

Queer Reasoning: Immigration Policy, *Baker v. State of Vermont*, and the (Non)Recognition of Same-Gender Relationships

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I. INTRODUCTION

Immigration policy reflects the social, political, and moral ethos of the people, or such is the conventional wisdom.¹ Accordingly, it should be no surprise that immigration laws and policies are subject to intense scrutiny and criticism. One of the most hotly debated issues of recent times has been the extension of immigration benefits routinely granted to heterosexual married couples to members of same-gender relationships.²

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1. See, e.g., Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 445 (1994) (stating that immigration exclusion policies often say more about those that exclude than those who are excluded).

2. Often, lesbian and gay relationships are referred to as same-sex, as in “same-sex” marriage. The author has intentionally joined with a growing number who reject this label as inappropriate and misleading. The issue actually centers on two people of the same *gender* forming a loving relationship. Indeed, the recent Hawaii Supreme Court decision discussing the propriety of legally recognized homosexual relationships relied on the equal protection basis of

Two issues have received intense debate. First, if a state officially recognizes same-gender relationships, such as through the extension of marriage rights,³ should the federal government's immigration policy change to reflect the validity of these relationships?⁴ Immigration laws already offer substantial benefits to alien heterosexual spouses and their children, such as the ability to sidestep numerical limitations on the number of aliens allowed to immigrate,⁵ the ability to receive second preference family status when married to a lawful permanent resident

gender as a sex-based classification. *See* Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993). While the term "sex" is often substituted for "gender," for present purposes the use of the term "sex" has the detrimental effect of implicitly focusing on the sexual component of the involved relationship. While no doubt this is usually a component of the relationship, it is by no means the only, or even the most important, component of the relationship. By using the term "same-gender" any unintentional, subtle, or implicit reference or focus on the sexual nature of the relationship is successfully avoided. *See, e.g.,* Cynthia Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 100 n.10 (1996).

Same-gender relationships are not a new concept. Same-gender relationships have been documented in ancient Egypt, Mesopotamia, classical Greece, pre-Christian Rome, Christian Rome, Medieval Europe, some Native American cultures, African cultures, Indian cultures, and Chinese, Japanese, and Melanesian cultures. *See* James Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 91 & n.418 (1994) (citations omitted).

The assertion that same-gender relationships are functional equivalents of heterosexual marriage is an issue hotly debated. *See, e.g.,* SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997). The author asserts this as true, in at least the sense that each of those relationships are made up of two individuals, affectionate for each other, engaged in a supportive relationship on many levels, such as economic, spiritual, emotional, and intimate. The author appropriately notes, however, that many same-gender couples themselves would refute the comparison to marriage due to a belief that participation in "marriage" is per se participation in an oppressive, patriarchal institution. *See, e.g.,* Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NATIONAL GAY AND LESBIAN QUARTERLY, Fall 1989, at 9, *reprinted in* SAME-SEX MARRIAGE: PRO AND CON 118-24 (Andrew Sullivan, ed. 1997). In light of brevity, these arguments are best left aside.

What is not in debate is the large number of benefits at stake, such as visitation, inheritance rights, insurance availability, joint contracting abilities, medical decisions, bereavement or sick leave, wrongful death benefits, division of property, joint child custody, child support, Social Security and Medicare availability, joint tax returns, veteran's discounts, and, of course, immigration benefits.

3. *See infra* Part V. Presently, Vermont and Hawaii stand as the only two states to have seriously approached the granting of full marriage rights to same-gender couples. Even with those efforts, the initial momentum has come from their judiciaries, not their legislatures. On the federal level, the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V. 1999)), appears to be a major impediment to federal recognition of such relationships, though the constitutionality of DOMA is heavily debated.

4. *See* Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (1994 & Supp. V 1999)). The INA is the general immigration statute and has been subject to numerous amendments since its original 1952 passage.

5. 8 U.S.C. § 1151(b)(2)(A)(i) (1994).

alien,⁶ and the ability of alien spouses and children to immigrate by accompanying or following to join the immigrant spouse or parent.⁷ At this time, however, foreign lesbian or gay⁸ “spouses” cannot enter this country based on their relationship with an American citizen.⁹

The second issue is international in scope. While same-gender marriage is not permitted in the United States, the same is not true internationally. Several foreign countries are quickly moving toward same-gender marriages while already maintaining strong domestic partnership laws.¹⁰ In addition, Denmark, Norway, Sweden, and Iceland grant same-gender couples in “registered partnerships”¹¹ the same

6. *Id.* § 1153(a)(2).

7. *Id.* § 1153(d).

8. Terminology can be confusing, much debated, and misleading in the dialogue concerning sexual orientation and its resulting legal implications. The author has used the terms “homosexual,” “gay,” and “lesbian” essentially interchangeably in the text. Each term has its own scope of coverage and connotation, and, for that reason, the author has included them all. No preference or alternative message is suggested by any use of any term other than simply signifying a nonheterosexual sexual orientation. For clarity, the author has omitted using the term “bisexual,” though that omission indicates nothing more than a search for clarity for the reader. Indeed, in the debate over the moral, societal, personal, and political ramifications surrounding sexual orientation, bisexuality is as fervently debated as any other orientation. Likewise, the author has omitted any significant discussion of “transsexuality” or “gender identity.” While these topics are inevitably linked to and discussed with sexual orientation, departure upon these topics seems to obfuscate an attempted narrowing of the issues discussed herein. Again, no affectional hierarchy is intended and, hopefully, none implied.

9. Lesbian and gay spouses are not prevented from entering the United States under another category independent of the connection to her or his partner.

10. The Netherlands is the only country to take the step of allowing same-gender marriages equal to that of heterosexual marriage. However, many countries have taken substantial steps toward recognizing and validating same-gender relationships through the employment of “domestic partnerships” or “registered partnerships.”

Currently, Denmark, Norway, Sweden, Iceland, France, Canada, and Finland have domestic partnership laws that grant civil recognition and benefits, including immigration rights. See Denise Hammond, *Immigration and Sexual Orientation: Developing Standards, Options, and Obstacles*, 77 INTERPRETER RELEASES 113, 118-20 (Jan. 24, 2000). The Czech Republic, Spain, Portugal, Switzerland, and Luxembourg are considering partnership laws or similar legislation. *Id.* at 120. Last year, Germany created “life partnerships” which would grant same-sex couples some of the benefits of marriage. See *Same Sex Marriage*, at <http://www.planetout.com/pno/news/roundups/issues/marriage.html> (last visited Mar. 2, 2001).

11. “Registered partnerships” or “domestic partnerships” act as substitutes to marriage, but they are not equivalent to marriage. The scope of rights, responsibilities, and obligations granted can vary greatly from jurisdiction to jurisdiction as can the ease with which the “contractual” relationship is entered into or dissolved. Typically, the agreements require: a common living space, a joint responsibility for the basic living expenses of the other, a prohibition of any other marriage or partnership, a prohibition on any characteristics that would prevent marriage, parties must be over 18, and both parties must sign a declaration as to the partnership. See, e.g., American Civil Liberties Union Freedom Network: Lesbian & Gay Rights, *Model Domestic Partnerships*, at <http://www.aclu.org/issues/gay/dpmodel.html> (last visited Feb. 25, 2000). Normally, domestic partnerships themselves do not automatically entitle the partners to seek the opportunity to utilize adoption rights, to participate in a church ceremony, or for partners to live outside of the country. The Vermont “civil unions” statutes, however, are

immigration benefits as their heterosexual counterparts.¹² Many other countries, such as France, Australia, New Zealand, the United Kingdom, Belgium, Canada, Finland, Namibia, and South Africa, have some form of domestic recognition of same-gender couples and provide concomitant immigration benefits.¹³ Other countries currently considering some form of legal recognition of same-gender couples are the Czech Republic, Spain, Portugal, Switzerland, and Luxembourg.¹⁴ Thus, many countries are adjusting their immigration laws to meet the reality that some of their citizens are gay or lesbian and desire to bring a nonresident partner into the country. Even without “same-sex marriage,” these countries have addressed the issue, and the United States should take appropriate notice.

