

SEPARATED AND UNEQUAL

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I. INTRODUCTION

United States immigration law unfairly impacts the lives of lesbian and gay couples in committed bi-national relationships and is a glaring exception to a growing trend in western democracies towards recognition of immigration rights for same-sex bi-national couples. Under federal immigration law, U.S. citizens and legal permanent residents do not have the right to sponsor their same-sex partners for immigration benefits, a right afforded U.S. citizens and lawful permanent residents in opposite-sex bi-national marriages. As a result, many bi-national same-sex couples in this country face separation or forced exile, having to find a country that will recognize their relationship while satisfying its immigration requirements. While some foreign nationals qualify for U.S. visas and residency independent of their relationship to a U.S. citizen or lawful permanent resident, the majority have no alternative means to immigrate to this country.

U.S. immigration law and policy towards lesbians and gay men has a long, ugly history. Over time, however, as social, political and governmental attitudes changed to be more tolerant of gay people, so too did immigration laws. Gay and lesbian foreign nationals are no longer excluded from entering the United States and are no longer barred from adjusting their status to lawful permanent residents as a result of their sexual orientation. Immigration law must again be modified to reflect contemporary social, political, governmental, and legal acceptance of alternative family arrangements, specifically the relationships of same-sex couples.¹

1. Currently, marriages between same-sex couples are recognized nationwide in five countries: Belgium, Canada, the Netherlands, South Africa and Spain. See *infra* note 61. On May 17, 2004, following the 2003 Supreme Judicial Court of Massachusetts ruling that denying marriage and its protections to same-sex couples is unconstitutional under the equality and liberty provisions of the Massachusetts Constitution, Massachusetts became the first state in the United States to allow same-sex couples to marry. Alan Cooperman & Jonathan Finer, *Gay Couples Marry in Massachusetts*, WASH. POST, May 18, 2004, at A1; see Goodridge v.

Dep't. of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

Civil unions and other forms of legal recognition for same-sex couples, which offer most if not all the rights accorded in a civil marriage, exist nationwide in Denmark, Norway, Israel (in the form of common law marriage), Sweden, Greenland, Hungary, Iceland, France, South Africa, Germany, Portugal, Finland, Croatia, Luxembourg, New Zealand, United Kingdom, Andorra, Slovenia, and Switzerland (approved 2005; expected implementation 2007). *See infra* notes 61-65, 74; *Establishment and Termination of Cohabitation*, HUNGARY.HU, July 30, 2003, http://www.magyarorszag.hu/angol/orszaginfo/ugyleiras/csalad/ellettars/kapcsolatokese/egyuttes_szabalyai_a.html (description of cohabitation status from Hungarian Government Portal website); International Gay and Lesbian Human Rights Commission, Croatian Law on Same Sex Civil Unions, <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=73> (English translation of the Croatian law on civil unions) (last visited Jan. 12, 2006); Le Gouvernement de Grand-Duché de Luxembourg, La loi relative aux effets légaux de certains partenariats, <http://www.gouvernement.lu/dossiers/justice/partenariat/> (French text of Luxembourg law on registered partnerships available from Luxembourg Government website); Butletí Oficial del Principat d'Andorra (BOPA), <http://www.bopa.ad/bopa.nsf/b84c2e9d2d34fe50c1256ad9003b8903/9559566b4feb8d3dc1256fcd002754ea!OpenDocument> (Catalan text of the Andorran registered partnership law); Republic of Slovenia National Assembly, <http://www.dzrs.si/index.php?id=101&type=98&vt=6&sm=k&docid=5025&showdoc=1&unid=SZ%7CC12563A400338836C12570280058F84F> (Slovenian text of Slovenia registered partnership law (ZRIPS) passed June 22, 2005); *Gay Couples Win Partnership Rights*, SWISSPOLITICS.ORG, June 5, 2005, http://www.swisspolitics.org/en/news/index.php?page=dossier_artikel&story_id=5845155&dossier_id=80 (reporting on Swiss voter approval of registered partnership law); OUTfront! Lesbian, Gay, Bisexual & Transgender Human Rights, International Briefs—Summer 2005, <http://www.amnestyusa.org/outfront/briefs.html> (noting that Greenland recognizes Denmark's civil union law).

Within the United States, individual states provide for civil unions or domestic partnerships between same-sex couples. Vermont and Connecticut currently grant protections to same-sex couples through civil unions. The Vermont civil union legislation provides: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." VT. STAT. ANN. tit. 15, § 1204(a) (2004). The Connecticut civil union law affords those legally joined in a civil union all the same benefits, protections, and responsibilities under law that are granted to spouses in marriage in categories such as state and municipal taxation, family leave benefits, hospital visitation and notification, state public assistance benefits, and court privileges. 2005 Conn. Acts 05-10 (Reg. Sess.).

Domestic partnerships are recognized by dozens of cities and a handful of states. Pursuant to the Domestic Partners Rights and Responsibilities Act of 2003 (A.B. 205), as of January 1, 2005, registered domestic partners in California have most of the rights and responsibilities given to married spouses under California state law. CAL. FAM. CODE § 297.5 (West 2005). On January 12, 2004, the New Jersey Governor signed into law the "Domestic Partnership Act." The rights provided to domestic partners include: the right to make medical or legal decisions for an incapacitated domestic partner, the right to consent for an autopsy, the right to authorize donation of the deceased partner's organs, the right to be exempt from New Jersey inheritance tax on the same grounds as a

Congress has the opportunity to pass the Uniting American Families Act; proposed legislation that would afford U.S. citizens and legal permanent residents the right to sponsor their same-sex partners for immigration benefits.² The Supreme Court ruling in *Lawrence v. Texas*³ and the recognition of same-sex couples for immigration benefits by eighteen countries worldwide make a strong legal and moral case for Congress to pass the proposed legislation and grant immigration benefits to bi-national same-sex

spouse, the right to be eligible for dependent benefits under the state-administered retirement system, and the right to domestic partner health benefits for state employees. N.J. STAT. ANN. § 26:8A-2 (2004); *see also* Domestic Partnership Act, 2004 N.J. Sess. Law Serv. 246 (West).

On April 28, 2004, Maine's Governor John Baldacci signed the state's first domestic partnership law into effect. *See* ME. REV. STAT. ANN. tit. 22, § 2710 (2004); *see also* 2004 Me. Legis. Serv. 672 (West). The law provides a handful of rights to domestic partners including the right to intestate succession, the right to elect against the will, the right to make funeral and burial arrangements, the right to receive victim's compensation, and preferential status to be named as guardian and/or conservator in the event of the death of a domestic partner. *See* 2004 Me. Legis. Serv. 672.

Several other states and individual cities provide more limited benefits and protections for domestic partners. For instance, in 1997, the Hawaii legislature passed the Reciprocal Beneficiaries law. *See* HAW. REV. STAT. ANN. § 572C-4 (LexisNexis 2004). The Reciprocal Beneficiaries law allows any two single adults who are not eligible to marry under state law to have access to approximately sixty state-conferred rights, benefits, and responsibilities of marriage, including the right to sue for wrongful death, the right to inherit intestate, the right to hospital visitation, the right to make medical decisions, and some property rights. *See* Partners Task Force for Gay & Lesbian Couples, Reciprocal Beneficiaries: The Hawaiian Approach, Oct. 23, 2005, <http://www.buddybuddy.com/d-p-hawa.html>. The District of Columbia has recognized same-sex partnerships since 2002. D.C. CODE §§ 32-701 to -710 (2001) (including domestic partners as "family members" for the purposes of health care). All couples registered as domestic partners are entitled to the same rights as legal family members to visit their domestic partners in hospitals and to make decisions concerning the treatment of a domestic partner's remains after the partner's death. *Id.* The measure also grants rights to a number of benefits to District of Columbia government employees. *Id.* Domestic partners are eligible for health care insurance policies, can use annual leave or unpaid leave for the birth or adoption of a dependent child and/or care for their domestic partner or their dependants, and/or arrange for or attend the funeral. *Id.*

Finally, eleven states—California, Connecticut, Illinois, Iowa, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington—and the District of Columbia provide domestic partner benefits for the domestic partners of state employees. NCLR Publications, Marriage, Domestic Partnerships, and Civil Unions, http://www.nclrights.org/publications/marriage_equality_0905.htm.

2. *See infra* Part III.B.

3. 539 U.S. 558 (2003).

couples.⁴ Likewise, providing immigration equality for same-sex couples would further U.S. obligations under international law, which were implicitly recognized by *Lawrence*, to protect and promote the right to family and family unity.

II. THE HISTORICAL TREATMENT OF LESBIANS AND GAY MEN UNDER U.S. IMMIGRATION LAW

This country's discriminatory immigration law and policy against lesbians and gay men dates back to the Immigration Act of 1917 when Congress first codified a ban against gay people seeking to enter the United States.⁵ In 1952, the Immigration and Nationality Act repealed the 1917 Act, but continued to exclude gay people as "afflicted with psychopathic personality . . . or a mental defect."⁶ This categorization reflected the view that homosexuality was a mental illness.⁷ Countless individuals have

4. Currently, the immigration laws and policies of Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, and the United Kingdom allow gay and lesbian citizens to sponsor their same-sex partners for immigration purposes. Susan Hazeldean & Heather Betz, *Years Behind: What the United States Must Learn About Immigration Law and Same-Sex Couples*, HUM. RTS. MAG. (2003), available at <http://www.abanet.org/irr/hr/summer03/immigration.html>; American Immigration Lawyers Association, Issue Paper, Permanent Partners Act, <http://www.aila.org/content/default.aspx?docid=8384>.

5. See 8 U.S.C. § 136 (2000) (originally enacted as Act of Feb. 5, 1917, 39 Stat. 874, 875, repealed by Immigration and Nationality Act § 403(a)(13), (16), (18), 66 Stat. 279, 280 (1952)) (excluding those "certified by the examining surgeon as mentally or physically defective").

6. Immigration and Nationality Act, § 212(a)(4), 66 Stat. 163, 182 (1952) (current version at 8 U.S.C. § 1182 (2002)). The 1990 amendment excluded "[a]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect," and grouped homosexuality with six other medical grounds for exclusion: mental retardation; insanity; one or more attacks of insanity; narcotic drug addiction or chronic alcoholism; dangerous contagious disease; and physical defect, disease, or disability that may affect the ability to earn a living. 8 U.S.C. §§ 1182(a)(1)-(3), (5)-(7) (1988) (amended 1990).

7. Shannon Minter, Note, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 777 (1993) (discussing the political and legal barriers to asylum for homosexuals in the United States). Congress deferred to the medical expertise of the Public Health Service (PHS) and abandoned an initial draft of the Act that had specifically named "homosexual and sex perverts" an excludable class. *Id.* The PHS voiced concern about the difficulty of diagnosing homosexuality and advised the legislature to use the more general language of "psychopathic personality or mental defect" to make the diagnosis of homosexuals easier. *Id.* Congress accepted the recommendation but registered the caveat that "[t]his change of

been excluded at the border, deported, or denied naturalization under this provision. Pursuant to statutory procedure under the 1952 Act, the Immigration and Naturalization Service⁸ (INS) referred any person suspected of homosexuality to a Public Health Service⁹ (PHS) official for an examination.¹⁰ The PHS official examined the individual, diagnosed the existence of a psychopathic personality or other condition, and issued a certificate, corresponding to 8 U.S.C. § 1182(a), to the INS officer.¹¹ The certificate constituted the sole evidence for exclusion or deportation of the foreign national.¹²

The 1952 exclusion operated to ban lesbians and gay men from entry into the United States¹³ until 1963 when the Ninth Circuit held that it was void for vagueness.¹⁴ Congress responded almost immediately to the court's ruling and, to avoid any

nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates." *Id.*; see also AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (1952) (listing homosexuality as a type of "sociopathic personality disturbance").

