.¹²⁰ The publication recognizes “new social realities” and the immigration needs of same-sex couples. Section III of the publication specifically calls for providing fair treatment of same-sex couples as one of the goals of the Canadian government. “Refusing permanent residence does not simply deny a benefit to the . . . same-sex partner, but may effectively deny Canadians the right to live with their life partners The recognition of common-law and same-sex relationships through regulatory changes would eliminate the recourse to discretionary administrative guidelines.”¹²¹ In other words, changing immigration laws to allow lesbian and gay Canadians or qualifying immigrants to sponsor their partners as spouses would eliminate the need for reliance on the discretion of the visa officer under the vague “humanitarian and compassionate grounds” criterion.

Canada’s current policies and the proposals under consideration are by far the most progressive of the countries discussed in this Note. In Britain, the final country discussed here and the most recent to change its immigration laws, the victory of the Labor party and the selection of Tony Blair as Prime Minister gave hope to that country’s gay and lesbian community. Immigration is just one of the areas of British law that has been made more hospitable toward gay men and lesbians.

D. UNITED KINGDOM

In 1996, Prime Minister John Major’s government enacted various immigration reforms, most of which were restrictive. However, one of the changes allowed for a “foreign national involved in a two-year ‘common

120. See Citizenship and Immigr. Can., *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (visited Apr. 14, 2000) <http://cicnet.ci.gc.ca/english/about/policy/lr/e_lr07.html>. The publication states:

Canada has a long tradition of supporting the reunification of Canadian citizens and permanent residents with their close family members from abroad, thereby assisting in social integration and the building of communities. The government proposes to support this tradition through policies that accommodate a wide range of family needs while maintaining a balance between self-reliance and collective responsibility.

It is proposed to strengthen family reunification through measures aimed at:

- keeping the core family together;
- better protecting the child in international adoptions;
- providing fair treatment to common-law and same-sex couples; and
- increasing the integrity of sponsorship undertakings.

Id.

121. *Id.* § III.

law' relationship with a UK citizen to apply for residency."¹²² Stonewall, an equal rights advocacy group, pointed out the new policy could potentially be used by gay and lesbian partners of British citizens. Major's government saw that as a serious threat and rescinded the provision for "common law" relationships rather than allow gay and lesbian couples to benefit from it.¹²³

Tony Blair's Labor government, in one of many instances of outreach to the nation's gay and lesbian community,¹²⁴ promised to reverse the policy and proceeded to actually do so. After the announcement, but before the enactment, "judicial proceedings involving same-sex partners seeking 'leave to remain' (similar to 'suspension of deportation' in the U.S.) [were] halted."¹²⁵ One case put on hold was that of a Brazilian research fellow who first arrived in Britain in 1988 to attend graduate school. His visa expired in June 1995. In challenging his deportation, he sought to remain in Britain "on the basis of a close and committed homosexual relationship with a UK national."¹²⁶ His application was rejected and two appeals failed. His application for "leave to remain" was adjourned by the judges who anticipated that the new immigration policy would make the need for his appeal unnecessary.¹²⁷ Under the new "concession" he would indeed be allowed to stay—under certain circumstances, that is.

The Concession Outside the Immigration Rules for Unmarried Partners went into effect on October 13, 1997.¹²⁸ Immigration Minister Mike O'Brien made the announcement:

122. *Victory in Britain: Government Will Change the Law to Allow Immigration of Same-Sex Partners of British Citizens; Deportations Halted*, TASK FORCE UPDATE (Lesbian and Gay Immigration Rights Taskforce, New York, N.Y.), Summer 1997, available at <<http://www.lgirtf.org/newsletters/Summer97/SU3.html>> (visited Apr. 14, 2000) [hereinafter *Victory in Britain*].

123. *See id.* *See also* Richard Ford, *Immigration Rights for Gay Partners*, THE TIMES (London), Aug. 27, 1997, at 1.

124. Blair has appointed an openly gay man to his cabinet (and, according to some, a few "closeted" men as well). *See* Michael Gove, *Nowt So Queer as a Minister*, THE TIMES (London), Nov. 10, 1998, at 18. Under his leadership, the House of Commons has voted to equalize the age of consent laws for gay or lesbian couples (to sixteen-years-old, the same as for non-gay couples). *See* Andrew Pierce & Polly Newton, *Peers Rebuff MPs Over Gay Sex at 16*, THE TIMES (London), July 23, 1998, at 1.