On September 12, 2000, the Netherlands became the first country in the world to pass a law granting same-gender couples full marriage rights.¹⁵ The INS has not yet taken an official position on whether U.S. immigration policy should allow the immigration of same-gender “spouses”;¹⁶ the last time it addressed the issue of same-gender marriages the INS stated:

[W]hether the marriages of lesbian or gay couples will be recognized as conferring immigration benefits to the alien spouse . . . remains a hypothetical issue since no jurisdiction in the United States currently recognizes same-sex marriages. As such, it is inappropriate for the INS to adopt an official position.¹⁷

required to secure rights identical to marriage. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (“[P]laintiffs are entitled . . . to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”).

12. See Hammond, *supra* note 10, at 118-20.

13. See *id.*

14. See *id.* at 120.

15. See *Dutch OK Full Marriage Rights*, at <http://www.planetout.com/pno/news/article.html?2000/09/12/1> (Sept. 12, 2000).

16. The author intentionally uses the term “spouse” in conjunction with a same-gender couple. Authorities dispute the application of “spouse,” a term traditionally associated with partners in a heterosexual marriage, to a same-gender couple. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (holding that a citizen’s spouse within the meaning of the INA must be an individual of the opposite sex). However, the author intentionally breaks from this reasoning. To limit the application of the term “spouse” to heterosexual married couples is to presuppose a condition of marriage which this work attempts to refute. Based upon an ever-increasing political, social, and moral dialogue on this subject, this step appears warranted and valid. All too often, the dialogue on this issue has inappropriately stifled debate on the issue by referencing the fact that marriage is “defined” as a man and a woman. This intellectual misstep presupposes a limitation where none exists.

17. Letter from T. Alexander Aleinikof, former General Counsel, Immigration and Naturalization Service, to Suzanne Goldberg and Evan Wolfson, Staff Attorneys, Lambda Legal Defense and Education Fund, New York (May 31, 1995) (on file with the *Columbia Human Rights Law Review*).

With the recent passage of same-gender marriage in the Netherlands, however, the issue has become a real one, especially for American citizens lawfully married overseas desiring to move back to the United States with their partners. In addition, with the recent debates in Hawaii and Vermont, it seems only a matter of time before the problem becomes even more pressing.

Both of the issues just mentioned have already received a preemptory answer from the United States federal government in the form of the Defense of Marriage Act (DOMA).¹⁸ DOMA erects a barrier to any benefits being conferred upon same-gender couples by mandating that all federal laws granting benefits upon one's spousal status only apply to heterosexual spouses. The law was passed as a (homophobic) response to the possibility that same-gender marriage stood on the horizon.¹⁹ Setting aside the strong dose of medicine DOMA was for an illness yet to have occurred, DOMA's passage erects an almost immovable obstacle in the search for immigration rights for same-gendered couples. In light of recent international and national events, however, the issues raised before the passage of DOMA should be examined anew, with the goal of shedding light on a shameful state of the law.

Despite the message of intolerance DOMA sends, U.S. immigration laws have not completely ignored the plight of lesbian and gay individuals. In 1993, the federal government began extending asylum under the Refugee Act of 1980²⁰ to individuals who were facing severe persecution from repressive regimes in their native lands because of their sexual orientation.²¹ The recognition of the plight and persecution of homosexuals, however, places the United States in a precarious position. If the United States is to allow asylum to a homosexual refugee, would not that refugee's lesbian or gay partner be suffering under similar circumstances? Should they not receive asylum based upon their spousal status, as we afford for heterosexual asylees?²² While the partner could

18. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999)) (defining marriage as "only a legal union between one man and one woman").

19. This fear was exacerbated by an embarrassing misunderstanding of basic conflicts of law principles. Any cursory study of conflicts of law principles will reveal an unyieldingly powerful weapon for the judiciary to invoke in the public policy exception. The public policy exception would effectively enable a court to refuse recognition of any marriage, same-gender or not, that the state wishes to ignore. See Larry Kramer, *Same-Sex Marriage, Conflicts of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

20. Pub. L. No. 96-212, 94 Stat. 102.

21. See *id.* § 201(a) (granting refugee status to members of particular social groups).

22. See 8 U.S.C. § 1158(c) (1994).

apply for asylum also, the extra application would not be necessary for a heterosexual granted asylum.

This Article will primarily focus on the issues surrounding same-gender relationships as mitigated by U.S. immigration policy. A critical examination of the underlying, yet often subtle, motivations that undergird our immigration policies is necessary to determine if recognition of same-gender couples is an inevitable consequence.

Part II will recount the historical treatment of immigrating homosexuals as individuals, examining the implicit and explicit restrictions placed upon homosexuals entering the United States.

Part III will examine current immigration laws relating to marriage and family reunification. Specifically, what are the policies behind such measures, and do they support recognition of same-gender couples? If we extend special immigration benefits to families, do gay and lesbian families count? Included will be an examination of the earliest attempt of a same-gendered couple to utilize spousal preferences to access immigration benefits in *Adams v. Howerton*.²³

Part IV will examine similar cases of “different” marriages. Specifically, how has immigration policy addressed incestuous and polygamous marriages, whether occurring in the United States or abroad?

Part V will briefly examine domestic efforts at grappling with the issue of same-gender marriage. Particularly, the recent Vermont Supreme Court case of *Baker v. State* addresses the domestic policies surrounding the legal recognition of same-gender couples.²⁴

Part VI will revisit *Adams v. Howerton* asking if, in the context of the recent Hawaii and Vermont Supreme Court rulings²⁵ and the mounting debate on the issue of same-gender marriage, the case’s rationale remains valid. In addition, DOMA must be examined as a serious, if not fatal, barrier to the recognition of same-gender relationships for purposes of immigration.

This Article concludes that the major premises underlying *Adams v. Howerton* have been obviated. A changing social, political, and moral landscape domestically, combined with a quickly developing international recognition of same-gender relationships and same-gender marriage, provides an opportunity, if not a mandate, to reexamine the policies behind the United States’ continued failure to recognize same-gender relationships. If the true purpose behind the policy of family

23. 673 F.2d 1036 (9th Cir. 1982).

24. 744 A.2d 864 (Vt. 1999).

25. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker*, 744 A.2d at 864.

reunification is to be served, the failure to equally provide for lesbian and gay families is wholly inconsistent with American ideals at best, and is morally wrong at worst.

II. HISTORICAL TREATMENT OF HOMOSEXUALITY UNDER IMMIGRATION LAW

The immigration policies of the United States have historically represented the fears, prejudices, and sometimes outright animus toward certain groups.²⁶ Lesbian and gay individuals have not escaped persecution and unequal treatment under U.S. immigration policy, though it has often been subtle if stated at all.²⁷ Today, gay men and lesbian women can freely enter the United States without fear that their sexual orientation will prevent entry. Before the last decade, however, the denial of entry into the United States for homosexuals took many forms.

Ironically, the first statutory exclusion of homosexuals never mentioned homosexuals as such, but instead relied upon a medical exclusion to prohibit immigration.²⁸ With the 1952 Immigration and Nationality Act (INA),²⁹ Congress drew upon exclusions found in the Immigration Act of 1917 (1917 Act).³⁰ The 1917 Act excluded:

[a]ll idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; *persons of constitutional psychopathic inferiority*; persons with chronic alcoholism; . . . persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; *persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living.*³¹

Neither the 1917 Act nor its legislative history mentions homosexuality.³² In 1952, the 1917 Act was repealed, but the exclusions were carried over, with the 1952 Act modifying the phrase to include “[a]liens afflicted with

26. See Foss, *supra* note 1.

27. See Foss, *supra* note 1, at 445-53.

28. See Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 875 (repealed 1952).

29. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (1994 & Supp. V 1999)).

30. Pub. L. No. 64-301, 39 Stat. 874 (repealed 1952).

31. *Id.* § 3, 39 Stat. at 875 (emphasis added).