8. On November 25, 2002, President George W. Bush signed the Homeland Security Act of 2002 into law. U.S. Citizenship and Immig. Servs., INS to DHS: Where is it now?, <http://uscis.gov/graphics/othergov/roadmap.htm> (last visited Jan. 12, 2006). This law transferred INS functions to the newly enacted Department of Homeland Security (DHS). *Id.* Immigration enforcement functions were placed directly within the Directorate of Border and Transportation Security (BTS), or indirectly through Customs and Border Protection (CBP) (including, Border Patrol and INS Inspections) or Immigration and Customs Enforcement (ICE) (which includes the enforcement and investigation components of INS such as Investigations, Intelligence, Detention and Removals). *Id.* As of March 1, 2003, the former INS was abolished and all functions and units were incorporated into the new DHS. *Id.*

9. The Public Health Service is an agency in the Department of Health and Human Services, headed by the Attorney General. 8 U.S.C. § 1182(a)(1)(A)(iii). PHS doctors are authorized to examine entering aliens at ports of entry and overseas. See 8 U.S.C. § 1224.

10. 8 U.S.C. § 1222 (original version at 8 U.S.C. § 1224 (1988)) (amended 1996); Minter, *supra* note 7, at 778.

11. 8 U.S.C. § 1222; Minter, *supra* note 7, at 778.

12. 8 U.S.C. § 1226(d) (stating the immigration judge should decide "based solely upon such certification"); Minter, *supra* note 7, at 778.

13. See, e.g., *Quiroz v. Neely*, 291 F.2d 906, 907 (5th Cir. 1961) (holding that Congress had intended to exclude homosexuals and that the medical profession's understanding of the term "psychopathic personality" would not control).

14. *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963) ("[T]he statutory term 'psychopathic personality,' when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein.").

ambiguity about its intention to exclude homosexuals, in 1965 amended the Act to specifically exclude from entry aliens who were afflicted with a “sexual deviation”—i.e., homosexuals.¹⁵ However, in 1967, the Supreme Court rejected the argument that the term “psychopathic personality” was unconstitutionally vague.¹⁶ In its decision, the Court examined the legislative history of the provision and found a clear congressional intent to exclude homosexuals.¹⁷ Despite Congress’s deference to medical expertise in drafting the provision, the Court held that “psychopathic personality” was a legal term of art independent of its clinical meaning in medical discourse, and as such, clearly included homosexuality.¹⁸

In 1973 the American Psychiatric Association removed homosexuality from its official list of disorders.¹⁹ Six years later, in 1979, the PHS informed the INS that it would no longer certify homosexuals as having psychopathic personalities.²⁰ In 1980, the Department of Justice reacted by announcing that despite the action of the PHS, it continued to have a “legal obligation to exclude homosexuals from entering the United States” because Congress’s ban on “sexual deviation” was still in effect.²¹ The Department of Justice indicated that it would carry out that obligation, however, “solely upon the voluntary admission by the alien that he or she was homosexual.”²²

Unsurprisingly, the Justice Department’s new policy was challenged and the courts split on the legality of excluding lesbians and gay men from entering the United States on the basis of their sexual orientation. In *Hill v. INS*, the Ninth Circuit ruled that gay people could not be excluded from the United States without a

15. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending 8 U.S.C. § 1182(a)(4)) (amended again in 1990).

16. *Boutilier v. INS*, 387 U.S. 118, 119 (1967).

17. *Id.* at 120.

18. *Id.* at 124.

19. Minter, *supra* note 7, at 779; *see also* SIMON LEVAY, *QUEER SCIENCE* 222-25 (1996) (summarizing the history of the APA’s decision to remove homosexuality from its list of disorders).

20. Memorandum from Julius Richmond, Assistant Sec. for Health, U.S. Dep’t of Health, Educ. & Welfare, and Surgeon Gen. to William Foege and George Lythcott (August 2, 1979); *see also* Minter, *supra* note 7, at 779.

21. *See* Press Release, Dep’t of Justice, Guidelines and Procedures for the Inspection of Aliens who are Suspected of Being Homosexual (Sept. 9, 1980) [hereinafter Guidelines and Procedures]; *see also* Minter, *supra* note 7, at 779.

22. *See* Guidelines and Procedures, *supra* note 21.

certification from the PHS.²³ Prior to the court's decision, the medical certificate could no longer be obtained.²⁴ In *In re Longstaff*, the Fifth Circuit reached the opposite result, denying petitioner's naturalization, as he had not been "lawfully admitted" into the country because he was homosexual.²⁵

The Immigration Act of 1990 resolved the conflict among the courts and eliminated the exclusionary provision altogether.²⁶ Under the 1990 Act, lesbians and gay men were no longer automatically barred from entering or immigrating to the United States. However, even after the 1990 Act, gay men and lesbians were vulnerable to deportation, exclusion, or denial of citizenship based on convictions for sodomy or public morality offenses under the "crimes involving moral turpitude" or "good moral character" exclusions still enshrined in immigration laws.²⁷ Thus, although the Immigration Act of 1990 eliminated the rationale for doing so, the U.S. government continued to exercise its discretion to use sodomy statutes to exclude and deport gay people from the country, as well as to deny them citizenship.²⁸ In *Lawrence v. Texas*,

23. 714 F.2d 1470 (9th Cir. 1983).

24. On August 2, 1979, the Surgeon General announced that the PHS would no longer issue certificates solely because an alien was suspected of being homosexual. *Id.* at 1472.

25. 716 F.2d 1439, 1440 (5th Cir. 1983). Longstaff had been admitted to the United States eighteen years earlier as a permanent resident. *Id.* In seeking citizenship, Longstaff admitted that he had always been a homosexual. *Id.* at 1447. His admission, had it been made at the time of his initial entry, would have sufficed to exclude him even without a medical certificate. *See id.* at 1447-50 (contending that certification is not a prerequisite to barring an applicant's admission and that naturalization can be denied based on the applicant's voluntary admission that he or she is a homosexual).

26. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-78 (1990) (codified at 8 U.S.C. § 1182 (1990)). The "psychopathic personality" exclusion was eliminated after years of lobbying by openly gay congressperson Barney Frank and others, and came in the wake of the litigation outlined above. Minter, *supra* note 7, at 771. The elimination was part of a "general reform of the old exclusion laws." *Id.* at 771-72, 780. Moreover, by this time, the "terminology used in the provision was medically obsolete." *Id.* at 780.

27. Immigration and Nationality Act (McCarran-Walter Act), ch. 477, § 212(a)(2)(A)(i)(I), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2000)); *see id.* § 316(a)(3) (codified as amended at 8 U.S.C. § 1427(a)(3) (2000)); *see also* Minter, *supra* note 7, at 772 (explaining that in the aftermath of the Immigration Act of 1990, "lesbians and gay men convicted of sodomy or of a public morality offense were at risk of exclusion or deportation under the 'crimes involving moral turpitude' exclusion, and might be denied citizenship under the 'good moral character' requirement").

28. Minter, *supra* note 7, at 772-73, 783. *But see* Nemetz v. INS, 647 F.2d 432

the United States Supreme Court held a Texas statute criminalizing homosexual sodomy unconstitutional, explaining that the government can not intervene to make private homosexual conduct between consenting adults a crime.²⁹ Since that decision, the Department of Homeland Security (DHS) has not proffered guidance as to how it will treat individuals with sodomy convictions for immigration purposes.

While lesbians and gay men are no longer statutorily barred from entering the United States, immigration laws continue to discriminatorily impact them in many ways.³⁰ The discriminatory impact of U.S. immigration laws against lesbians and gay men is most prevalent in the arena of family immigration. Foreign nationals currently cannot immigrate to the United States based on their committed relationship with a U.S. citizen or lawful permanent resident of the same sex.

(4th Cir. 1981) (holding private consensual homosexual acts in themselves do not make one ineligible for naturalization for lack of "good moral character").

29. 539 U.S. 558 (2003).

30. U.S. immigration law disproportionately affects lesbian and gay foreign nationals seeking entry into the United States. Foreign nationals that have communicable diseases, such as HIV, are inadmissible or removable from the United States. See 8 U.S.C. § 1182(a)(1)(A)(i) (2000) (stating an alien "who is determined . . . to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome" is ineligible for a visa and may not enter the United States). Existing waivers to exclusion and relief from removal can be granted to foreign nationals if they can demonstrate that their opposite-sex spouse is a U.S. citizen or lawful permanent resident. See *id.* § 1182 (g)(1)(A) (providing that the Attorney General may waive application of subsection (a)(1)(A)(i) to an alien who is the spouse of a U.S. citizen, lawful permanent resident, or alien with an immigrant visa). Similar bars to admission also have a disproportionate effect on homosexuals, as the applicable waiver provisions do not apply to lesbian and gay foreign nationals. These include the three and ten year bars to admission for aliens that were unlawfully present in the United States: (i) for more than six months, but less than one year who then departed the United States and subsequently sought to re-enter or adjust their status (three year bar), or (ii) for one year or more, then departed the United States and subsequently sought to re-enter or adjust their status (ten year bar). See *id.* § 1182 (a)(9)(B)(i). Waivers to the three and ten year bars are not available to lesbians and gay men because they require a showing of proof that refusal to admit the foreign national "would result in extreme hardship to the citizen or lawful[] resident [of an opposite-sex] spouse or parent of such alien." *Id.* § 1182(a)(9)(B)(v). A foreign national does not qualify for a waiver based on the extreme hardship suffered by a same-sex partner that is a U.S. citizen or legal permanent resident.

III. THE EXCLUSION OF LESBIAN AND GAY BI-NATIONAL COUPLES FROM FAMILY-SPONSORED IMMIGRATION TEARS APART AMERICAN FAMILIES AND IS CONTRARY TO THE GROWING INTERNATIONAL TREND TO RECOGNIZE SAME-SEX COUPLES FOR IMMIGRATION PURPOSES

Under the Immigration and Nationality Act (INA), U.S. citizens and lawful permanent residents may sponsor their spouses for immigration purposes.³¹ The Immigration and Nationality Act does not define the term “spouse,” but has historically been interpreted to apply only to opposite-sex couples.³² In 1996, Congress clarified the meaning of “spouse” under the INA, and all federal statutes, to refer only to a person of the opposite sex who is a husband or a wife, thereby excluding recognition of same-sex spouses.³³ As a consequence, same-sex partners of U.S. citizens and permanent residents are not considered “spouses” under immigration law and their partners cannot sponsor them based on their relationship for family-based immigration.³⁴ Current immigration law forces many bi-national couples to separate, relocate to another country, and/or live apart, maintaining expensive and emotionally challenging long distance relationships.³⁵

31. Immigration and Nationality Act, ch. 477, § 201(b)(2)(A)(i), 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1151(b)(2)(A)(i) (2000)); *id.* § 203(a)(2) (codified at 8 U.S.C. § 1553(a)(2) (2000)).