125. *Victory in Britain*, *supra* note 122.

126. Ford, *supra* note 123, at 1.

127. *See id.* *See also* *Victory in Britain*, *supra* note 122.

128. Immigration and Nationality Directorate Home Office, *Concession Outside the Immigration Rules for Unmarried Partners* (visited Apr. 14, 2000) <<http://www.homeoffice.gov.uk/ind/concess.htm>> [hereinafter *Concession*]. A "concession" in this instance is like a formal exception to the Immigration Rules.

“It has been a fundamental principle of the Immigration Rules that someone already settled in the United Kingdom . . . may bring their spouse into the UK to join them, subject to meeting clear tests as to the genuineness of the marriage and the financial capacity of the couple.

. . . .

“However, some couples are prohibited by law from marrying . . . because they are of the same sex.

“The previous Government acknowledged that provision for entry should in certain circumstances be made for such couples, but the practice was in our view wholly unsatisfactory.

. . . .

“We have therefore decided to introduce a concession outside the Rules in respect of these couples. The criteria will be strict—and much tighter than for those who can marry. Under this concession a couple must show that they have been living together for four years or more and intend to continue to live together permanently. Once admitted they will then have to show that the relationship has subsisted for a further year before being granted settlement.”¹²⁹

“Leave to enter” also includes the following criteria: that any previous marriage or similar relationship has ended; that the parties may not marry under British law (other than instances of incestuous or underage relationships); and that the parties and their dependents will not require public funds for support or accommodation.¹³⁰

Even with all these enumerated requirements, O’Brien said that “[t]he key requirement of immigration policy is fairness. The new policy will keep the special position of marriage. But it would be unfair to stop unmarried people in long-standing relationships from being together if they would otherwise satisfy the immigration rules and meet certain other criteria, but are unable to get married. We are replacing an unfair policy with a fairer one.”¹³¹

His statement is contradictory. He claims that the new policy keeps the “*special position* of marriage,” while at the same time, the main requirement of immigration policy is fairness. Is it really “fair” that the

129. *Home Office: Change to Immigration Provisions*, M2 PRESSWIRE, Oct. 13, 1997, available in LEXIS, News Group File, All [hereinafter M2 PRESSWIRE].

130. *See id.* *See also Concession*, *supra* note 128. The criteria established for granting leave to remain are the same with some additional requirements. The applicant must have limited leave to remain in the country, must not have remained in the country in violation of the immigration laws, and the relationship must predate any decision made to deport the applicant. *See id.*

131. M2 PRESSWIRE, *supra* note 129.

government considers some families more “special” than others? The new policy may indeed be fairer in that a select few gay and lesbian couples will be able to make a life together in Britain, but it is not equal. O’Brien even stated outright that the new policies are stricter than for those who can marry. In Britain, a person may bring his or her spouse into the country as long as they have met at least once.¹³² What could be the justification for this unequal treatment? As discussed in Part IV, *supra*, the social stigma attached to being identified as gay or lesbian would be enough to discourage many people from attempting to immigrate fraudulently under the new policy. If one were going to enter the country on the basis of a phony relationship, why not arrange a heterosexual marriage instead? A marriage would, after all, receive less scrutiny under British immigration policy. The new policy, like those in Australia and New Zealand, fails to provide for same-sex couples where one partner must relocate to Britain. Also, the couple is required to have been together for four years.¹³³ This is a difficult, if not impossible, requirement for many couples to meet, and seems particularly *unfair* considering the relatively lax policy toward married couples.

Although all the countries discussed in this Part have taken admirable steps toward making their immigration laws more equitable as applied to same-sex couples, there are still some obvious obstacles. As noted above, Australia, New Zealand, and the United Kingdom require that the partner seeking entry be in a relationship with a citizen or legal permanent resident of that country. There are no provisions for same-sex couples to immigrate together to any of these countries. Also, the New Zealand and British policies requiring couples to have been together for two years and four years, respectively, are unfair and severely limit the number of couples who can take advantage of the policies. The nation that provides the best example for how the United States could reform its immigration laws also happens to be its nearest neighbor—Canada. The next Part calls for reform of U.S. immigration law incorporating as models the immigration policies in the countries discussed here, the domestic partner legislation that has been enacted in dozens of U.S. municipalities, as well as some state court decisions recognizing nontraditional families.