32. See *id.*; see also H.R. REP. NO. 64-1266 (1917); H.R. REP. NO. 64-1291 (1917); S. REP. NO. 64-352 (1915); H.R. REP. NO. 64-95 (1915); *Restriction on Immigration: Hearing on H.R. 10384 Before the House Comm. on Immigration and Naturalization*, 64th Cong. (1915).

psychopathic personality, epilepsy, or a mental defect.”³³ The legislative history of the 1952 Act explicitly refers to the Public Health Service’s advice that the amendment was broad enough to provide for the exclusion of “homosexuals and sex perverts.”³⁴ Evidence exists that the exclusion of homosexuals was politically motivated due to a fear of communism because both groups represented minorities which rejected the mainstream American ideal.³⁵ On the other hand, the focus of the exclusion on “mental defect” and “psychopathic personality” reflected a view that homosexuality was a medical disorder.³⁶

After a 1961 United States Court of Appeals for the Fifth Circuit decision held that Congress intended to exclude homosexuals with the phrase “psychopathic personality,”³⁷ the United States Court of Appeals for the Ninth Circuit in *Fleuti v. Rosenberg* held the term “psychopathic personality” was unconstitutionally vague as applied to homosexuals.³⁸ *Fleuti*, a native of Switzerland, was admitted to the United States in 1952.³⁹ On August 5, 1959, charges were brought against *Fleuti* claiming he was deportable because, at the time of entry to the country,

33. Immigration and Nationality Act, § 212(a)(4), 66 Stat. at 182. Robert Foss asserts the linguistic inappropriateness of applying the 1917 exclusion to homosexuality, positing that the reason for the 1917 exclusions was eugenics; as Foss points out, an exclusion based upon eugenics is inapposite to a homosexual exclusion. *See Foss, supra* note 1, at 446-47.

34. S. REP. NO. 82-1137 (1952). The exclusion came at the heart of McCarthyism and anticommunist sentiment. As Robert Foss points out, Cold War America had long associated communist tendencies with homosexuals, and that “had a certain grounding in reality.” Foss, *supra* note 1, at 449. Foss also points out that the radical oppression felt by homosexuals in the 1950s led to a natural attraction to the social critique provided by the Communist Party. *See id.* The Communist Party, although also rejecting homosexuality, lent an ear to oppressed groups, and homosexuals were sympathetic to that cause. *See id.* at 449-50. Beyond the attraction of the Communist Party’s treatment of the oppressed, like communism, lesbians and gays were just “different.”

The phrase “homosexuality and sex perverts” represents another fascinating treatment of lesbians and gays. The phrase is ambiguous as to whether homosexuals were considered sex perverts, or whether the two were only incidentally mentioned together. While the inclusion of homosexuality as a *medical* exclusion seems to argue that homosexuality was not thought of as a morality-based excludable characteristic such as a sex perversion, homophobic tradition is heavy support for the opposite conclusion. It seems imminently plausible that homosexuals were considered sex perverts in the 1950s; again begging the unanswerable question as to why the government would opt to exclude homosexuals through a medical exclusion. Perhaps, the idea of the concept of homosexuality was so foreign and unimaginable that the only possible conclusion was that those that engaged in conduct had some type of medical disorder. However, in light of the historical, even biblical, castigation of homosexual conduct, this explanation seems to be undermined.

35. *See Foss, supra* note 1, at 449-50.

36. *See Hammond, supra* note 10, at 114.

37. *See Quiroz v. Neelly*, 291 F.2d 906, 907 (5th Cir. 1961).

38. 302 F.2d 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963).

39. *See id.* at 653.

he was “afflicted with a ‘psychopathic personality.’”⁴⁰ It was *not* stated in the formal charges what made Fleuti suffer from such condition, but it was alleged that a medical officer of the Public Health Service had certified that Fleuti had the condition before entry and “ha[d] been afflicted with the desire for sexual relations with members of [the same] sex for approximately the past twenty-two (22) years; . . . ha[d] indulged in the practice of sexual relations with members of [the same] sex at periodic intervals, averaging about once a month for the past twenty-two (22) years.”⁴¹

Fleuti challenged the vagueness of the term of “psychopathic personality” to cover homosexuals.⁴² The court held that Fleuti’s homosexual practices, which in part he had admitted and in part were taken from two convictions for such activity, were “a matter of choice.”⁴³ Thus, if the statute was too vague to warn Fleuti that his practices were forbidden, he was substantially prejudiced.⁴⁴ The court also noted that the charges of deportation against Fleuti rested on pre- *and* post-entry homosexual conduct.⁴⁵ For the court, this cast doubt upon the strength of the “psychopathic personality” characteristic as a tool for exclusion.⁴⁶ In addition, if the statute was too vague to warn Fleuti, his post-entry conduct was inconsequential to harming him.⁴⁷ The court held that the void-for-vagueness examination was limited to the face of the statute, not the legislative history, which in this case tended to demonstrate that Congress tacitly accepted that the term covered homosexuals.⁴⁸ Based upon contradictory expert medical opinion as to the scope of the term “psychopathic personality” and confusion and disagreement as to the general meaning of the term, the court found that the term “does not convey sufficiently definite warning that homosexuality . . . [is] embraced therein” when measured by common understanding and practice.⁴⁹

In response to *Fleuti*, Congress added the term “sexual deviation” to INA section 212(a)(4) and thereby reaffirmed the homosexual exclusion.⁵⁰ Congress’s plenary power over immigration and act of

40. *Id.* at 653-54.

41. *Id.* at 654 n.3.

42. *See id.* at 654-55.

43. *Id.* at 656.

44. *See id.*

45. *See id.* at 655-56.

46. *See id.* at 656.

47. *See id.*

48. *See id.* at 657.

49. *Id.* at 658.

50. *See* H.R. REP. NO. 89-745 (1965); S. REP. NO. 89-748 (1965).

homosexual exclusion was subsequently affirmed by the Supreme Court in *Boutilier v. INS* “beyond a shadow of a doubt.”⁵¹ In *Boutilier*, the appellant challenged his deportation to Canada on the grounds that the statute under which he was deported contained no explicit exclusion of homosexuals and was necessarily void for vagueness.⁵² The Court rejected both arguments, finding adequate intent to exclude homosexuals from immigration in the legislative history of the Act.⁵³ The Court dismissed his void for vagueness argument because the exclusion of petitioner was based not on any homosexual conduct of the petitioner in the United States but rather an “afflict[ion]” that the petitioner had upon initial entry to the country.⁵⁴ The Court’s ruling was prefaced by a detailed description of the petitioner’s sexual history, including an average annual number of homosexual and heterosexual partners and a description of sexual acts in which petitioner was either “active” or “passive.”⁵⁵

INA section 212(a)(4), which included the implicit homosexual exclusion discussed in *Boutilier*, was a list of medical exclusions.⁵⁶ For these exclusions, an established medical procedure confirming the presence of the medical condition was required.⁵⁷ If an inspector believed an alien may be excludable under section 212(a)(4), the inspector referred the alien to a Public Health Service (PHS) physician, who then performed an examination of the alien to confirm or dispel the presence of the excludable medical condition.⁵⁸ Unlike other medical conditions, there existed no objective criteria to identify a homosexual, thereby leaving the physician with only her or his subjective belief.⁵⁹ If the physician “found” that the alien was a homosexual, the physician issued a Class A certificate, which was considered to be conclusive evidence of excludability.

The medical evaluation procedure ended in 1979 with an announcement by the Surgeon General of the United States.⁶⁰ Relying on the American Psychiatric Association’s removal of homosexuality as

51. 387 U.S. 118, 120, 123 (1967).

52. *See id.* at 122-23.

53. *See id.* at 120-21.

54. *See id.* at 123.

55. *See id.* at 119-20.

56. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(1)-(7), 66 Stat. 163, 182 (1952).

57. *See Foss, supra* note 1, at 456.

58. *See id.*

59. This was not so if the alien freely admitted her or his sexual orientation. However, when no admission of homosexuality was freely given, this unfortunately led to a problem of coerced confessions of homosexuality. *See id.* at 456-57.

60. *See* 56 INTERPRETER RELEASES 387, 398 (1979).

a psychiatric disorder,⁶¹ the Surgeon General ordered PHS medical officers to no longer issue Class A certificates based upon homosexuality.⁶² Without the medical evidence of homosexuality, the exclusion of homosexuality based upon a medical disorder was placed in jeopardy.