32. In March 2003, William Yates of the United States Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), issued a memorandum instructing DHS officials about various aspects of marriage under U.S. immigration law. Cyrus D. Mehta, *Gay Marriage and Immigration*, Mar. 15, 2004, available at http://cyrusmehta.com/news_cyrus.asp?news_id=964&intPage=10. One small section of that memorandum addresses the issue of marriages between same-sex couples and refers to the Defense of Marriage Act. *Id.* Yates instructed that for a relationship to qualify as marriage for purposes of federal law, including under the Immigration and Nationality Act, one partner must be a man and the other a woman in a marriage. *Id.* In 1982, the Ninth Circuit considered whether a citizen’s spouse must be of the opposite sex in order to fall within the meaning of “spouse” under section 201(b) of the Immigration and Nationality Act (INA) and whether such a requirement would be constitutional. *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982). The court held that section 201(b) of the INA categorically excluded same-sex partners from its definition of “spouse.” *See id.* at 1041 (holding Congress’s intent under the INA was that “only partners in heterosexual marriages [can] be considered spouses under section 201(b)”). The decision was based, in part, on the court’s reasoning that Congress could not have intended to include same-sex partners under the term “spouses” because the INA also mandated the exclusion of homosexuals. *Id.* at 1040-41. The court also reasoned that it was adopting the “ordinary, contemporary,

Proposed U.S. legislation, the Uniting American Families Act (UAFA), recognizes the right to family and family unity by granting bi-national same-sex couples immigration benefits.³⁶ The UAFA would promote and protect the international right to family unity for all families, and align the United States with eighteen other countries that already recognize same-sex couples for purposes of immigration.³⁷

A. *The Defense of Marriage Act: The Legal Basis for Excluding Lesbian and Gay Bi-National Couples from Family-Sponsored Immigration Benefits*

The federal Defense of Marriage Act (DOMA) clarified the meaning of “spouse” under the Immigration and Nationality Act.³⁸ Signed into law in 1996 by President Bill Clinton, DOMA creates a federal definition of marriage to be applied in connection with all federal statutes and programs.³⁹ The federal definition of marriage is the “legal union between one man and one woman as husband and wife.”⁴⁰ DOMA further clarifies that, for federal purposes, the “word spouse refers only to a person of the opposite sex who is a

common meaning” of “spouse,” which at the time did not include spouses of the same sex. *Id.* at 1040. Furthermore, the Ninth Circuit held that the exclusion of gay or lesbian spouses was constitutionally permissible. *Id.* at 1043. In determining the constitutionality of the prohibition, the court noted its limited power of judicial review over immigration procedures, stating that for immigration purposes, “Congress has almost plenary power and may enact statutes which, if applied to citizens, would be unconstitutional.” *Id.* at 1042.

33. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2000)); *id.* § 2(a) (codified at 28 U.S.C. § 1738C (2000)).

34. *Id.* § 3(a) (codified at 1 U.S.C. § 7); *id.* § 2(a) (codified at 28 U.S.C. § 1738C).

35. A preliminary study of the 2000 census by demographer Gary Gates of the Williams Project on gay studies at the UCLA School of Law, found that in six percent of the 594,391 same-sex unmarried couples, one of the partners is a citizen and one is a noncitizen; that would indicate more than 35,000 same-sex bi-national couples living in the United States at the time of the census. GARY J. GATES, BI-NATIONAL SAME-SEX UNMARRIED PARTNERS IN CENSUS 2000: A DEMOGRAPHIC PORTRAIT 1 (2005), http://www.law.ucla.edu/williamsproj/publications/Binational_Report.pdf.

36. Uniting American Families Act, H.R. 3006, 109th Cong. (2005).

37. Those eighteen countries are: Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and the United Kingdom. *See infra* notes 61-76; *see also* GATES, *supra* note 35, at 2.

38. This publication will not address the legality of DOMA.

39. Defense of Marriage Act § 3 (codified at 1 U.S.C. § 7 (2000)).

40. *Id.*

husband or a wife.”⁴¹ The effect of such language is to exclude all same-sex couples from having a federally recognized marriage. Under DOMA, this definition applies to any federal law or regulation as well as to any interpretation of the various administrative bureaus and agencies of the federal government.⁴²

By itself, DOMA precludes recognizing any spousal rights or benefits, including immigration, for same-sex couples. Therefore, unlike heterosexual spouses, lesbian and gay foreign nationals cannot immigrate to the United States based on their relationship with a U.S. citizen or lawful permanent resident of the same sex. Only opposite-sex married persons may sponsor their foreign national spouses for permanent resident status.⁴³

The immigration restriction against bi-national same-sex partners remains true for bi-national same-sex couples whose marriage is legally recognized by the state or foreign country in which they wed. Because U.S. immigration benefits are federal rights, only the federal government can confer legalization onto a foreign national. Under DOMA, marriages, civil unions, and domestic partnerships recognized by states confer no immigration benefits to bi-national same-sex couples.⁴⁴ Therefore, even though marriages between same-sex couples are being legally performed in other countries, as well as in the State of Massachusetts, such recognition does not impact the current federal immigration law and policy precluding lesbian and gay U.S. citizens or lawful permanent residents from sponsoring their foreign national partners for immigration benefits.

To date, DOMA has not been successfully challenged in the context of immigration benefits or otherwise.⁴⁵ Challenging the

41. *Id.*

42. *Id.*

43. See Mehta, *supra* note 32 (discussing the Yates memo).

44. See Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 3, 1996 U.S.C.C.A.N. (110 Stat.) 2419 (codified at 28 U.S.C. 1738C (2000) and 1 U.S.C. 7 (2000)).

45. See, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 870, 880 (C.D. Cal. 2005) (Finding section 3 of DOMA constitutional under the Due Process Clause because the fundamental right to marriage does not include marriages between two people of the same sex, and constitutional under the Equal Protection Clause because the government’s interest in promoting procreation or “stable relationships that facilitate rearing children” passes a rational basis test); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (finding DOMA constitutional and dismissing complaint seeking declaratory judgment and injunction against its enforcement); *In re Kandu*, 315 B.R. 123, 140-41 (Bankr.

immigration treatment of same-sex couples in court is not currently sanctioned by scholars and public interest groups. DOMA's virtual insulation of marriage between same-sex couples and any related federal benefits, as well as the Supreme Court's required deference to Congress, makes litigation in immigration a disfavored option for challenging the issue. Further, a negative decision at this point would create a blockade for same-sex bi-national couples' immigration efforts. A court challenge to DOMA is not the only avenue for changing the treatment of bi-national same-sex couples under immigration law. Currently, the best way to achieve immigration equality for bi-national same-sex couples is to further develop the ideas of family rights and unity for all U.S. citizens and lawful residents while advocating for legislation that recognizes and supports such rights.

B. The Uniting American Families Act Would Provide Same-Sex Bi-National Couples with Equal Immigration Rights to Opposite Sex Bi-National Couples

The Uniting American Families Act (formerly Permanent Partners Immigration Act (PPIA)) is a bill currently before Congress that provides same-sex couples with the same immigration benefits as opposite-sex couples.⁴⁶ Specifically, the UAFA would grant U.S. citizens and lawful permanent residents the right to sponsor their same-sex permanent partners to immigrate to the United States.⁴⁷ This legislation would ease the current immigration inequality and injustice endured by thousands of bi-national same-sex couples by granting immigration rights and benefits to same-sex couples. It would not alter the federal definition of spouse or provide same-sex couples with the federal

W.D. Wash. 2004) (finding DOMA constitutional and dismissing debtors'—two women married in British Columbia, Canada—joint petition in bankruptcy); *see also* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1385 (S.D. Fla. 2001) (citing DOMA and equivalent Florida law that homosexuals cannot marry and are thus relevantly dissimilar to nonmarried heterosexuals for the purposes of a rational basis test as applied to a Florida statute prohibiting adoption of children by homosexuals), *aff'd sub nom.* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), *reh'g denied* 377 F.3d 1275 (11th Cir. 2004).

46. Uniting American Families Act, S. 1278, 109th Cong. (2005); H.R. 3006, 109th Cong. (2005).

47. Uniting American Families Act, S. 1278, 109th Cong. (2005); H.R. 3006, 109th Cong. (2005).

rights and responsibilities of marriage.⁴⁸ While the UAFA does not cure the effects and reach of the Defense of Marriage Act, it will advance family unity and end the forced separation and constant fear of deportation faced by thousands of lesbian and gay couples in the United States.

Representative Jerrold Nadler (D-NY) first introduced this bill, then known as the Permanent Partners Immigration Act, to Congress in 2001.⁴⁹ In July 2003, Senator Patrick Leahy (D-VT) introduced the Senate companion bill for the first time.⁵⁰ By the end of the 108th Congress, the PPIA had garnered 129 co-sponsors in the House and 12 co-sponsors in the Senate.⁵¹ On June 21, 2005, the bill was re-introduced in both chambers of Congress under the new name, the Uniting American Families Act.⁵² If passed, the UAFA would allow U.S. citizens and permanent residents to file a visa petition on behalf of their foreign national same-sex permanent partners, allowing them to immigrate to the U.S. and adjust their status to become lawful permanent residents.⁵³ The bill defines “permanent partner” as any person eighteen years of age or older who is:

- (i) in a committed, intimate relationship with an adult U.S. citizen or legal permanent resident eighteen years of age or older in which both parties intend a lifelong commitment;

48. See Uniting American Families Act, S. 1278, 109th Cong. (2005); H.R. 3006, 109th Cong. (2005) (inserting “permanent partners” after the term “spouses” at many points throughout the Immigration and Nationality Act).

49. Bill Summary and Status, H.R. 690, 107th Cong. (2001), <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR00690:@@L&summ2=m&>.

50. Bill Summary and Status, S. 1510, 108th Cong. (2003), <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01510:@@L&summ2=m&>.

51. *Id.*; Bill Summary and Status, H.R. 832, 108th Cong. (2003), <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR00832:@@L&summ2=m&>.

52. Bill Summary and Status, S. 1278, 109th Cong. (2005), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.01278;>; Bill Summary and Status, H.R. 3006, 109th Cong. (2005), [http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.03006.](http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.03006;)

53. See S. 1278, 109th Cong. § 3 (2005), which would amend 8 U.S.C. § 1151(b)(2)(A)(i) (2000) to include “permanent partners” as “immediate relatives” of U.S. citizens not subject to numerical limitations or worldwide limitations, thus allowing U.S. citizens to file a petition under 8 U.S.C. § 1154(a)(1)(A)(i). See also *id.* § 5 (amending 8 U.S.C. § 1153(a) to give “permanent partners” and spouses of permanent residents the same preference allocation, allowing permanent residents to file a petition under 8 U.S.C. § 1154(a)(1)(B)(i)).