132. See IAS, *Information About Admission of Spouses* (visited Apr. 14, 2000) <<http://www.vois.org.uk/ias/html/SPOUSES.HTML>>.

133. This part of the Concession is currently under review. Stonewall has met with immigration officials urging them to reconsider the four-year requirement. They are proposing a one and a half year cohabitation requirement with a two year probationary period. See *The Status Interview: Mark Watson*, TASK FORCE UPDATE (Lesbian and Gay Immigration Rights Task Force, New York, N.Y.), Fall 1998, available at <<http://www.lgirtf.org/newsletters/Fall98/FA98/FA98-10.html>> (visited Apr. 14, 2000).

VI. A CALL FOR REFORM OF U.S. IMMIGRATION LAW

Immigration laws should reflect the U.S. ideal of family unity. However, current U.S. immigration law continues to follow the unfortunate U.S. tradition of discriminating based on sexual orientation. Congress should change the immigration laws, by including same-sex partners within the definition of “immediate relatives,” to reflect the reality of modern family life. Today, at least ten thousand same-sex couples are waiting for Congress and the INS to act.¹³⁴ The policies discussed in the previous Part, particularly those in Canada and Australia, provide concrete examples of how U.S. immigration laws could be changed to reflect what the Canadian government has called “new social realities.”

A. THE UNITED STATES SHOULD LOOK TO CANADA AND AUSTRALIA

The immigration policies in Australia set out clear criteria for establishing the genuineness of a same-sex relationship. Personal knowledge about each other, intermingling of finances, some form of joint tenancy, and statements from others who know the couple well are all perfectly reasonable requirements.¹³⁵ These are similar to the INS requirements for non-gay married couples. Congress should also consider, however, incorporating the flexibility of Canada’s policies.

Canadian immigration policies for same-sex couples do not require that one of the partners be Canadian. Since U.S. immigration laws automatically allow qualified married foreign couples to immigrate here together, even if temporarily, adoption of a policy similar to that in Canada would put same-sex couples seeking to immigrate to the United States on the same footing as married opposite-sex couples. Incorporating the best parts of the Australian and Canadian policies provides an excellent example for U.S. immigration reform. Congress has the models and the powers¹³⁶ to reform the laws, now it needs the political will to recognize the “social reality” of gay and lesbian families.

134. See *Equality in Immigration: Activists Protest for Changes to Allow Foreign Partners of Gays to Stay in U.S.*, FRONTIERS (L.A. ed.), Mar. 5, 1999, at 22.

135. See *supra* Part V.A.

136. As so many of the judges in the cases discussed *supra* Part II pointed out, Congress has almost plenary power over immigration matters.

B. CONGRESS CAN ALSO LEARN FROM DOMESTIC PARTNERSHIP LAWS

Several American municipalities have had the political will to recognize gay and lesbian families. Domestic partnership¹³⁷ legislation has become popular in the nation's largest cities, cities with large gay and lesbian populations, and many small college towns.¹³⁸ Domestic partnership registration in some cities is merely symbolic—there are no tangible benefits to registration.¹³⁹ However, in many cities domestic partnership legislation allows for hospital visitation rights, housing rights (particularly important for a surviving partner living in a rent-controlled apartment), jail visitation rights, and health and pension benefits for the partners of government employees.¹⁴⁰ Most domestic partnership registrants must sign a form at city hall stipulating to the genuineness of the relationship.¹⁴¹ But same-sex couples are not even asking for those types of benefits from Congress (because they could get them at the local level if only they were allowed to live here together). They simply want recognition of their relationships so that their families are not torn apart by unfair laws supposedly based on family unification principles. As in many municipalities, establishing an INS registry would be a symbolic gesture, in no way equal to marriage. The only benefit would be the immigration preference.

Congress already recognizes the domestic partners of its own members. The “significant others” of the few openly gay members of the House of Representatives are afforded the same privileges as the married spouses of members.¹⁴² Do the members value their own right to have their

137. For a good definition and other information about domestic partnership, see generally Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995).

138. Municipalities with domestic partnership legislation include the City and County of San Francisco, the cities of Berkeley, Santa Cruz, West Hollywood, Sacramento, San Diego, New York, Atlanta, Los Angeles, Santa Barbara, Chicago, Laguna Beach, Ithaca, and Seattle. Additionally, nearly 500 private corporations also provide domestic partner benefits. For a more comprehensive list and details about what benefits are offered, see Lambda Legal Def. & Educ. Fund, *Domestic Partnership Listings* (last modified Oct. 25, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=21>> [hereinafter *Listings*].