In response to the Surgeon General's action, the Attorney General suggested that the INS develop its own procedure for exclusion based upon the clear intent of Congress to exclude homosexuals.⁶³ The INS subsequently adopted "Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual."⁶⁴ Under the guidelines, the INS no longer inquired into an alien's sexual orientation, but a self-proclamation of homosexuality was grounds for exclusion.⁶⁵ This procedure was struck down in *Hill v. INS*.⁶⁶ In *Hill*, the Ninth Circuit reaffirmed the requirement for exclusion that a PHS physician certify an alien's "homosexual status," finding a self-admission did not meet the grounds for the medical exclusion provided for in section 212(a)(4).⁶⁷ Thus, the INS policy was invalid, and because medical diagnosis of homosexuality was prohibited by the Surgeon General, the policy of exclusion was rendered ineffective.⁶⁸ However, in *In re Longstaff*, the Fifth Circuit reached an opposite conclusion, refusing to allow the Surgeon General's decision to discontinue medical examinations for homosexuality to trump the Congressional "policy" of excluding homosexuals.⁶⁹

The policy excluding homosexuals stood in limbo until the Immigration Act of 1990 completely overhauled the exclusions of the INA, removing the terms "psychopathic personality," "mental defect," and "sexual deviation."⁷⁰ With the removal, homosexuality was no longer a bar to entry into the country. The legislative history specifically states that "in order to make it clear that *the United States does not view personal decisions about sexual orientation as a danger to other people*

61. Homosexuality was removed from the American Psychiatric Association's list of mental disorders in *Diagnostic and Statistical Manual: Mental Disorders* (DSM-II) in 1974. *See id.*

62. *Id.*

63. 56 INTERPRETER RELEASES 569, 572 (1979).

64. *See* Hammond, *supra* note 10, at 114.

65. One author deemed this the first "don't ask, don't tell" policy. *See id.*

66. 714 F.2d 1470 (9th Cir. 1983).

67. *See id.* at 1480.

68. *See id.* at 1481.

69. *See* 716 F.2d 1439, 1447 (5th Cir. 1983).

70. *See* Pub. L. No. 101-649, 104 Stat. 4978 (1990).

in our society, the bill repeals the ‘sexual deviation’ exclusion ground.”⁷¹ In a statement proposing a change to the homosexual exclusion offered in 1985, Senator Alan Cranston stated:

[The exclusion] attempts to use private sexual orientation as a criterion for judging who does and who does not qualify for admission to the United States. . . . Adoption of [the amendment] will end a form of discrimination *which has no valid scientific or medical basis* and which violates traditional American respect for the privacy and dignity of an individual.⁷²

Despite Senator Cranston’s recognition of the “privacy” and “dignity” of the homosexual, that recognition has not translated into respect for homosexual *relationships* and the concomitant extension of benefits to homosexual *families*.

III. MARRIAGE, FAMILY, AND IMMIGRATION POLICY

Federal immigration law is a complex web of laws constantly aiming at stabilizing the influx of people into the United States through the promulgation of strict limits on the types of immigration and the number of immigrants. Despite what at first (and second) glance is a near incomprehensible legislative schema micro-managing immigration, “free passes” can be found littered throughout the immigration code in the form of family preferences.

Section 201(a) of the Immigration and Nationality Act places numerical limitations on immigration, commonly known as quotas.⁷³ “Immediate relatives,” however, are not subject to the numerical limitations of section 201(a).⁷⁴ “Immediate relatives” are, generally, the children, spouses, and parents of a citizen of the United States.⁷⁵ Relatives of aliens lawfully admitted to the United States are also entitled to certain immigration benefits under the numerical limitations as “family-sponsored immigrants.”⁷⁶ The INA provides for a hierarchy of familial preferences under “family-sponsored immigrants.”⁷⁷ The

71. H.R. REP. NO. 101-723(I) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6736 (emphasis added).

72. Amending Section 212(a)(4) of the Immigration and Nationality Act, 131 CONG. REC. S395 (daily ed. Jan 21, 1985) (statement of Sen. Cranston) (emphasis added).

73. Pub. L. No. 82-414, § 201(a), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1151(a) (1994)). The Immigration and Nationality Act is the general immigration statute and has been subject to numerous amendments since its original 1952 passage. *See* 8 U.S.C. §§ 1101-1537 (1994 & Supp. V 1999).

74. 8 U.S.C. § 1151(b)(2)(A)(i) (1994).

75. *Id.* To qualify as an “immediate relative” parent, the U.S. citizen child must be at least twenty-one years of age. *Id.* To qualify as an “immediate relative” child, the child must be unmarried and under twenty-one years of age. *Id.* § 1101(b)(1) (1994 & Supp. V 1999).

76. *Id.* §§ 1151(a)(1), 1153(a).

77. *Id.* § 1153(a).

spouses and unmarried sons and unmarried daughters of permanent resident aliens are allotted a specific number of visas under the immigration numerical limitations.⁷⁸ Furthermore, seventy-five percent of the visas made available under section 203 of the INA to the spouses and children of lawful permanent resident aliens are not subject to the per country limitations in section 201.⁷⁹ In addition, a spouse or child that does not otherwise qualify under the section 203 family-sponsored immigrant preferences, employment-based immigration preferences,⁸⁰ or diversity immigrant preferences,⁸¹ “shall . . . be entitled to the same status, and the same order of consideration . . . if accompanying or following to join, the spouse or parent.”⁸²

Despite the intricate statutory framework providing for such family-focused benefits, it is surprising that no substantive definition of “spouse” is provided by the Immigration and Nationality Act itself.⁸³ The Act defines “child”⁸⁴ and the terms “parent,” “father,” and “mother,”⁸⁵ yet the only definition of spouse that is provided is: “The term [sic] ‘spouse’, ‘wife’, or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”⁸⁶

Aside from an obvious lack of definitions, American immigration policy has clearly reflected the goal of family reunification with the provision for immediate relatives and family-sponsored immigrants.⁸⁷ This is undoubtedly a direct outgrowth of the painfully obvious conclusion that family is important. There are several significant benefits to this policy, not all of which necessarily flow to the individual. The presence of family makes people happier, more productive, and more secure, but it also provides much needed economic support, thereby keeping people off public assistance.⁸⁸ The togetherness of

78. *Id.* § 1153(a)(2).

79. *Id.* § 1152(a)(4).

80. *Id.* § 1153(b).

81. *Id.* § 1153(c).

82. *Id.* § 1153(d).

83. This definitional absence, however, is somewhat cured by DOMA. *See infra* notes 176-179 and accompanying text.

84. 8 U.S.C. § 1101(b)(1) (1994 & Supp. V 1999).

85. *Id.* § 1101(b)(2).

86. *Id.* § 1101(a)(35) (1994).

87. *See, e.g.*, 136 CONG. REC. H8631 (daily ed. Oct. 2, 1990) (statement of Rep. McGrath) (“[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.”).

88. *See, e.g.*, 8 U.S.C. § 1182(a)(4) (1994).

individuals encourages stable family units that provide capable environments for the furthering of socially responsible values, beliefs, and ideals—a goal made exceedingly difficult when separated by continents and thousands of miles.

Despite the obvious benefits to American society garnered by favoring the immigration of family units, same-gender couples have not been allowed to exploit the immediate relative exception or family-sponsored immigrant preferences to the numerical limitations on immigration. The only prominent attempt to use the immigration exception for spouses involving a same-gender couple was *Adams v. Howerton*.⁸⁹ Richard Adams, an American citizen, and Anthony Sullivan, his Australian partner, petitioned the INS for classification of Sullivan as an “immediate relative” of an American citizen after they obtained a marriage license and were “married” by a minister in Boulder, Colorado.⁹⁰ Adams was denied and the denial was affirmed by the Board of Immigration Appeals.⁹¹ In response, Adams filed an action in district court challenging the decision on statutory and constitutional grounds.⁹² The district court entered summary judgment for Joseph Howerton, the Acting District Director of the INS.⁹³ Adams appealed.⁹⁴

The Ninth Circuit addressed two questions: (1) whether a citizen’s spouse within the meaning of section 201(b) of the Act must be an individual of the opposite sex and (2) whether the statute, if so interpreted, was constitutional.⁹⁵

In addressing the first question, the court noted the lack of a clear definition of “spouse” in the INA.⁹⁶ To determine for immigration purposes the validity of the marriage between Adams and Sullivan, the court undertook a two-step process.⁹⁷ First, the court considered whether the marriage was valid under state law.⁹⁸ Second, the court determined whether the state-approved marriage qualified under the INA.⁹⁹ Both steps were required, but the court bypassed the inquiry into the validity of the marriage under Colorado law because it determined Adams failed the second prong of the test.¹⁰⁰

89. 673 F.2d 1036 (9th Cir. 1982).