- (ii) financially interdependent with that other person;
- (iii) not married to, or in a permanent partnership with, anyone other than that other person;
- (iv) unable to contract with that person a marriage cognizable under the Immigration and Nationality Act; and
- (v) is not a first, second, or third degree blood relation of that other individual.⁵⁴

The permanent partners could prove that they have a bona fide relationship through documentary and testimonial evidence. The sponsoring “permanent partner” would also have to commit to providing financial support before the other partner could obtain immigration benefits based on their relationship.⁵⁵

These requirements ensure that the UAFA protects same-sex couples in committed relationships while preventing fraudulent immigration applications. Indeed, the applicable burden of proof standard would be identical to that which currently applies to all heterosexual married couples seeking immigration benefits. Moreover, just like heterosexual couples, permanent partners would be subject to severe criminal penalties for immigration fraud or other abuse in connection with the application for permanent residence.⁵⁶ Because the Act’s intent is to remedy the unequal treatment of same-sex partners, it would not affect unmarried heterosexual couples, who currently have the option to marry and seek relief under the Immigration and Nationality Act.⁵⁷

The UAFA is analogous to immigration equality legislation and policy adopted by Australia and Israel.⁵⁸ It does not alter or redefine the federal definition of marriage for immigration purposes or otherwise. Nor does it provide additional legal rights and responsibilities comparable to those afforded through marriage. Instead, it simply provides U.S. citizens and lawful permanent residents with the right to petition for their foreign

54. S. 1278, 109th Cong. § 2 (2005).

55. See Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(4)(C)(ii), 1183a(f).

56. See, e.g., S. 1278 § 18 (amending 8 U.S.C. 1325(c) to include permanent partners in the marriage fraud provision).

57. See *id.* § 2(51)(D).

58. See *infra* Part III.C and note 65.

national permanent partners to immigrate to the United States, a right provided heterosexual bi-national couples. The right to petition for one's foreign national permanent partner would provide for family unity and strengthen familial bonds. Partners unable to reside together are forced to separate, relocate to another country, and/or maintain expensive and emotionally challenging long distance relationships. As recognized by *Lawrence*, lesbians and gay men have the right to form and sustain loving personal relationships.⁵⁹ Geographical unity is an essential element to sustain such relationships.

At the time of this publication, ten Senate members and ninety-one Representatives co-sponsor the bill.⁶⁰

59. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

60. Sen. Boxer, Barbara (CA); Sen. Chafee, Lincoln (RI); Sen. Corzine, Jon S. (NJ); Sen. Dayton, Mark (MN); Sen. Feingold, Russell D. (WI); Sen. Jeffords, James M. (VT); Sen. Kennedy, Edward M. (MA); Sen. Kerry, John F. (MA); Sen. Lautenberg, Frank R. (NJ); Sen. Murray, Patty (WA); Rep. Abercrombie, Neil (HI-1); Rep. Allen, Thomas H. (ME-1); Rep. Andrews, Robert E. (NJ-1); Rep. Baird, Brian (WA-3); Rep. Baldwin, Tammy (WI-2); Rep. Berkley, Shelley (NV-1); Rep. Berman, Howard L. (CA-28); Rep. Blumenauer, Earl (OR-3); Rep. Brown, Corrine (FL-3); Rep. Brown, Sherrod (OH-13); Rep. Capps, Lois (CA-23); Rep. Capuano, Michael E. (MA-8); Rep. Clay, William Lacy (MO-1); Rep. Crowley, Joseph (NY-7); Rep. Davis, Susan A. (CA-53); Rep. DeGette, Diana (CO-1); Rep. Delahunt, William D. (MA-10); Rep. DeLauro, Rosa L. (CT-3); Rep. Emanuel, Rahm (IL-5); Rep. Engel, Eliot L. (NY-17); Rep. Eshoo, Anna G. (CA-14); Rep. Farr, Sam (CA-17); Rep. Fattah, Chaka (PA-2); Rep. Filner, Bob (CA-51); Rep. Frank, Barney (MA-4); Rep. Gonzalez, Charles A. (TX-20); Rep. Grijalva, Raul M. (AZ-7); Rep. Gutierrez, Luis V. (IL-4); Rep. Harman, Jane (CA-36); Rep. Hastings, Alcee L. (FL-23); Rep. Hinchey, Maurice D. (NY-22); Rep. Holt, Rush D. (NJ-12); Rep. Honda, Michael M. (CA-15); Rep. Hoyer, Steny H. (MD-5); Rep. Inslee, Jay (WA-1); Rep. Jackson, Jesse L., Jr. (IL-2); Rep. Jones, Stephanie Tubbs (OH-11); Rep. Kennedy, Patrick J. (RI-1); Rep. Kolbe, Jim (AZ-8); Rep. Kucinich, Dennis J. (OH-10); Rep. Langevin, James R. (RI-2); Rep. Lantos, Tom (CA-12); Rep. Larson, John B. (CT-1); Rep. Lee, Barbara (CA-9); Rep. Levin, Sander M. (MI-12); Rep. Lewis, John (GA-5); Rep. Lofgren, Zoe (CA-16); Rep. Lowey, Nita M. (NY-18); Rep. Markey, Edward J. (MA-7); Rep. Matusi, Doris O. (CA-5); Rep. McCarthy, Carolyn (NY-4); Rep. McCollum, Betty (MN-4); Rep. McDermott, Jim (WA-7); Rep. McNulty, Michael R. (NY-21); Rep. Meeck, Kendrick B. (FL-17); Rep. Menendez, Robert (NJ-13); Rep. Michaud, Michael H. (ME-2); Rep. Miller, Brad (NC-13); Rep. Miller, George (CA-7); Rep. Moore, Dennis (KS-3); Rep. Moore, Gwen (WI-4); Rep. Moran, James P. (VA-8); Rep. Napolitano, Grace F. (CA-38); Rep. Neal, Richard E. (MA-2); Rep. Olver, John W. (MA-1); Rep. Owens, Major R. (NY-11); Rep. Pallone, Frank, Jr. (NJ-6); Rep. Pastor, Ed (AZ-4); Rep. Payne, Donald M. (NJ-10); Rep. Pelosi, Nancy (CA-8); Rep. Rangel, Charles B. (NY-15); Rep. Rothman, Steven R. (NJ-9); Rep. Sabo, Martin Olav (MN-5); Rep. Sanchez, Linda T. (CA-39); Rep. Sanders, Bernard (VT); Rep. Schakowsky, Janice D. (IL-9); Rep. Schiff, Adam B. (CA-29); Rep. Serrano, José E. (NY-16); Rep. Sherman, Brad (CA-27); Rep. Simmons, Rob (CT-2); Rep. Smith, Adam (WA-9); Rep. Solis, Hilda

C. *The United States Should Heed Legislation of Eighteen Countries World-Wide that Have Granted Immigration Equality*

Currently eighteen countries around the world recognize same-sex couples for immigration purposes, generally through marriages, registered domestic partnerships, or civil unions.⁶¹ The U.S. government's failure to provide same-sex bi-national couples with equal access to immigration rights provided opposite-sex couples is contrary to the growing acknowledgment of same-sex relationships reflected in western democracies' immigration laws and policy. The absence of immigration equality undercuts family security and democratic ideals endorsed by U.S. politic.

Belgium, Canada, the Netherlands, South Africa, and Spain recognize marriages between same-sex partners and thereby provide immigration rights and benefits to bi-national same-sex spouses.⁶² Denmark, Finland, Iceland, Norway, Sweden, and the

L. (CA-32); Rep. Stark, Fortney Pete (CA-13); Rep. Tierney, John F. (MA-6); Rep. Wasserman Schultz, Debbie (FL-20); Rep. Watson, Diane E. (CA-33); Rep. Waxman, Henry A. (CA-30); Rep. Weiner, Anthony D. (NY-9); Rep. Wexler, Robert (FL-19); Rep. Woolsey, Lynn C. (CA-6); Rep. Wu, David (OR-1). See Immigration Equality, Information on Current Co-Sponsors, <http://www.immigrationequality.org/template.php?pageid=152> (listing current co-sponsors of UAFA) (last visited Jan. 6, 2006).

61. Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and the United Kingdom have reformed their immigration policies and/or enacted additional legislation to allow gay and lesbian citizens to sponsor their same-sex partners for immigration purposes. See Partners Task Force for Gay & Lesbian Couples, *Immigration Roundup: A Survey of Welcoming Countries*, Aug. 16, 2005, <http://www.eskimo.com/~demian/immigr.html>; *infra* notes 62-76.

62. Belgium offers legal marriage for same-sex couples. Partners Task Force for Gay & Lesbian Couples, *supra* note 61. "Originally, it was offered only if they are both Belgium citizens, or come from a country that allows legal marriage." *Id.* The text of the Belgian law opening civil marriage to same-sex couples is available in Flemish and French. See *Projet de Loi Ouvrant le Mariage à des Personnes de Même Sexe et Modifiant Certaines Dispositions du Code Civil* [Law Project Opening Marriage to Same-Sex Persons and Modifying Certain Provisions of the Civil Code], Doc. 50 2165/ (2002/2003) (2003), <http://www.dekamer.be/FLWB/pdf/50/2165/50K2165003.pdf>.

Canada initially permitted foreign same-sex partners to apply for residency under the humanitarian and compassionate grounds exception, but now simply includes same-sex couples in its "family" immigration category. See Citizenship and Immigration Canada, Family Class Immigration, <http://www.cic.gc.ca/english/sponsor/index.html> (last updated Sept. 27, 2005).

The foreign partner of a Dutch National, or of an EU citizen resident in the Netherlands, or of a foreign national granted refugee status in the Netherlands, may settle in the Netherlands. Dutch Ministry of Justice, IND

United Kingdom have all passed legislation allowing same-sex couples to become registered partners and/or enter into civil unions, enjoying most of the rights and benefits of marriage, including immigration benefits.⁶³ France, Germany, and Portugal

Residence Wizard, <http://www.ind.nl/EN/verblijfwijzer/> (last visited on Dec. 5, 2005) (offering information for those who wish to enter the Netherlands).

In December 2005, in the case of *Minister of Home Affairs v. Fourie*, the Constitutional Court of South Africa ruled unanimously that it was unconstitutional to prevent people of the same gender marrying when marriage was permitted for people of opposite genders. CCT 60/04, available at <http://news.findlaw.com/wp/docs/glrts/mhafourie120105.pdf>. The court held that the Marriage Act 25 of 1961, insofar as it did not allow marriage between same-sex partners, was inconsistent with the constitution, but suspended the declaration of its invalidity for twelve months from the date of judgment so as “to allow Parliament to correct the defects.” *Id.* The court further held that should Parliament not correct the defects by then, the Marriage Act would then be read so as to allow same-sex partners to marry. *Id.* Since 1999, following a national court ruling that addressed the issue of immigration equality, South Africa has provided citizens with the right to sponsor their same-sex partners for immigration benefits. Hazeldean & Betz, *supra* note 4, at 18. The South African decision unanimously held that failing to treat same-sex life partners equally was a violation of the South African Constitution’s equality clause. *Id.*; see also *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs*, 2000 (1) BCLR 39 (CC) at 69 (S. Afr.). “Previously, the South African government granted immigration benefits only in heterosexual marriage relationships.” Hazeldean & Betz, *supra* note 4, at 18.