139. Hartford, Connecticut's registry is symbolic only. See Lambda Legal Def. & Educ. Fund, *States and Municipalities Offering Domestic Partnership Benefits and Registries* (last modified Oct. 25, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=403>>.

140. See *id.*

141. Some cities have time requirements (either between partnerships or a minimum time before a partner is eligible), and often require evidence of financial interdependence, joint residence, exclusivity, no blood relationship, no current legal marriage (or other partnership), and the naming of the partner as beneficiary on life insurance or pension plans. See O'Brien, *supra* note 137, at 181.

142. See *Listings*, *supra* note 138.

relationships recognized more than the rights of their constituents? While domestic partnership legislation provides another model Congress could use to reform immigration laws, so too do precedents from the state courts.

C. STATE RECOGNITION OF NON-MARITAL RELATIONSHIPS

In 1976, the California Supreme Court decided that movie actor Lee Marvin's female partner was entitled to continued support after their separation even though they were never legally married.¹⁴³ In *Marvin v. Marvin*,¹⁴⁴ the court noted that "[t]he mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."¹⁴⁵ This decision opened the door to recognition of non-marital relationships in California and, in time, elsewhere.

In deciding the 1989 case *Braschi v. Stahl Associates*,¹⁴⁶ the Court of Appeals of New York recognized for the first time that the word "family" in New York City's rent control and stabilization laws includes "lifetime partners."¹⁴⁷ The court recognized that

a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our *society's traditional concept of "family"* and with the expectations of individuals who live in such nuclear units.¹⁴⁸

Like the *Marvin* Court, the *Braschi* Court acknowledged the existence of non-marital relationships. The *Braschi* Court went even further, however, and suggested how such relationships should be evaluated. The factors suggested by the court include "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for

143. See generally *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

144. See *id.*

145. *Id.* at 122.

146. 543 N.E.2d 49 (N.Y. 1989).

147. See *id.* More recently, Britain's highest court has ruled that "a gay man is entitled to remain in the state-subsidized apartment leased by his dead partner—a right restricted by law to spouses or 'family' members." *British High Court Recognizes Same-Sex Couples as Family*, L.A. TIMES, Oct. 29, 1999, at A4.

148. *Id.* at 53-54 (citations omitted) (emphasis added).

daily family services.”¹⁴⁹ The court noted that these criteria are not dispositive and that each relationship should be judged in its “totality . . . as evidenced by the dedication, caring and self-sacrifice of the parties.”¹⁵⁰ These criteria are quite similar to those used in Australia to determine eligible “interdependent partners” for immigration purposes. In fact, a couple meeting the Australian immigration criteria would probably be considered a “family” in the state of New York. The *Braschi* case, therefore, provides another realistic framework for Congress to use in reforming immigration laws.

There are other cases recognizing gay and lesbian families. Also in New York, an immigration judge allowed an HIV-positive Nicaraguan man to remain in the U.S. with his partner.¹⁵¹ He addressed the court with an emotional plea: “Manuel and I are not separate: We’re two human beings but one family If I left, we would be destroyed.” He also said their health “depended on ‘giving each other something to fight for’ and concluded, ‘Our souls are entwined.’”¹⁵² In fact, his plea was so heartfelt and emotional that the INS lawyer, arguing for deportation, burst into tears. The judge granted the man permanent residence and wished the couple good luck.¹⁵³ Across the river in New Jersey, a court also recognized that a gay couple could be a family. Jon and Michael Galluccio were the state’s first gay couple to legally adopt a child together, their three-year-old son Adam.¹⁵⁴ These cases act as clear indications to Congress that the courts are becoming more likely to legally recognize same-sex couples and to grant them certain rights and responsibilities. Perhaps it is only a matter of time before the courts take action on an unfair immigration policy that Congress has chosen to ignore.

Late in 1999, just weeks apart, the supreme courts of Hawaii¹⁵⁵ and Vermont released their highly anticipated same-sex marriage decisions.

149. *Id.* at 55 (citations omitted).

150. *Id.*

151. See Sara Miles, *Gay Immigrants Face More Problems*, ANS NEWS SERV., May 16, 1997, available in LEXIS, US News Combined Library.