90. *See id.* at 1038.

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.* at 1038-39 (citing *United States v. Sacco*, 428 F.2d 264, 270 (9th Cir. 1970)).

The court began its analysis of the marriage's validity under the INA by noting Congress's plenary power over immigration.¹⁰¹ Thus, "the intent of Congress governs the conferral of spouse status under section 201(b)."¹⁰² Seeing no specific definition of spouse in the statute, the court conferred the "ordinary, contemporary, common meaning" onto the term "spouse" as directed by principles of traditional statutory construction.¹⁰³ Hence, the court held that "spouse" referred to one member of a marriage and "marriage" ordinarily constituted one man and one woman.¹⁰⁴ There was no rational reason, in the court's opinion, to believe that Congress intended to break from this definition of what constituted a "spouse" solely for immigration purposes.¹⁰⁵ The court took as further evidence of the strictly heterosexual definition of "spouse" the INA's exclusion of homosexuals from immigration:

We think it unlikely that Congress intended to give homosexual spouses preferential admission treatment under section 201(b) of the Act when, in the very same amendments adding that section, it mandated their exclusion. Reading these provisions together, we can only conclude that Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b).¹⁰⁶

The court gave short shrift to arguments of constitutional violations.¹⁰⁷ Ignoring Adams's argument that strict scrutiny was appropriate because of the exclusion's adverse impact on the fundamental right to marry, the court once again reiterated Congress's plenary power over immigration and held itself to a "limited judicial review."¹⁰⁸ Accepting *without discussion or analysis* that there was a rational basis for Congress's decision conferring spousal status exclusively upon members of heterosexual marriages, the court upheld section 201(b) against the challenge.¹⁰⁹ The court guessed that Congress may have denied spousal status to homosexuals "because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often

101. *See id.* at 1039.

102. *Id.*

103. *Id.* at 1040 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

104. *See id.*

105. *See id.*

106. *Id.* at 1040-41.

107. *See id.* at 1041. Adams asserted that the inability of his spouse to immigrate violated equal protection on the basis of sex and sexual orientation. *See id.* Adams also advanced that the right to marry was fundamental, and thus the appropriate standard of review should be strict scrutiny. *See id.*

108. *Id.*

109. *See id.* at 1042-43.

prevailing societal mores.”¹¹⁰ Other than offering possible justifications, the court did not probe the validity of those justifications.¹¹¹

The rationales behind family reunification laws, when applied to lesbians and gays attempting to utilize these laws, beg the question of what constitutes a “family.” Can a gay couple form a family? Those who answer “no” assert that inherent in the definition of family is the presence of a man and a woman.¹¹² But, then again, this discounts the large percentage of single-parent households due to separation, divorce, abandonment, or death. No one would think twice about calling a mother with her two children a family. Furthermore, a single immigrant mother could bring her children into the country as a family-sponsored immigrant in the spirit of family reunification.¹¹³ Thus, federal immigration law must recognize that not every family is comprised of a different-gendered couple. However, does the presence of a mother’s *female* partner change that? For all the rhetoric over “family” and “family values,” there exists no settled definition of family.¹¹⁴ American families, like families across the globe, all define themselves differently, with different financial, emotional, spiritual, physical, and moral connections.¹¹⁵

If there are some underlying universal human needs that drive immigration benefits for committed couples, is it not entirely possible that lesbians and gays can provide as equally a compelling case to be reunited with family? Ultimately, the decision is one of policy. This, however, does not trivialize the importance of the decision. On the one hand, there is the case for inclusion and equal treatment. On the other hand, does an “anything goes” definition of family open a Pandora’s box of problems, not the least of which is the search for a workable rule?

110. *Id.*

111. *See id.*

112. *See, e.g.,* James Q. Wilson, *Against Homosexual Marriage*, COMMENTARY, Mar. 1996, at 34, reprinted in *SAME-SEX MARRIAGE: PRO AND CON* 159-68 (Andrew Sullivan ed., 1997).

113. *See* 8 U.S.C. § 1153(a)(2)(A) (1994).

114. DOMA may be the exception. *See* Pub. Law No. 104-199, 110 Stat. 2419 (1996). Specifically defining marriage as the union between one man and one woman, the Act’s scope is the federal definition of marriage. With no intent to “define” marriage, the sole, explicit intent of the statute is to prevent same-gender couples from claiming federal benefits, such as immigration rights, and to provide states an out to recognizing same-gender marriages performed in other states. The Act’s constitutionality has been seriously questioned. *See infra* notes 180-184 and accompanying text.

115. *See, e.g.,* MAXINE BACA ZINN & D. STANLEY EITZEN, *DIVERSITY IN AMERICAN FAMILIES* (1987).

IV. IMMIGRATION POLICY AND OTHER CONTROVERSIAL
RELATIONSHIPS—POLYGAMOUS AND INCESTUOUS MARRIAGES

Traditionally, U.S. immigration law recognizes the validity of a marriage according to the rules of the place where the marriage was celebrated.¹¹⁶ This deferential standard has the potential for conflicting results as to individual cases. For example, immigration law would not recognize a marriage if it was celebrated in State A which prohibited such a marriage; but the exact same marriage in State B, which allowed such unions, would be recognized as a valid marriage entitling the couple to certain immigration benefits. Immigration law would recognize the marriage even though the marriage may not be recognized in State A. The tension caused by differing rules regulating marriage has motivated some states to enact marriage evasion laws.¹¹⁷

The possibility of same-gender marriage being legitimized in a state such as Vermont, however, presents a scenario where one and only one state allows a specific type of marriage when every other state has specifically prohibited such a marriage or has not addressed the issue. In such a scenario, immigration law is not without analogous situations. Two types of marriages present possible paradigms for same-gender marriages: incestuous marriages and polygamous marriages. Unfortunately, these paradigms offer little guidance to the proper application of federal law to same-gender marriages.

A. *Incestuous Marriages*

Incest, unlike polygamy, is not mentioned in the INA. Rather, immigration law defers to the law of the country in which the marriage

116. See *United States v. Sacco*, 428 F.2d 264, 268 (9th Cir. 1970) (stating the general principle of recognizing the validity of a marriage if it is valid where celebrated); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (stating that a “marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage”).

117. State marriage evasion laws invalidate any marriage where a couple residing in State A, in which they cannot legally marry, intentionally travels to State B to marry and then returns to State A to reside. See, e.g., *In re Zappia*, 12 I&N Dec. 439 (BIA 1967) (holding that two elements must be shown under marriage evasion statutes: (1) state intent to prohibit the marriage and (2) intent of couple to evade state prohibition). As of 1996, thirteen states (Arizona, Delaware, Georgia, Illinois, Indiana, Maine, Massachusetts, Mississippi, North Dakota, Vermont, Virginia, West Virginia, and Wisconsin) and the District of Columbia had enacted such laws. See Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 n.2 (1998).

was performed¹¹⁸ *or* to the state where the couple planned to reside.¹¹⁹ Looking to the laws of the state where residence will occur is reminiscent of marriage evasion laws.¹²⁰ However, many states currently recognize marriages that violate their laws because, ultimately, public policy more strongly favors recognition.¹²¹

The approach to incestuous marriages under immigration law has a puzzling fit with same-gender marriage. If Vermont were to legalize gay marriage, there would be no question that the validity of the marriage would be determined according to the place of celebration.¹²² Thus, if immigration policy strictly applied the approach to incestuous marriages to same-gender marriages, such same-gender unions performed in Vermont would be recognized for immigration purposes.¹²³ One issue raised by overlaying the incestuous marriage paradigm on same-gender marriage is the greater ambiguity of the validity of homosexual marriages. All states have spoken as to the degree of blood relationship that prohibits an “incestuous” marriage, but only thirty-five states have explicitly prohibited same-gender marriages.¹²⁴ Interestingly, twenty-four states, at one time or another, have *blocked* anti-gay marriage bills.¹²⁵ Many states actually have gender-neutral marriage statutes that create further problems.¹²⁶ If two men, one a resident of the United

118. See *supra* note 116 and accompanying text. See also *Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982) (citing Board of Immigration appeals holding that the “validity of a marriage is governed by the law of the place of celebration”).