Spain recognized marriages between same-sex couples in a law that took effect on July 3, 2005. See Daniel Woolis, *Spain’s Gay Marriage Law Goes into Effect*, 365GAY.COM, July 2, 2005, <http://www.365gay.com/newscon05/07/070205spain.htm>. Since then, one court in Catalonia has denied a bi-national couple (one Spanish partner, one Indian partner) a marriage license based on an article in the Spanish civil code that foreign nationals seeking to marry must follow the laws of their country of citizenship. Daniel Woolis, *Spain’s Gay Marriage Law Hits Snag Over Foreigners*, 365GAY.COM, July 6, 2005, <http://www.365gay.com/newscon05/07/0706705spain.htm>. However, other bi-national couples have successfully wed in Spain and received the attendant immigration rights granted to married couples. See Tito Drago, *Matrimonio gay se internacionaliza [Gay Marriage is Internationalized]*, INTER PRESS SERVICE NEWS AGENCY (2005), <http://www.ipsnoticias.net/nota.asp?idnews=34585>. Finally, on the week before August 10, 2005, Spain’s justice ministry overturned the unfavorable ruling in Catalonia, and ruled that there are no such restrictions on marriages between same-sex bi-national couples in Spain. See *Spain Opens Door to Foreign Gay Marriages*, 365GAY.COM, Aug. 10, 2005, <http://www.365gay.com/newscon05/08/081005spain.htm>. Information about applying for a *Visa de Reagrupación Familiar* or Schengen visa (for family reunification) is available at the Spanish Consulate. See, e.g., Consulate General of Spain in New York, *Residence Visa to Reunite a Family with a Spaniard or a Citizen of the European Union*, <http://www.spainconsulny.org/%21consula.doi!/reagrupsp.html> (last visited Dec. 5, 2005).

63. Denmark’s domestic partnership law of 1989, amended in 1999, provides registered partners all the rights associated with marriage, including immigration,

where one of the partners is Danish. “Foreign nationals can obtain a residence permit in Denmark if they have a spouse, cohabiting companion or registered partner already resident in Denmark.” See Danish Immigration Service, Spouses and Cohabiting Companions, <http://www.udlst.dk/english/Family+Reunification/Spouses/Default.htm> (last visited Dec. 6, 2005); see also Danish Immigration Service, Legislation and Conventions, <http://www.udlst.dk/english/Legislation/Default.htm> (last visited Dec. 6, 2005) (displaying links to an English translation of the Aliens Act).

In Finland, “[p]ersons of the same sex who have registered their partnership are considered spouses” for purposes of immigration. Finland Directorate of Immigration, Family Members of Finnish Citizens and Others than EU Citizens and Equivalent Persons, <http://www.uvi.fi/netcomm/content.asp?path=8,2472,2491&language=EN> (last visited Dec. 6, 2005). “A cohabitant can be granted a residence permit if the cohabitants have lived together for at least two years and can prove the cohabitation by presenting a lease agreement or other documentation or if the cohabitants have joint custody of a child, it is not required that the spouses have lived together for two years.” *Id.*

Under Iceland’s Registered Partnership Law 1996, bi-national lesbian and gay couples have the same rights of residence as bi-national married couples, where one is an Icelandic national. See Icelandic Directorate of Immigration, E – Residence Permit for Family Members, <http://www.utl.is/index.php?bId=202> (last visited Dec. 6, 2005).

Under Norway’s Registered Partnership Law, bi-national lesbian and gay couples have the same rights of residence as bi-national married couples when one is a Norwegian national. See Norwegian Directorate of Immigration, Family Reunification, <http://www.udi.no/templates/Page.aspx?id=4665> (last visited Jan. 12, 2006).

In 1972, the Swedish Immigration Board adopted the same rules for same-sex partners as for heterosexual domestic partners in cases where applicants referred to family connection as a reason for immigrating to Sweden. SWEDISH MIGRATION BOARD, FACTS ABOUT RESIDENCE PERMIT ON THE GROUNDS OF FAMILY TIES (2005), http://www.migrationsverket.se/infomaterial/bob/sokande/familj/utfam_en.pdf. The first actual residence permit to be granted under this decision came in the mid-1970s. *Id.* Bi-national couples in a Registered Partnership enjoy the same treatment as opposite-sex married couples when one partner is a Swedish national. *Id.* Sweden’s 1995 partnership law gives registered partners the same legal rights as heterosexual marriages. *Id.*

The United Kingdom’s Civil Partnership Act, which came into effect on December 5, 2005, “affords same-sex couples almost all the same benefits as heterosexual married couples.” *Civil Unions begin in UK*, WORKPERMIT.COM, Dec. 16, 2005, http://www.ukimmigration.com/news/2005_12_16/uk/civil_unions_begin.htm. The legal status allows recognition of same-sex partners for immigration and nationality purposes. *Id.* “Civil partners gain rights to survivor pensions[,] hospital visitation, and equal treatment for tax purposes. They will be exempt, as married couples are, from testifying against each other in court. They will also be deemed stepparents of each others’ children, and able to formally adopt.” *Id.* Prior to the Civil Partnership Act, a same-sex partner of a British citizen, European Union national or permanent resident of the U.K. could be granted permission to remain in the U.K. Immigration Rules, pt. 8, § 1, ¶ 295A (U.K.), available at http://www.ind.homeoffice.gov.uk/ind/en/home/lawspolicy/immigration_rules/part_8/part_9.html.

have created alternative partnership schemes which provide a limited number of legal rights to same-sex partners, including the right to petition one's same-sex partner for immigration benefits.⁶⁴ Australia and Israel have reformed their immigration policies to recognize same-sex couples without granting the right to marry or creating an alternative partnership scheme.⁶⁵

Brazil provided citizens with the right to sponsor their same-sex partners for immigration benefits following national court

64. "France grants gay and lesbian couples immigration rights through a less comprehensive partnership scheme called the Pacte Civil de Solidarite (PACS). The PACS is open to opposite-sex couples as well as same-sex couples and is not intended to be parallel to marriage; it does not change a person's civil status from single to married, nor is a formal proceeding similar to a divorce required to terminate the relationship. It does, however, confer immigration rights." Hazeldean & Betz, *supra* note 4, at 17.

"Germany passed a Registered Life Partnership Law in November 2000, [creating *Lebenspartnerschaft*, or "Life Partnership,"] which grants participating same-sex couples a limited number of legal rights including inheritance, tenancy, and immigration." *Id.* at 17-18. Prior to the passage of Germany's partnership scheme, a number of same-sex couples managed to obtain residence permits for the foreign partner by invoking the ruling of the Higher Administrative Court in Munster. See generally Stephen Ross Levitt, *New Legislation in Germany Concerning Same-Sex Unions*, 7 ILSA J. INT'L. & COMP. L. 469 (2001) (providing an extensive description of Germany's history of same-sex legislation and recent legislative developments). The Munster court, which has sole jurisdiction in Germany in appeals regarding visa matters, ruled that the European Convention on Human Rights implied a right for the foreign partner of a bi-national same-sex couple in a lasting relationship to be granted a residence permit. *Id.* The German Foreign Ministry appealed this ruling but then allowed the time-limit for the written submission of the appeal to expire so that the ruling became legally valid. *Id.* Before the Registered Life Partnership Law became enacted, each region individually dealt with the issue of same-sex partner immigration. *Id.*

"Portugal passed a . . . statute in March 2001, creating an institution called a registered union that grants same-sex couples a limited number of rights, including the ability to sponsor a foreign partner for immigration." Hazeldean & Betz, *supra* note 4, at 18.

65. In Australia, same-sex partners of Australian citizens, permanent residents, or eligible New Zealand citizens gain permanent residence to Australia under the Interdependency class of available relationships. See Australian Gov't, Dep't of Immigr. & Multicultural and Indigenous Affairs, Fact Sheet 30: Family Stream Migration—Partners, <http://www.immi.gov.au/facts/30partners.htm> (last visited Jan. 12, 2006).

Since 1994, in the form of common law marriage, Israel has granted unregistered cohabitation for same-sex couples. *Civil Unions in Israel*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Civil_unions_in_Israel (last visited Jan. 6, 2006). Prior to 1994, common law marriage was only extended to heterosexual couples. *Id.* Following lawsuits in 1994-1996, same-sex couples enjoy several benefits. *Id.*

rulings that addressed the issue of immigration equality.⁶⁶ In 2003, a Brazilian court held that same-sex unions entered into abroad must be recognized for purposes of immigration in Brazil.⁶⁷ This ruling enables bi-national couples who enter into marriage, a civil union, or domestic partnership, to utilize Brazilian immigration procedures associated with sponsoring a spouse.⁶⁸ Although slow to implement national adherence to the decision, the Brazilian government eventually “dispose[d] of the criteria for the concession of temporary or permanent visa, or of definitive permanence to the male or female partner, without distinction of sex.”⁶⁹ The Brazilian National Council on Immigration currently recognizes same-sex bi-national couples for immigration purposes.⁷⁰

Since March 29, 1999, New Zealand’s immigration law has allowed for same-sex partners of New Zealand citizens or residents to apply for residence in New Zealand in the same manner as different-sex spouses or partners.⁷¹ Prior to this alignment, same-sex couples were able to immigrate although serious constraints applied against them that were not applicable to similarly situated heterosexual couples.⁷² For instance, “same sex couples ha[d] to

66. Hazeldean & Betz, *supra* note 4, at 18.

67. Press Release, Immigration Equality, Brazil Clarifies its Same-Sex Immigration Policy (May 11, 2005), [http://www.lgirtf.org/uploadedfiles/Brazil clarifies same-sex immigration policy.pdf](http://www.lgirtf.org/uploadedfiles/Brazil%20clarifies%20same-sex%20immigration%20policy.pdf) [hereinafter Brazil 2005 Press Release]; *see also* Press Release, Love Sees No Borders, Brazil Beats U.S. in Providing Immigration Equality to Same-Sex Couples (Dec. 18, 2003), http://www.loveeseenoborders.org/Rel_121803.html.

68. Partners Task Force for Gay & Lesbian Couples, Immigration Roundup: A Survey of Welcoming Countries, Aug. 16, 2005, <http://www.eskimo.com/~demian/immigr.html> (last visited Jan. 6, 2006).

69. Press Release, Brazilian Rainbow Group, Brazil Clarifies Its Same-Sex Immigration Policy, (May 11, 2004), <http://www.brgny.org/Press.html> (quoting Brazil’s National Immigration Council’s Administrative Resolution Number 3 of December 3, 2003); Brazil 2005 Press Release, *supra* note 67.

70. Brazil 2005 Press Release, *supra* note 67; Love Sees No Borders, *supra* note 67.

71. Hazeldean & Betz, *supra* note 4 at 18. In 2004, New Zealand passed a civil union law that took effect in April 2005; the immigration laws applicable to bi-national same-sex couples are unaffected by the civil union law. *See Internal Affairs Prepares for Civil Unions*, NEW ZEALAND HERALD, Dec. 10, 2004, available at [http://www.nzherald.co.nz/section/ story.cfm?c_id=1&objectid=9002623](http://www.nzherald.co.nz/section/story.cfm?c_id=1&objectid=9002623); *see also* The New Zealand Department of Internal Affairs, Services, Civil Union, http://www.bdm.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Civil-Union?OpenDocument (last visited Jan. 16, 2006) (describing the Civil Union Act 2004).

72. Media Statement, Hon Tuariki John Delamere, N.Z. Minister of Immigration, Immigration, Discrimination and Same-Sex de Facto Couples (Dec.

show their relationship [was] at least of four years duration before it [would be] recognized [sic] for the purposes of residence eligibility, whereas de facto heterosexual couples ha[d] to show they've been together for only two years."⁷³ In expanding its immigration law and policy to include same-sex couples, the New Zealand government relied upon the New Zealand Human Rights Act of 1993 which prohibits discrimination on the basis of sexual orientation.⁷⁴ Moreover, since 2001, "partners of student or work visa or permit holders may be issued with temporary visas or granted temporary permits of a type appropriate to their needs for the currency of their partner's visa or permit."⁷⁵

On February 11, 2003, [the European Parliament of the European Union] approved a directive guaranteeing same-sex couples freedom of movement among member states equal to that of married heterosexual couples, where those same-sex relationships are recognized. Justification for the legislation was unambiguous: the European Union declared it must "reflect and respect the diversity of family relationships that exist in today's society" by including same-sex couples.⁷⁶

All eighteen countries have adopted varying legal bases for recognizing bi-national same-sex couples for immigration purposes. Behind each approach, however, is the inherent recognition by these countries' politic that such legislation and policy furthers the right to family and the importance of family unity, regardless of sexual orientation. Absence of similar U.S. legislation abrogates our obligation under international law to promote and protect

22, 1998), *available at* <http://www.gaylawnet.com/news/1998/im98.htm>.