152. *Id.*

153. See *id.*

154. See Tara George, *Gay Couple Following Its Marching Orders*, N.Y. DAILY NEWS, June 26, 1998, at 36. The Galluccios also have a foster daughter whom they hope to adopt. See *id.*

155. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court found that not granting marriage licenses to same-sex couples was sex discrimination. On remand, the judge found the state’s arguments against same-sex marriage unconvincing. See generally *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). However, he stayed his ruling pending appeal. The appeal was moot following the success of an anti-gay ballot measure that amends the state’s

Although neither decision brought the end result the plaintiffs were hoping for, both decisions recognized that same-sex couples in Hawaii and Vermont were being discriminated against, contrary to each state's constitution. In Hawaii, an anti-gay ballot measure precluded the supreme court from recognizing same-sex marriages, but the court's conclusion that gay and lesbian couples were being discriminated against led the Hawaii legislature to enact some of the most wide-ranging domestic partnership legislation in the country. In Vermont, the supreme court held that denying gay and lesbian Vermonters the benefits and responsibilities of marriage violates the state's Common Benefits clause. The court left the remedy up to the legislature, but held that the state must either recognize same-sex marriages or adopt some mechanism that would guarantee same-sex couples in Vermont all the same rights and responsibilities as married opposite-sex couples.¹⁵⁶ Both these decisions, but the Vermont decision especially, portend that the issue will enter the federal court system soon—especially if the Vermont legislature decides to allow same-sex couples to marry. The recognition of same-sex couples as a family unit at the state level should indicate to Congress that the immigration laws are overdue for reform.

CONCLUSION

A spokesman for the INS feels that “[t]his is not an immigration issue. It’s a question of the invalidity of same-sex marriage under existing U.S. law. Any person who is legally married has the right to file a petition for their spouse to immigrate.”¹⁵⁷ He is both right and wrong. Yes, any legally married person may petition for his or her spouse. However, the dilemma facing same-sex couples when dealing with U.S. immigration laws is more of an immigration issue. What binational same-sex couples want more than anything else is to be able to live in the same country. Marriage rights are a separate issue, as is clearly demonstrated by the countries discussed in Part V of this Note. Not one of those countries recognizes the right of same-sex couples to marry, but each has still amended its immigration policies to reflect what the Canadian government calls “new social realities.”¹⁵⁸ Congress should look particularly closely at Canadian and Australian immigration policies, but should examine the

constitution to explicitly prohibit same-sex marriages. See Cheryl Wetzstein, *Top Hawaii Court Ends Gay 'Marriage' Bid; Cites Vote Amending State Constitution*, WASH. TIMES, Dec. 11, 1999, at A1.

156. See *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

157. Woog, *supra* note 5, at 32.

158. See *supra* text accompanying notes 114-21.

domestic partnership legislation found throughout the United States as well.

Alternatively, Congress could look to the state court decisions in California, New York, New Jersey, Hawaii, and Vermont that recognize non-marital relationships, especially the *Braschi* decision in New York. These American examples demonstrate the direction in which the country is moving, displaying more modern and progressive attitudes toward gays and lesbians and their relationships. Even President Clinton (who has dealt his own blows to same-sex couples), when confronted with one couple's immigration nightmare found the current immigration laws to be unfair. At a recent New York fundraiser he stated: "I don't think that's right. I think that ought to be changed."¹⁵⁹

Congress has displayed its willingness to acknowledge same-sex couples within the halls of the Capitol building. Now the time has come for Congress to recognize the injustice being done to same-sex couples under the current discriminatory immigration laws. It is time for the "family reunification" rationale behind the laws to be applied equally. Ten thousand families are waiting.¹⁶⁰

159. Ryan Gierach, *Coming to America: Jekyll-Hyde Nature of U.S. Immigration Policy Leaves Many Gays, PWAs Out in the Cold*, FRONTIERS (L.A. ed.), Dec. 10, 1999, at 43.

160. Among them is well-known performance artist Tim Miller, one of the "NEA Four": "If things don't get better, it won't be a choice . . . I won't end my relationship to stay in the United States. I won't let the U.S. government break up my family and home, as it's done to literally thousands and thousands of lesbian and gay couples." John Breslauer, *Love Knows No Boundaries*, L.A. TIMES, Feb. 6, 2000, (Calendar) at 3.