119. See Cynthia Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 101-02 (1996); see also *In re S*, 8 I&N Dec. 234 (BIA 1958) (holding that an incestuous marriage involving an Illinois citizen cannot be recognized because it is violative of Illinois incest laws); *In re M*, 3 I&N Dec. 465 (BIA 1948) (citing general rule of validity determined by place of marriage performance and criminality of marriage in place of intended residence).

120. See *supra* note 117.

121. See *Leszinske v. Poole*, 798 P.2d 1049, 1055 (N.M. Ct. App. 1990) (holding that an uncle/niece marriage, valid where performed, does not bar child custody); *In re Estate of Loughmiller*, 629 P.2d 156 (Kan. 1981) (holding that Colorado marriage between first cousins is recognized by Kansas).

122. See *Adams*, 673 F.2d at 1038-39.

123. Of course, DOMA prevents such recognition. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999)). However, if immigration law wholly adopted the approach with homosexual relationships or marriages as it has with incestuous marriages, and DOMA is repealed or successfully appealed, immigration law would recognize the validity of a homosexual marriage. Of course, until “marriage” itself is statutorily permitted by any state, this problem is only theoretical.

124. See Lambda Legal Defense and Education Fund, *2000 Anti-Marriage Bills Status Report*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=578> (last modified May 25, 2000).

125. See *Statewide Anti-Gay Marriage Laws*, at <http://www.aclu.org/issues/gay/gaymar.html> (last visited Mar. 3, 2001).

126. The fact that states have gender-neutral marriage statutes does not imply a receptiveness to same-gender marriage. In fact, the omission of gender-specificity most likely

States and one a resident of Canada claim to be married in Vermont,¹²⁷ but with plans to reside in a state with gender-neutral language in the state's marriage statutes, should the federal government recognize the marriage for immigration purposes or should recognition be withheld? Should the couple's immigration benefits hinge upon the place of celebration (Vermont) or the place of future residence? DOMA potentially answers this question for us, but the distinction between incestuous marriages still exists. Thus, to adopt a similar approach to same-gender marriage as that of incestuous marriages leaves immigration policy in a state of flux.

B. *Polygamous Marriages*

The United States has continually refused to recognize polygamous marriages, even when such marriages have been legally obtained in a foreign country.¹²⁸ The federal government advances two reasons for the prohibition of recognition of polygamous marriages.¹²⁹ First, polygamists are specifically excluded from immigration by statute.¹³⁰ Second, courts have advanced the proposition that polygamy violates the law of nature in Christian countries.¹³¹

Like the incest approach, the polygamy paradigm is an uneasy fit when placed over a same-gender marriage model. In 1990, the exclusion of homosexual immigrants was removed.¹³² As for the second rationale prohibiting polygamous marriage and its application to homosexual marriage, it should be noted that the argument of "violating the law of nature" has also been employed to discriminate against interracial couples, thus undercutting the validity of such an argument.¹³³ In initially upholding a Virginia law prohibiting interracial marriage, the

cuts the other way. The concept of two individuals of the same sex marrying was so foreign that the need to have gender-specific terms in a marriage statute most likely escaped many states. *See, e.g., Adams*, 673 F.2d at 1040 (holding that, in the absence of a gender-specific rule controlling marriage, the "ordinary" meanings of "marriage" and "spouse" control). However, in a contemporary environment of increased dialogue on the issue, does the continued existence of a gender-neutral marriage statute convey any other message? This issue remains unresolved.

127. Of course, at this time, even Vermont does not recognize same-gender marriage.

128. *See In re Mujahid*, 15 I&N Dec. 546 (1976) (denying recognition of a polygamous marriage validly performed in Egypt); *In re H*, 9 I&N Dec. 640 (BIA 1962) (declining to recognize Jordanian polygamous marriage valid under Islamic law).

129. *See Reed*, *supra* note 119, at 123 (citations omitted).

130. *See* 8 U.S.C. § 1182(a)(9)(A) ("Any immigrant who is coming to the United States to practice polygamy is excludable."). *See also In re Man*, 16 I&N Dec. 543, 544 (BIA 1978) (denying entry to Chinese polygamist).

131. *See Ng Suey Hi v. Weedon*, 21 F.2d 801, 802 (9th Cir. 1927) (holding that children from a second polygamous marriage are illegitimate).

132. *See Hammond*, *supra* note 10, at 115.

133. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1966).

law of nature was invoked by a judge who stated: “Almighty God created the races . . . and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.”¹³⁴

Because polygamy remains a prohibited basis for immigration, not to mention a prohibited activity domestically, the approach of immigration law to polygamous marriages is also an unhelpful approach when confronted with the problem of same-gender relationships or marriage. If same-gender relationships are to be legally recognized by a state through marriage or some other legislative arrangement, the approach to other controversial marriages such as incestuous marriages and polygamous marriages under the immigration statutes offer little guidance to the proper course for same-gender relationship recognition. Neither provide a satisfactory approach to the provision of immigration due to the fact that neither incestuous nor polygamous marriages are similarly situated to same-gender relationships. For polygamous marriages, the difference occurs on the federal level inasmuch as the very activity of polygamous marriage—polygamy—is a prohibited immigration activity. As for incestuous marriages, the difference occurs on the state level. While every state has addressed the requisite consanguinity for marriage, not all states have addressed same-gender marriage. This result demands the creation of another approach to grapple solely with same-gender relationships and any immigration rights those relationships may be entitled to or the adoption of the heterosexual marriage approach under immigration law for same-gender couples. Of course, the federal government has answered this question by electing “none of the above” with the passage of DOMA.

V. *BAKER V. VERMONT*—RECOGNIZING THE VALIDITY OF SAME-GENDER RELATIONSHIPS

In 1999, Vermont became the second state to tackle the issue of same-sex marriage rights in state court.¹³⁵ The Vermont Supreme Court’s

134. *Id.* at 3.

135. In 1993, Hawaii became the first state to tackle the issue of homosexual marriage. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Any significant discussion of the Hawaii Supreme Court decision in *Baehr v. Lewin* has been omitted due to the fact that subsequent Hawaiian legislative efforts have made the issue of same-gender marriage in Hawaii moot. See HAW. CONST. ART. I, § 23. Currently, Vermont stands as the only state where same-gender marriage has a realistic opportunity to become legally viable.

The Vermont and Hawaii cases regarding homosexual marriage used the phrase “same-sex marriage” whereas this author has employed the phrase “same-gender marriage.” See *supra* note 2. Essentially, both are interchangeable. For this section, when appropriate or necessary, the

decision did not explicitly grant the right of marriage to homosexuals, but rather the court reserved the exact legislative details to the Vermont legislature.¹³⁶ The court, in dicta, specifically referenced the number of options available to the Vermont legislature—from full same-sex marriage to domestic partnerships to registered partnerships.¹³⁷ What the Vermont Supreme Court did decide was that same-sex couples could not be denied the benefits and protections extended to heterosexual married couples under the Common Benefits Clause of Vermont's constitution.¹³⁸

The *Baker* plaintiffs were three same-gender couples who had been together between four and twenty-five years.¹³⁹ Two of the couples had raised children together.¹⁴⁰ Each couple had been refused a marriage license, and they collectively challenged these denials.¹⁴¹

Initially, the court concluded that any plain and ordinary reading of the Vermont statutes revealed that the legislature had intended that marriage, along with its attendant protections and benefits, was to be entered into between one woman and one man.¹⁴² Thus, any claim by plaintiffs that their marriages were permitted under Vermont's statutes was held to be patently incorrect.¹⁴³

The court next addressed the validity of the scope of the statute.¹⁴⁴ Because the statute provided marriage only for a certain group of people, the Common Benefits Clause of the Vermont constitution was potentially violated.¹⁴⁵ The court recognized that plaintiffs were potentially deprived of numerous benefits and protections emanating from a Vermont marriage, such as:

the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions; preference in being appointed as the personal representative of a spouse who dies intestate; the right to bring a lawsuit for the wrongful death of a

author has used the terminology applied by the courts in Vermont and Hawaii. Any confusion is unintended.