73. *Id.*

74. *Id.*; *see also* Immigration New Zealand, Partner, <http://www.immigration.govt.nz/migrant/stream/live/partner/> (last visited Jan. 6, 2006) (offering information regarding immigration policies in New Zealand); NEW ZEALAND IMMIGRATION SERVICE, OPERATIONS MANUAL § F3.10 (2001) (setting out evidentiary requirements for living in a "genuine and stable" relationship), *available at* http://www.immigration.govt.nz/nzis/operations_manual/5538.htm (last visited Jan. 6, 2005).

75. *Compare* NEW ZEALAND IMMIGRATION SERVICE, OPERATIONS MANUAL § E4.5a (2001), *available at* http://www.immigration.govt.nz/nzis/operations_manual/5089.htm, *with* NEW ZEALAND IMMIGRATION SERVICE, OPERATIONS MANUAL § E4.5a (2003), *available at* http://www.immigration.govt.nz/nzis/operations_manual/6161.htm, *and* NEW ZEALAND IMMIGRATION SERVICE, OPERATIONS MANUAL § E4.5a (2005), *available at* http://www.immigration.govt.nz/nzis/operations_manual/990.htm#o7611.

76. Hazeldean & Betz, *supra* note 4, at 18.

family unity.⁷⁷ In adopting the UAFA, Congress will be strengthening the right to family and family unity for gay and lesbian U.S. citizens and lawful permanent residents as well as their children.

IV. INTERNATIONAL LAW AND THE SUPREME COURT'S DECISION IN *LAWRENCE* SUPPORT EXTENDING IMMIGRATION BENEFITS TO SAME- SEX COUPLES

The Supreme Court's decision in *Lawrence* relied heavily upon international norms to strike down a Texas state anti-sodomy law. In so doing, the Court affirmed the right to form and sustain loving personal relationships, regardless of the partners' genders, and to lead private lives free of government restriction and legal condemnation. Current immigration law acts to restrict the right of bi-national same-sex couples to sustain loving personal relationships. Many bi-national same-sex couples are forced by law to separate because the U.S. citizen or lawful resident cannot sponsor his or her foreign-national partner for immigration benefits. Such reality is contrary to the internationally recognized right to family and family unity as well as the liberty right recognized by *Lawrence*. In adopting non-discriminatory immigration legislation and policy, eighteen countries have recognized the importance of family unity to same-sex couples. By passing the UAFA, Congress will further comply with its obligations under international law to protect the right to family and family unity. Moreover, Congress will further the liberty interest of same-sex couples, recognized by *Lawrence*, to form and sustain loving personal relationships without the governmental intrusion of forced separation.

A. *The International Right to Family and Family Unity and Its Application to Immigration Law and Policy*

There is broad international consensus on the importance of the family. International human rights law protects the right to family life. As one court has noted, "[t]he essence of family life is the right to live together."⁷⁸ Moreover, a variety of different treaty provisions suggest that current international law contains norms

77. See *infra* Part IV.

78. *Mojica v. Reno*, 970 F. Supp. 130, 149 (E.D.N.Y. 1997).

against involuntary family separation.⁷⁹ The protection of the international right to family life and unity is of particular relevance to foreign nationals, both in matters of entry and deportation, as well as in the conditions of residence. Immigration equality is necessary to protect the families and family unity of same-sex couples.

1. International Law Mandates that the United States Protect the Right to Family Life and Family Unity

International treaty law renders a duty upon State Parties to uphold the provisions set forth within a given treaty instrument.⁸⁰ States become Party to an international treaty upon signature and ratification of the instrument. Upon such ratification, State Parties are obliged to implement national legislation consistent with the duties and obligations to which the treaty alludes. The Universal Declaration of Human Rights (“Universal Declaration”); the International Covenant of Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; and three regional human rights conventions for Europe, the Americas, and Africa entered into force in 1953, 1978, and 1986, respectively, all contain specific provisions affecting families and have implications for the development of an international norm against involuntary family separation.

The international right to family integrity is an aspect of the right to privacy, which is protected by a number of international conventions. Article 12 of the Universal Declaration of Human Rights states: “No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”⁸¹ Similar language focusing on a standard of arbitrariness is found in Article 17 of the ICCPR,⁸² Article 11 of the American Convention

79. See *infra* text accompanying notes 88-97.

80. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law . . .”).

81. Universal Declaration of Human Rights art. 12, G.A. Res. 217(A)(III), U.N. GAOR, U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter UDHR].

82. International Covenant on Civil and Political Rights art. 17, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

on Human Rights (“American Convention”),⁸³ Article 16 of the Convention on the Rights of the Child,⁸⁴ and Article 10 of the African Charter on the Rights and Welfare of the Child.⁸⁵ Article 8 of the European Convention on Human Rights (“European Convention”) provides similar protection in that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”⁸⁶ Instead of using the term “arbitrary,” the European Convention spells out the conditions under which the State may interfere with family life:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁸⁷

Various treaty provisions also “seek to protect the family unit, as opposed to the rights of individuals to remain with their families. These provisions focus on the family as an institution and its relationship to society as a whole.”⁸⁸ For instance, Article 16(3) of the Universal Declaration states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁸⁹ Article 23(1) of the ICCPR⁹⁰ and Article 17(1) of the American Convention⁹¹ contain identical language to that contained within the Universal Declaration. “Implicit in this right is the right of family members to live together,” according to

83. American Convention on Human Rights art. 11, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

84. Convention on the Rights of the Child art. 16, adopted Nov. 20, 1989, 1577 U.N.T.S. 3.

85. African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999).

86. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Council of Europe, 213 U.N.T.S. 222, 230.

87. *Id.* art. 8(2); see also Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 220 (2003) (listing treaties that address the subject and noting, “arbitrariness is the touchstone for what counts as unlawful interference with the family”).

88. Starr & Brilmayer, *supra* note 87, at 228.

89. UDHR, *supra* note 81, art. 16(3), at 71.

90. ICCPR, *supra* note 82, art. 23(1).

91. American Convention on Human Rights, *supra* note 83, art. 17(1).

one American court's interpretation of the ICCPR.⁹² To protect the fundamental right of families to live together, the ICCPR provides that "no one shall be subjected to arbitrary or unlawful interference with his . . . family"⁹³ The Preamble to the Convention on the Rights of the Child similarly describes the family as the "fundamental group of society."⁹⁴ Protections for family life are also espoused in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹⁵ Article 18 of the African Charter on Human and People's Rights goes into further detail regarding the family's cultural role and the State's obligations:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.⁹⁶

These treaties explicitly promote and protect the rights to family life and family unity. The United States, being a State Party to the ICCPR and the American Convention, has a duty under international treaty law to implement national legislation consistent with the duties and obligations alluded to within these instruments, including the right to family and family unity.⁹⁷

92. *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 608 (M.D. Pa. 2000) (citing ICCPR, *supra* note 82, art. 23(1)).

93. ICCPR, *supra* note 82, art. 17(1).

94. Convention on the Rights of the Child, *supra* note 84.

95. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 10(1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and [because] it is responsible for the care and education of dependent children.").

96. African Charter on Human and People's Rights art. 18(1), (2), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

97. "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . ." *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 67 (1804), *quoted in* *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953)); *see also*, e.g., RICHARD B. LILlich & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE 159, 160, 272 (3d ed. 1995) (discussing the Alien Tort Statute, 28 U.S.C. § 1350 (1988), which gives district courts original jurisdiction of actions by aliens for torts "committed in violation of the law of nations or a treaty of the United States"); *cf.* Judicial Conference, Second Circuit, 170 F.R.D. 201, 312-18 (1997) (public debate by members of the Court of Appeals,

Furthermore, as a member of the United Nations, the United States has a duty to respect the principles set forth in the United Nations Charter. The U.N. Charter is a treaty which binds member states of the United Nations.⁹⁸ The U.N. Charter reads, in relevant part, that the purpose of the United Nations is to promote and encourage respect for human rights.⁹⁹ While the U.N. Charter fails to define what human rights are, such rights may be defined by reference to the various human rights conventions subsequently adopted by the United Nations, known as the International Bill of Human Rights.¹⁰⁰ The Universal Declaration and the ICCPR, instruments included within the International Bill of Human Rights, recognize the international right to family. The rights contained within the International Bill of Human Rights are incorporated into the larger definition of human rights under the U.N. Charter that should be adhered to by the United States.

Lastly, the United States may have a duty under customary international law to protect and preserve the right to family and family unity as recognized by the Universal Declaration and ICCPR. Customary international law, which is comprised of the customs and usages among nations of the world, is part of the law of the United States.¹⁰¹ The United States applies the international customary law of human rights, which is part of the greater body of law.¹⁰² Treaty law can be evidence of customary international law in

Second Circuit on the effect of treaties and human rights law on the internal law of the United States).

98. U.N. Charter art. 2, para. 2 (“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”).

99. U.N. Charter art. 1, para. 3.

100. The International Bill of Human Rights incorporates the following instruments: Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Optional Protocol to the International Covenant on Civil and Political Rights; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Office of the High Commissioner for Human Rights, Fact Sheet No. 2 (Rev. 1), the International Bill of Human Rights, June 1996, <http://www.unhchr.ch/html/menu6/2/fs2.htm>.

101. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 735 (2004) (reviewing a claim that the principles of a treaty not enforceable in federal courts had “attained the status of binding customary international law”); *The Paquete Habana*, 175 U.S. 677, 700 (1900).

102. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. e (1987).

that treaties tend to reflect customary norms.¹⁰³ When a treaty codifies customary international law, the provisions that originated as customary law remain binding on all states, while any new provisions bind only the states that ratify the treaty.¹⁰⁴ The provisions within the ICCPR and Universal Declaration of Human Rights reflect customary international law.¹⁰⁵ As such, the rights to be free from arbitrary interference with family life and from arbitrary expulsion are human rights that are part of customary international law that the United States must respect.

2. *The Application of the International Right to Family Life and Family Unity to Countries' Immigration Laws and Policy*

Some of the most frequent instances of family separation occur in the context of immigration and anti-immigration policies.¹⁰⁶ Traditionally, international law has recognized a sovereign right by states to exclude and deport aliens under its domestic immigration laws.¹⁰⁷ This right, however, is limited by countervailing provisions of international law, including the right that deportees be provided with various procedural protections, have individualized deportation proceedings, and not be removed if they can demonstrate eligibility for asylum or refugee status.¹⁰⁸

“No specific human rights treaty provision bans separation of families through deportation.”¹⁰⁹ The deportation of foreign nationals may nevertheless violate various human rights treaties, specifically the treaty provisions which recognize the international right to family and family unity. For example, the U.N. Human

103. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 345 (1991); Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 222 (1991).

104. Gunning, *supra* note 103, at 213.

105. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (citing the Universal Declaration of Human Rights, General Assembly Resolution 217(III) (A) (Dec. 10, 1948), as a source of customary international law).

106. See Starr & Brilmayer, *supra* note 87, at 213. Other instances include wars and refugee crises, intra-cultural conflicts, and “changing conceptions of what constitutes a family.” *Id.* at 278, 287.

107. See *id.* at 266.

108. *Id.*; see also *Maria v. McElroy*, 68 F. Supp. 2d 206, 233-34 (E.D.N.Y. 1999), *abrogated on other grounds by Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); Louis Henkin, *Evolving Concepts of International Human Rights Law and the Current Consensus*, Speech before the Judicial Conference for the Second Circuit (June 15, 1996) in 170 F.R.D. 201, 275-76 (1997).

109. See Starr & Brilmayer, *supra* note 87, at 262.

Rights Committee has recognized that deportation can interfere with family life in violation of Article 23(1) of the ICCPR.¹¹⁰ The ICCPR prevents a nation from separating families in a manner that, while in accordance with national law, is nonetheless unreasonable and in conflict with the treaty provisions which specify that interference with family shall be “unlawful” and shall not be “arbitrary.”¹¹¹ Similarly, the European Human Rights Committee considered the application of the right to family and the rights of aliens. It noted that although the ICCPR does not recognize a right of an alien to enter or to reside in a particular state, “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of nondiscrimination, prohibition of inhuman treatment and respect for family life arise.”¹¹² In accord with this statement, the Committee also noted the following in its comment on article 23:

[T]he right to found a family implies, in principle, the possibility to procreate and live together . . . [and this] implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.¹¹³

The Committee considered the application of ICCPR article

110. *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 608 (M.D. Pa. 2000); *see also* *Aumeeruddy-Cziffra v. Mauritius*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 13, at 134, U.N. Doc. A/36/40 (Apr. 9, 1981), *reprinted in* 2 HUMAN RIGHTS L.J. 139 (The findings and recommendations of the U.N. Human Rights Committee are not binding upon the U.S. Article 19(6) of the Convention on Economic, Social, and Cultural Rights requires states to “facilitate as far as possible the reunion of the family of a foreign worker” who has legally migrated, while the 1977 European Convention on the Legal Status of Migrant Workers provides similar protections for migrant workers’ families.); Starr & Brilmayer, *supra* note 87, at 219-20.

111. *Taveras-Lopez*, 127 F. Supp. 2d at 608.

112. Elizabeth Landry, Note & Comment, *States As International Law-Breakers: Discrimination Against Immigrants and Welfare Reform*, 71 WASH. L. REV. 1095, 1108-09 (1996); *see also* International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies 18, P 5 (1992) [hereinafter HRI/GEN]. Drawing from its experience in reviewing state reports submitted under article 40 of the Covenant, the Human Rights Committee intends its comments to assist state parties in implementing their Covenant obligations. *Id.*

113. Landry, *supra* note 112, at 1109; *see also* HRI/GEN, *supra* note 112, at 28-29, P 5.

17 to a state's immigration laws that prevented women from bringing their alien husbands into the country. It held:

[T]he exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of Article 17 [Whether the immigration laws are] compatible with the Covenant depends on whether such interference is either "arbitrary or unlawful" as stated in Article 17(1), or conflicts in any other way with the State party's obligations under the Covenant.¹¹⁴

The Committee went on to find that "[i]n the present cases, not only the future possibility of deportation but the existing precarious residence situation of foreign husbands in Mauritius represents . . . an interference . . . with the family life of the Mauritian wives and their husbands."¹¹⁵

In interpreting the content of Article 8 of the European Convention "respect for family life" with regard to aliens' entry and expulsion from European states, the European Court of Human Rights has consistently held that an illegal immigrant's interest in family unity outweighs a State's interest in enforcing its immigration laws and protecting the "public order."¹¹⁶ In its decisions, the court recognized that no alien has a right to enter or reside in a particular country or a right not to be expelled. It further recognized that the expulsion or refusal of entry of persons

114. Landry, *supra* note 112, at 1109; *see also* Report of the Human Rights Committee, Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. R. 9/35, U.N. GAOR, 36th Sess., Supp. No. 40, at 134, P 9.2(b)(2)(i)(2) U.N. Doc. A/36/40 (1981) [hereinafter HRC Report].

115. *See* Landry, *supra* note 112, at 1109; HRC Report, *supra* note 114.

116. Starr & Brilmayer, *supra* note 87, at 221; *see* Landry, *supra* note 112, at 1110-11; *see also, e.g.*, Mojica v. Reno, 970 F. Supp. 130, 147-48 (E.D.N.Y. 1997); Lamguindaz v. The United Kingdom, 17 Eur. H.R. Rep. 213, 215-16 (1993) (Court report); Moustaquim v. Belgium, Eur. H.R. Rep. 802, 815 (1991) (Court report); Djeroud v. France, App. 14 Eur. H.R. Rep. 68, 79 (1991) (Court report); Berrehab v. The Netherlands, 11 Eur. H.R. Rep. 322, 331 (1988) (Court report); Abdulaziz v. United Kingdom, 7 Eur. H.R. Rep. 471, 494-95 (1985) (Court report). Lamguindaz and Djeroud reached friendly settlement with the state party so references are to the decisions of the European Commission on Human Rights. Although certainly not binding on the United States, decisions of the European Court of Human Rights are an invaluable source of international human rights jurisprudence. The European Court is especially significant because it has been interpreting fundamental human rights norms under the European Convention for nearly forty years.

from or to a country in which their immediate family is resident may violate article 8 of the European Convention.¹¹⁷ “The right to cohabit with one’s family has been held to be a central aspect of ‘family life’ under Article 8 (as well as a core element of the Article 12 right to ‘found a family’)” of the European Convention.¹¹⁸

European courts have even recognized the right to family unity for same-sex couples. A Finnish court “found a violation of article 8 [of the European Convention] in the attempted expulsion of a Russian homosexual who was in the country illegally.”¹¹⁹ “Noting his domestic partnership with a Finn, the court deemed the proposed expulsion an interference with the couple’s ‘private life’ and, hence, prohibited by article 8.”¹²⁰ Similarly, where immigration “authorities had failed to weigh the interests [of a foreign national, married to an Austrian,] in maintaining his family life against the general interests of the community in public safety, the [Constitutional Court of Austria] invalidated the visa-denial under article 8.”¹²¹

In contrast to European tribunals, U.S. courts have traditionally been reluctant to incorporate international norms into their interpretation of domestic laws.¹²² Many courts, however,

117. See *Lamguindaz*, 17 Eur. H.R. Rep. at 215-16; Landry, *supra* note 112, at 1111. Interestingly, the European Court’s position that forced separation may violate the respect for family life did not change when it considered the attempted expulsion of a long-time resident “criminal” alien or alien divorced from a national with whom he had a child. See, e.g., *Lamguindaz*, 17 Eur. H.R. Rep. at 215-16; *Moustaquim*, 13 Eur. H.R. Rep. at 815; *Djeroud*, 14 Eur. H.R. Rep. at 79; *Berrehab*, 11 Eur. H.R. Rep. at 331; see also *Mojica*, 970 F. Supp. at 147-48.

118. Starr & Brilmayer, *supra* note 87 at 220; see *Abdulaziz*, 94 Eur. Ct. H.R. at 10, P 10.

119. See *X v. Finland*, 1993 Y.B. Eur. Conv. on H.R. 499 (Sup. Admin. Ct.); Landry, *supra* note 112, at 1112. The other part of the decision rested on the fact that, as a homosexual, he might face inhuman or degrading treatment if he were returned to Russia.

120. *Id.*

121. See, *X v. Austria*, 1993 Y.B. Eur. Conv. on H.R. 487-88 (Const. Ct.); Landry, *supra* note 112, at 1113.

122. See *Breard v. Greene*, 523 U.S. 371, 376 (1998) (recalling that the Court has held that an “[a]ct of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute, to the extent of conflict, renders the treaty null”); *Rainey v. United States*, 232 U.S. 310, 316 (1914) (“[I]t is well settled that when a treaty is inconsistent with a subsequent act of Congress, the latter will prevail.”). A principle of customary international law does not preempt a contrary enactment of Congress. See *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450-51 (9th Cir. 1995); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983) (“[I]n enacting statutes, Congress is not bound by international law. If it chooses to do so, it may legislate [contrary

are now considering international law when deciding domestic cases.¹²³ Moreover, a few federal courts have considered the international right to family and family unity when adjudicating immigration law.¹²⁴ The *Lawrence* Court's reliance on international

to] the limits posed by international law.” (citation omitted); *In re Cuban*, 822 F. Supp. 192, 197-98 (M.D. Pa. 1993) (“Congress in enacting legislative law, is not bound by international law.”). Thus, “no enactment of Congress can be challenged on the ground that it violates customary international law.” *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988). Finally, according to the Restatement of Foreign Relations, “[a]n Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §115(1)(a) (1987).

123. See, e.g., Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 420 (2000). In *Cabrera-Alvarez v. Gonzales*, the petitioner sought “cancellation of removal in order to prevent hardship to his two young children, who are United States citizens.” 423 F.3d 1006, 1007 (9th Cir. 2005). He argued that the immigration judge, in denying him cancellation of removal, interpreted the “exceptional and extremely unusual hardship” standard, 8 U.S.C. § 1229b(b)(1)(D) (2000), in a manner inconsistent with international law, specifically Article 3(1) of the United Nations Convention on the Rights of the Child, which states that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.” Convention on the Rights of the Child, *supra* note 84, art. 3(1). The court denied the petition. In doing so, it recognized “the presumption that Congress intends to legislate in a manner consistent with international law is a recognized canon of statutory construction.” *Cabrera-Alvarez*, 423 F.3d at 1009. However, it held that because “Congress has the power to ‘legislate beyond the limits posed by international law,’ in some cases a statute’s text will not be susceptible to an interpretation consistent with international law.” *Id.* Thus, “an act of Congress should be construed so as not to conflict with international law where it is possible to do so without distorting the statute. The statute at issue here limits cancellation of removal to those who can demonstrate that removal would result in *exceptional and extremely unusual hardship* to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” *Id.* at 1009-10 (emphasis in original). It is noteworthy that the United States has not ratified the Convention on the Rights of the Child. *Id.* Therefore, the court found “the Convention is not ‘the supreme Law of the Land’ under the Treaty Clause of the United States Constitution.” *Id.* at 1010. In evaluating the petitioner’s claim, the court did assume that the Convention had attained the status of “customary international law.” *Id.* From that point, the analysis rested on the best interests of the child, rather than the right to family unity. *Id.* at 1011.

124. See *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev’d*, 329 F.3d 51 (2d Cir. 2003); *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598 (M.D. Pa. 2000) (holding that Article 23(1) of the ICCPR does not mandate that petitioner, convicted of aggravated felony, be accorded the opportunity to seek cancellation of removal); *Maria v. McElroy*, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999), *overruled by Restrepo v. McElroy*, 369 F.3d 627, 629 (2d Cir. 2004) (finding that customary

norms invites application of these norms to other areas of the law, including immigration. Moreover, the Supreme Court has already held that family unity is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.¹²⁵

B. The Legal and Equitable Implications of Lawrence and Its Application to Immigration Equality in the United States

In *Lawrence v. Texas*, the Court recognized the existence of and affirmed the value of same-sex relationships. In addition, although the *Lawrence* Court did not treat international consensus as determinative, it found the international community strongly supported and confirmed the correctness of its decision to overturn *Bowers*.¹²⁶ In light of the legal changes described in the preceding section, there is strong evidence of similar international support for providing legal recognition to same-sex couples for the purposes of immigration.