136. See *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999).

137. See *id.* at 886-87.

138. See *id.* at 886. The court referenced this pertinent part of the clause: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." *Id.* (quoting VT. CONST., ch. I, art. 7).

139. See *id.* at 867.

140. See *id.*

141. See *id.* at 867-68.

142. See *id.* at 868-69.

143. See *id.* at 869.

144. See *id.* at 880-86.

145. See *id.* at 880. The "limited" class consisted of all heterosexual and/or different-gendered couples.

spouse; the right to bring an action for loss of consortium; the right to workers' compensation survivor benefits; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance; the opportunity to be covered as a spouse under group life insurance policies issued to an employee; the opportunity to be covered as the insured's spouse under an individual health insurance policy; the right to claim an evidentiary privilege for marital communications; homestead rights and protections; the presumption of joint ownership of property and the concomitant right of survivorship; hospital visitation and other rights incident to the medical treatment of a family member; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce.¹⁴⁶

Before examining the different treatment received by heterosexual and homosexual couples under Vermont's marriage statute, the court delineated the differences between the Equal Protection Clause of the United States Constitution and the Common Benefits Clause of the Vermont Constitution.¹⁴⁷ Noting close similarities, the court reiterated it was not bound by United States Supreme Court equal protection jurisprudence and, in many instances, found Vermont's protections broader and her burdens greater.¹⁴⁸ After a lengthy discussion of the historical roots and implications of the Common Benefits Clause,¹⁴⁹ the court concluded that the clause has an "inclusionary principle at its core."¹⁵⁰ Thus, the exclusionary effect of Vermont's marriage statute possibly violated the Clause unless the state could advance sufficient reasons for the existence of unequal treatment.¹⁵¹

The court utilized a three-part analysis: first, what group was excluded; second, what were the governmental objectives behind the different treatment; and finally, and most importantly, did the exclusion and governmental purpose have a "reasonable and just relation."¹⁵² The court summarily concluded that the marriage statute obviously excluded homosexuals from the benefits of the marriage statute.¹⁵³ Turning to the

146. *Id.* at 883-84 (citations omitted).

147. *See id.* at 870-79.

148. *See id.* at 870. The Vermont Supreme Court stated that it would only allow the statutory classification [excluding same-gender couples from marriage] if the state could establish a case of necessity to the "common benefit, protection, and security of the people." *Id.* at 871. According to the court, the Common Benefits Clause requires a "more stringent" reasonableness inquiry than was generally associated with rational basis review under the federal constitution." *Id.*

149. *See id.* at 870-77.

150. *Id.* at 878.

151. *See id.* at 878-79.

152. *See id.* at 879.

153. *See id.* at 880.

governmental purpose behind the different treatment, the court reiterated that the government's purpose in the exclusion of homosexuals from marriage benefits was "the government's interest in furthering the link between procreation and child rearing."¹⁵⁴ The government argued that because same-gender couples cannot conceive children on their own, the Vermont "Legislature could reasonably believe that sanctioning same-sex unions would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage."¹⁵⁵ While conceding that the government has a "legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children," the court rejected the State's argument that the exclusion of same-gendered couples derived automatically from this interest.¹⁵⁶ The court pointed out that many heterosexual couples marry for reasons other than procreation.¹⁵⁷ In addition, if the sole statutory goal of the marriage statute is to promote procreation, its exclusions are under-inclusive and the group currently allowed to marry is over-inclusive.¹⁵⁸ Furthermore, the court recognized that many same-gender couples raise children, noting Vermont itself had previously changed its adoption and domestic relations laws to allow for such occurrences.¹⁵⁹ Thus, the court concluded that the marriage statute excluded same-gender couples while admitting different-gender couples who were similarly situated as to child-bearing and procreation.¹⁶⁰

Rejecting the State's connection between the exclusion and its governmental interest, the court turned to the analysis of whether the exclusion of gays from the marriage statute violated Vermont's Common Benefits Clause.¹⁶¹ Reiterating the myriad benefits flowing from marriage,¹⁶² the basic civil right contained in marriage as held in *Loving v. Virginia*,¹⁶³ and the disjunctive logic asserted by the State that failed to

154. *Id.* at 881 (internal quotation marks omitted).

155. *Id.*

156. *Id.*

157. *See id.* Furthermore, some couples never intend to have children, and some couples are unable to have children due to age, infirmity, sickness, or medical condition. *See id.*

158. *See id.*

159. *See id.* at 882 (noting VT. STAT. ANN. tit. 15A §§ 1-102(b), 1-112 (1995)).

160. *See id.* The court also rejected the state's argument that same-sex marriage would weaken the link between procreation and child-rearing because the state did not assert the same argument as to infertile heterosexual couples who conceived children through means of artificial insemination, which often involves the genetic material of an undisclosed third party. In those situations, the link between procreation and child rearing are equally strong as between the heterosexual and homosexual couple.

161. *See id.*

162. *See id.* at 883-84.

163. 388 U.S. 1, 12 (1967).

provide a just and reasonable basis for exclusion,¹⁶⁴ the court concluded that denial of the marriage statute's benefits to same-gender couples violated the Common Benefits Clause of the Vermont Constitution.¹⁶⁵ The court mandated the Vermont legislature remedy the unconstitutional denial of benefits to homosexual couples, but conspicuously did not hold that same-gender couples have the right to marry.¹⁶⁶ Rather, the court explicitly stated that the provision of marital benefits could possibly be accomplished through various legislative mechanisms, such as a domestic partnership regime.¹⁶⁷

VI. *ADAMS V. HOWERTON* REVISITED

The *Adams* decision rested on two grounds.¹⁶⁸ First, when *Adams* was decided in 1982, homosexuals were excluded from immigration.¹⁶⁹ Secondly, no state had recognized same-gender marriage, and, beyond that, the court held the INA itself evinced a federal public policy against the recognition of same-gender marriages.¹⁷⁰ Two decades later, do these foundations still exist?

It is immediately apparent that the policy of homosexual exclusion relied upon in *Adams* no longer exists. With the exclusion formally and explicitly removed by the Immigration Act of 1990, lesbian women and gay men are able to enter the United States free from interference based upon their sexual orientation. Thus, the first and strongest tier of analysis in *Adams* has unambiguously faded away.

The remaining justification for the decision of the court is questionable. In concluding that the INA evinced a congressional intent to recognize only heterosexual spouses, the court relied heavily upon the logical contradiction between admitting foreign same-gender spouses of American citizens yet excluding homosexuals altogether.¹⁷¹ Because of this contradiction, the court posited that Congress must have adopted the "plain and ordinary" meaning of the word "spouse."¹⁷² However, today the exclusion has been lifted, no longer creating the logical contradiction to which the court pointed. In addition, and perhaps more persuasively, the court's reliance on the "ordinary" meaning of the word "spouse" has lost significant impact. In the two decades since the *Adams* decision,

164. See *Baker*, 744 A.2d at 884-86.

165. See *id.* at 886.

166. See *id.* at 886-88.

167. See *id.* at 886-89.

168. See *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982).

169. See *id.*

170. See *id.*

171. See *id.*

172. See *id.*

homosexuals and homosexual couples have realized an extraordinary growth in societal acceptance. Recent state supreme court decisions in Hawaii and Vermont mark the beginning of legal recognition of such relationships on state levels.¹⁷³ Furthermore, the rampant proliferation of domestic partnership regimes in cities across the United States and countries around the world provide further evidence of public recognition of such relationships.¹⁷⁴ Even the United States Supreme Court has strongly voiced its disapproval of attempts to strip homosexuals of their fundamental constitutional rights, although the Court has seemingly equivocated on its commitment to the “rights” of homosexuals.¹⁷⁵

The primary obstacle to the recognition of same-gender couples for immigration purposes is the Defense of Marriage Act (DOMA).¹⁷⁶ DOMA has two main provisions.¹⁷⁷ Section 2 of DOMA allows states to refuse to recognize lawful same-gender marriages performed in other states.¹⁷⁸ Section 3 directs that for the purposes of *federal* law, “marriage” means only a legal union between one man and one woman as husband and wife, and “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁷⁹

The constitutionality of DOMA has been raised by several prominent constitutional scholars.¹⁸⁰ DOMA breaks with the federal government’s tradition of deferring to a state’s determination of the validity of a marriage. Even with incestuous marriages and immigration,

173. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

174. See American Civil Liberties Union Freedom Network: Lesbian & Gay Rights, *Domestic Partnerships: List of Cities, States and Counties*, at <http://www.aclu.org/issues/gay/dpstate.html> (last visited Mar. 3, 2001).

175. See *Romer v. Evans*, 517 U.S. 620 (1996) (holding states may not deny equal protection based solely on homosexual status). *But see* *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (holding private organizations’ right to expressive association allows discrimination against homosexuals); *Hurley v. Irish-American Gay, Lesbian, Bisexual Group*, 515 U.S. 557 (1995) (holding the forced inclusion of gay group into parade violates First Amendment rights of organizers).

176. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999)).

177. *See id.*

178. *See id.*

179. *See id.*

180. Critics of DOMA include Professor Laurence Tribe of Harvard Law School. Professor Tribe has stated: “Congress possesses no power under any provision of the Constitution to legislate any such categorical exemption from the Full Faith and Credit Clause of Article IV. For Congress to enact such an exemption . . . would entail an exercise by Congress of a ‘power . . . not delegated to the United States by the Constitution’—a power therefore ‘reserved to the States’ under the Tenth Amendment.” 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy).

the federal government deferred to the states.¹⁸¹ Furthermore, in light of the Supreme Court's decision in *Romer v. Evans*,¹⁸² the possibility exists that DOMA could fail rational basis scrutiny, though this remains a minute possibility. The Supreme Court has been extremely deferential to the Congress as it establishes immigration policy. In an early twentieth century opinion addressing immigration law, the Court stated that "over no conceivable subject is the legislative power of Congress more complete."¹⁸³ While the Court has continually affirmed Congress's plenary power over immigration, it has not surrendered total control. In *Galvan v. Press*, the Court stated that a statute could be "so baseless as to be violative of due process and therefore beyond the power of Congress."¹⁸⁴ It stands to reason that the glimmer of hope provided by *Galvan* may ultimately provide the leverage to argue that DOMA represents an impermissible, not to mention illogical and unwarranted, violation of the rights and privileges afforded American citizens, at least in the immigration context.

Vermont's solution to the same-gender marriage question leaves this issue in an even more damning quandary. It is clear that same-gender couples in Vermont cannot marry as such, but, through the most recent actions of the Vermont legislature, same-gender couples may legally enter into "civil unions" in which the couple will receive every legal right, benefit, and obligation provided to married couples under state law. The legislature avoided using the word "marriage" for political reasons, but what cannot be denied is Vermont has recognized the validity of same-gender relationships. The conclusion is clear: same-gender relationships are valid familial units entitled to the rights of other families, at least by Vermont standards.

Where do we go from here? Undoubtedly, the federal government controls immigration policy, and the ultimate granting of immigration benefits to same-gender partners of American citizens rests with the federal government. Can the federal government grant family preferences in immigration to different-gender couples for the reasons of economic, physical, emotional, and spiritual support and deny the same to same-gender couples even though the state of Vermont has precisely recognized the validity of such things in same-gender relationships? Of course, the federal government can do that, but is that not queer reasoning?

181. See *supra* notes 118-127 and accompanying text.

182. See *supra* note 175.

183. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

184. 347 U.S. 522, 529 (1954).

VII. CONCLUSION

Until the United States recognizes the validity of same-gender relationships domestically and internationally, lesbian and gay relationships will remain second-class relationships. But, the recognition of immigration rights for same-gender couples will only follow one state's recognition of such relationships. We have reached that point. Now that states such as Vermont have begun to validate same-gender relationships, will federal immigration policy continue to ignore those relationships?

While Vermont has not granted same-gender couples the ability to "marry," the extension of civil unions and the concomitant benefits to same-gender couples evinces a recognition by Vermont that such couples are entitled to the rights, benefits, and responsibilities traditionally reserved for heterosexual married couples. It is a simple recognition by Vermont that such relationships exist and benefit society. The Vermont Supreme Court was clear that same-gender couples are entitled to the equivalent rights and obligations as married heterosexual couples.¹⁸⁵ Unfortunately, current law (DOMA) places a restriction on the same-gender couple's obtainment of equivalent benefits and protections by limiting the definition of "spouse" in federal law to only a heterosexual couple.¹⁸⁶ By restricting "immediate relative" status to heterosexual spouses, homosexual couples cannot obtain immigration benefits if one partner to the relationship is not an American citizen. Thus, effectively, immigration law restricts a homosexual's ability to enter into a civil union with a partner who is not an American citizen, because entering into a Vermont civil union will not allow that partner to continue to stay in the United States unless he or she can qualify under another provision of immigration law separate and distinct from his or her relationship. Although "immediate relative" status is a benefit granted by the federal government and not by Vermont, there exists no other example of federal immigration policy withholding recognition of a relationship that has been recognized by a state as deserving of the rights and responsibilities of marriage. Albeit traditionally such recognition by a state has normally been followed by the issuance of a marriage license, Vermont's civil unions stand as equal testimony that same-gender couples do form families. The rationales behind familial immigration law demand that the federal government take notice.

185. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) ("[P]laintiffs are entitled . . . to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.").

186. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999)).

Recognition of such relationships poses no threat to the social, political, or moral fabric of the country. In fact, it only reinforces the importance of a solemn commitment to support, care, and love for one another. If U.S. immigration policy desires to provide an opportunity for American citizens to be reunited with their “spouse” or their “family,” the denial of such benefits to lesbians and gays is to deny the obvious fact, as painful as it may be to some, that lesbians and gays do form strong, supportive families.¹⁸⁷

Until the legitimacy of DOMA is challenged, however, along with the “traditional” definitions of spouse and marriage, that recognition will not be forthcoming. A further investigation into the reasons we recognize the importance of families and spouses yields the fact that we want the support, love, and stability that those relationships provide. Unfortunately, for same-gender couples, sometimes love is not enough to overcome reasoning that is quite queer.

[Author’s Note: For the second time in as many years a resolution has been introduced in the House of Representatives to amend the Immigration and Nationality Act to provide for immigration benefits for “permanent partners.” *See* Permanent Partners Immigration Act of 2001, H.R. 690, 107th Cong. Essentially, the Act provides comparable immigration benefits for permanent partners as afforded “spouses.” Under the Act, “a ‘permanent partner’ means an individual eighteen years of age or older who (A) is in a committed, intimate relationship with another individual eighteen years of age or older in which both parties intend a lifelong commitment; (B) is financially interdependent with that other individual; (C) is not married to or in a permanent partnership with anyone other than that other individual; (D) is unable to contract with that other individual a marriage cognizable under this Act; and (E) is not a first, second or third degree blood relation of that other individual.” *Id.* at § 2. The Act is explicitly designed for same-gender couples. *See id.* at § 2(D). For the past two years, this resolution has been offered on Valentine’s Day. *See id.*]

187. *See, e.g., Baker*, 744 A.2d at 867-68. The three plaintiff couples had lived together between four and twenty-five years. In addition, two of the three couples had raised children together. *Id.*