In *Lawrence v. Texas*, petitioners Lawrence and Garner challenged the Texas “Homosexual Conduct” law, which criminalized certain types of sexual intimacy in same-sex couples, but not in different-sex couples.¹²⁷ The Court overruled *Bowers v. Hardwick*,¹²⁸ in which it had found that a Georgia law criminalizing sodomy was constitutional.¹²⁹ The Court overruled *Bowers* for

international law prohibited arbitrary expulsion and interference with family life).

125. See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.”).

126. 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)). The Court again established its willingness to look to law in other countries to support its position in *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005). In that case, the Court affirmed the Missouri Supreme Court’s holding in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), finding the execution of minors unconstitutional. The Court based its decision on its interpretation of the Eighth and Fourteenth Amendments. However, it found its decision was confirmed by “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” 125 S. Ct. at 1198. It also acknowledged “the overwhelming weight of international opinion against the juvenile death penalty.” *Id.* at 1200. This was reflected in the laws of other countries which had outlawed or disapproved of application of the death penalty to juveniles, but also in international treaties including the ICCPR, the American Convention on Human Rights: Pact of San Jose, Costa Rica, and the African Charter on the Rights and Welfare of the Child. *Id.* at 1199.

127. 539 U.S. 558, 563 (2003).

128. 478 U.S. 186 (1986).

129. *Lawrence*, 539 U.S. at 578.

several reasons, including the growing international awareness that adults should have liberty in choosing partners for consensual intimate relationships.¹³⁰

The Court's criticism of *Bowers* has four components. First, the *Bowers* Court "misapprehended the claim of liberty there presented to it" by underestimating the "far-reaching consequences" of sodomy statutes and framing the issue merely as whether there was a "fundamental right to engage in consensual sodomy."¹³¹

Second, the *Bowers* Court relied in its ruling on a definitive version of history now criticized and rejected by the *Lawrence* Court.¹³² Specifically, the *Lawrence* Court rejected the idea that sodomy laws reflected a tradition in the U.S. of systematic punishment of homosexual acts, noting that they were instead consistent with "ensur[ing] . . . coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law" and "a general condemnation of nonprocreative sex."¹³³

Third, the *Bowers* Court ignored the general trend towards permissiveness towards same-sex relations and "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."¹³⁴ The Court noted that this trend was apparent in the fact that sodomy laws were rarely enforced by the States that had them, and that authorities in Britain and the European Court of Human Rights had found in favor of legalizing consensual homosexual conduct.¹³⁵

Finally, two Supreme Court cases decided after *Bowers* undermined its holding—*Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³⁶ and *Romer v. Evans*.¹³⁷ *Casey* was a due process case in which the Court reaffirmed that "laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."¹³⁸ The Court reasoned that *Casey*'s

130. *Id.* at 572-73.

131. *Id.* at 567.

132. *Id.* at 568.

133. *Id.* at 569-70.

134. *Id.* at 572.

135. *Id.* at 572-73.

136. 505 U.S. 833 (1992).

137. 517 U.S. 620 (1996); *see also Lawrence*, 539 U.S. at 573-74.

138. *Lawrence*, 539 U.S. at 573-74 (interpreting *Casey*, 505 U.S. at 851 (joint

guarantee of autonomy extends to those in a homosexual relationship, who must be allowed to make “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . central to the liberty protected by the *Fourteenth Amendment*.”¹³⁹

Romer was an equal protection case in which the Court held unconstitutional a law that was “born of animosity”¹⁴⁰ towards homosexuals and that “had no rational relation to a legitimate governmental purpose.”¹⁴¹ The Court declined to use *Romer* alone to base the *Lawrence* decision on the Equal Protection Clause, however, recognizing that such a decision would leave uncertain the constitutionality of sodomy laws drawn to prohibit the conduct between same-sex and different-sex partners.¹⁴²

The *Lawrence* Court noted that because *Romer* and *Casey* had weakened the precedent set by *Bowers*, criticism from other sources takes on greater significance.¹⁴³ These “other sources” include legal scholars and foreign courts and legislatures, many of which have recognized a right for homosexual adults to engage in “intimate, consensual conduct.”¹⁴⁴ The *Lawrence* Court looked outside the borders of the United States and relied heavily on other tribunals’ analyses in examining the issue of anti-sodomy laws. Justice Kennedy’s decision noted the developments in England and under the European Convention on Human Rights to make the point that there is an international view that anti-sodomy laws violate basic human rights.¹⁴⁵ Moreover, the Court noted that this trend was apparent in the fact that sodomy laws were rarely enforced by the states that had them and that authorities in Britain and the European Court of Human Rights had found in favor of legalizing consensual homosexual conduct.¹⁴⁶ The *Lawrence* Court also noted that many authorities at the time of *Bowers*, including a committee advising the British Parliament in 1957 and the European Court of Human Rights, recommended the decriminalization of sodomy.¹⁴⁷

opinion of O’Connor, Kennedy, and Souter, JJ.)).

139. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851 (emphasis added)).

140. *Id.* (quoting *Romer*, 517 U.S. at 634).

141. *Id.*

142. *Id.* at 575.

143. *Id.* at 576.

144. *Id.* at 576-77.

145. *Id.* at 572-73.

146. *Id.*

147. *Id.*

Further, the *Lawrence* Court imported the concept of Article 8 of the European Convention (right to respect for private life) into its interpretation of the boundaries of “liberty” protected by the Due Process Clause. The court held: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”¹⁴⁸

The *Lawrence* Court made clear that in overruling *Bowers* it was doing more than decriminalizing an act—it was affirming the right of gay people to form and sustain loving personal relationships and to lead their private lives free of government restriction and legal condemnation. The Court declared that gay couples “are entitled to respect for their private lives.”¹⁴⁹ It recognized that sodomy prohibitions wrongly “seek to control a personal relationship that . . . is within the liberty of persons to choose,” in which intimate sexuality may be “but one element in a personal bond that is more enduring.”¹⁵⁰ Likewise, in her concurrence, Justice O’Connor observed that sodomy laws had been abused to deny gay people rights in the very context before this Court: “the law ‘legally sanctions discrimination against [homosexuals]’ . . . in the area[] . . . ‘of family issues . . .’”¹⁵¹ Justice O’Connor noted that the Constitution is most skeptical of state action that “inhibits personal relationships.”¹⁵²

Crucial to understanding the decision in *Lawrence* is the recognition that same-sex relationships deserve the same liberty rights as other family units. The *Lawrence* Court explicitly stated that its ruling was silent on whether a same-sex relationship was entitled to formal recognition in the law.¹⁵³ Its reasoning, however, implies that such recognition might be appropriate where its absence is so damaging as to actively infringe on the liberty of “homosexual persons” to choose how and with whom they create a

148. *Id.* at 578. Article 8 of the European Convention on Human Rights provides a right to respect for one’s “private and family life, his home and his correspondence,” subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society.” Landry, *supra* note 112, at 1110; *see also* Arthur S. Leonard, *The Impact of International Human Rights Developments on Sexual Minority Rights*, 49 N.Y.L. SCH. L. REV. 525 (2004).

149. *Lawrence*, 539 U.S. at 578.

150. *Id.* at 567.

151. *Id.* at 582. (O’Connor, J., concurring) (citation omitted).

152. *Id.* at 580.

153. *Id.* at 578.

“personal bond” (i.e., romantic relationship).¹⁵⁴ Just as intimate sexual conduct is an important, if not an integral, part of an intimate relationship, so too is geographical proximity. Denying a couple the ability to live in the same country can be as devastating as criminalizing their sexual conduct. Partners unable to reside together are forced to separate, relocate to another country, and/or maintain expensive and emotionally challenging long distance relationships. Immigration equality provides for the liberty interest of a committed couple’s desire to live together as a family unit.

The U.S. government has historically taken the position that family unity is a worthwhile policy objective for immigration law and that forced separation of family members may be a hardship.¹⁵⁵ In an attempt to promote family unity, Congress eliminated numerical restrictions upon immediate family members of U.S. citizens to immigrate to the United States.¹⁵⁶ Similarly, Congress created ranking preferences for family-sponsored visas, granting preference in this order: unmarried sons and daughters of citizens; spouses and children, and unmarried sons and daughters of permanent residents; married sons and daughters of citizens; brothers and sisters of adult citizens.¹⁵⁷ A Select Commission appointed by Congress to study U.S. immigration policy recognized

154. *Id.* at 567. This Article is not the place to argue about the constitutionality of denying marriage to same-sex couples. While, like Laurence Tribe, the authors do not wish to “join the veritable cottage industry . . . developing out of the unremarkable observation that *Lawrence* might in the end prove to be [a] halting and limited . . . step forward,” they do want to forestall the “slippery slope” fears that have proven such a sticking point in meeting the urgent need for legislation sensitive to the realities of same-sex bi-national couples. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1950 (2004). It is thus worth noting that the denial of some rights, such as the ability to stay together in the same country, impacts couples in a qualitatively different way from others, such as the ability to file taxes jointly.

155. See 8 U.S.C. § 1229b(b)(1)(D) (2000) (allowing cancellation of removal for some cases where there is “exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”); H.R. 440, 108th Cong. (2003) (“To amend the Immigration and Nationality Act . . . to promote family unity.”).

156. H.R. 440, 108th Cong. (2003).

157. 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); cf. 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).

the family reunification goal in its recommendations, finding 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.¹⁵⁸ The Commission went on to find that, psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.¹⁵⁹ 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."¹⁶⁰ Representative McGrath 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."¹⁶¹

Congress should recognize the principles espoused in *Lawrence* as further support to enact legislation providing for immigration equality. As illustrated by the reasoning in *Lawrence*, it is a very small step from finding sodomy statutes unconstitutional to recognizing that same-sex partners must have the same rights to immigration as opposite-sex married couples. Adoption of the UAFA would strengthen the privacy rights of same-sex couples to form and sustain loving personal relationships without governmental interference, specifically in the form of separation by exclusion or deportation. Such legislation would also promote U.S. policy that recognizes the importance of family unity. Just as the U.S. Supreme Court relied upon foreign tribunals' analyses in examining the constitutionality of anti-sodomy laws, Congress should adopt the practice and policy of eighteen countries' immigration laws that allow gay citizens and residents to sponsor their same-sex partners for immigration benefits.

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

159. *Id.*

160. 136 CONG. REC. H8629 (daily ed. Oct. 2, 1990) (statement of Rep. Bonior).

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

V. CONCLUSION

The Constitution guarantees gay people the right to choose how and with whom to create a “personal bond,” to form and sustain loving personal relationships, and to lead their private lives free of government restriction and legal condemnation. Countless bi-national same-sex couples are faced with the painful reality of serious challenges to their family unification, including forced separation. Adoption of the UAFA would give effect to the government’s policy of “family unity,” remedy the unequal treatment of same-sex partners under U.S. immigration law, align the U.S. with its foreign allies’ immigration policies, further the equality guaranteed in the U.S. Constitution and reaffirmed by *Lawrence*, and carry out the obligations and duties imposed upon the U.S. under its international treaty obligations.