

DIVERSE FAMILIES WITH PARALLEL NEEDS: A PROPOSAL FOR SAME-SEX IMMIGRATION BENEFITS

Do not mistreat foreigners who are living in your land. Treat them as you would a fellow Israelite, and love them as you love yourselves. Remember that you were once foreigners in the land of Egypt.¹

INTRODUCTION

Seventeen years ago the U.S. Supreme Court denied certiorari of an appeal by two men in a desperate battle to stay together.² According to the 1982 judgment by the Ninth Circuit Court of Appeals in *Adams v. Howerton*,³ it is not a violation of the equal protection clause to deny immigration preferences to the same-sex partners of legal residents or citizens.⁴

Anthony Sullivan and Richard Adams met in 1971 in Los Angeles, California.⁵ Anthony is an Australian citizen and Richard is a citizen of the United States.⁶ In 1975, both men were able to obtain a legal marriage license from a Boulder, Colorado county clerk.⁷ On April 21, that same year, the couple was married.⁸ When Richard applied to sponsor Anthony as an immediate relative spouse described under section 201(b) of the Immigration and Nationality Act⁹ (INA), the petition was denied.¹⁰ The denial was accompanied by a written response from the Immigration and Naturalization Service (INS), explaining that the two men had “failed to establish that a

1. *Leviticus* 19:33-34.

2. *See Adams v. Howerton*, 458 U.S. 1111 (1982).

3. 673 F.2d 1036 (9th Cir. 1982).

4. *See id.* The court held that section 201(b) of the Immigration and Nationality Act did not unconstitutionally deny spouses of homosexual “marriages” the same immediate relative preferences accorded to spouses of heterosexual marriages. *See id.* at 1043.

5. *See Lesbian & Gay Immigration Rights Task Force, Anthony Sullivan & Richard Adams, Plaintiffs in 1982 Case Against INS, Celebrate 25th Anniversary: A Look Back at Their Struggle to Have Their Marriage Recognized for Immigration Purposes* (visited Jan. 26, 1999) <<http://www.lgirtf.org/newsletters/Fall96/FA96-12.html>>.

6. *See id.*

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

8. *See id.*

9. *See* Immigration & Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 201 (b), 79 Stat. 911 (codified at 8 U.S.C.S. § 1151 (b)(2)(A)(i) (Lexis L. Pub. 1997)). Section 201(b)(2)(A)(i) provides the following in relevant part: “For purposes of this subsection, the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.” *Id.*

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

bona fide marital relationship can exist between two faggots.”¹¹ The couple’s final attempt at staying together in the United States was denied when the U.S. Supreme Court refused to hear the case.¹²

In its analysis of the case, the Ninth Circuit Court of Appeals followed a two-step test in its determination of whether the “marriage” between the two plaintiffs was valid for immigration purposes.¹³ The first step required that a marriage be deemed valid under state law to qualify for immigration purposes.¹⁴ The second step required that the state marriage must qualify under the INA.¹⁵ In applying these prongs, the court was unsure as to whether the marriage would be considered to be bona fide under Colorado law.¹⁶ However, this determination was deemed unnecessary because the court concluded that the second prong had not been satisfied.¹⁷ The court’s rationale was primarily based on the argument that the INA does not explicitly include same-sex couples in any definition of spouse.¹⁸ It was therefore to be understood within the context of its “ordinary, contemporary, common meaning.”¹⁹ Because Congress had not made any attempts to expand the “ordinary” meaning of spouse, the court deemed it not within its jurisdiction to do so.²⁰

Seventeen years have passed since the *Adams* decision. With these years has come growing tolerance for, and gradual acceptance of, gay male and lesbian relationships in the United States.²¹ In the state of New Jersey same-

11. Lesbian & Gay Immigration Rights Task Force, *supra* note 5.

12. *See Adams*, 458 U.S. at 1111.

13. *See Adams*, 673 F.2d at 1038 (citing *U.S. v. Sacco*, 428 F.2d 264, 270 (9th Cir. 1970)).

14. *See id.*

15. *See id.*

16. *See id.* at 1039.

17. *See id.*

18. *See id.* at 1040.

19. *Id.* (citing *Perrin v. U.S.*, 444 U.S. 37, 42, (1979)).

20. *See id.* The Ninth Circuit Court of Appeals also incorporated a restriction existing at the time against homosexuals that provided for their exclusion under health-related grounds. *See id.* at 1040-41. “At the time the court decided *Adams*, the INA required exclusion of ‘aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect.’” Amy Brownstein, Note, *Why Same-Sex Spouses Should Be Granted Preferential Immigration Status: Reevaluating Adams v. Howerton*, 16 LOY. L.A. INT’L & COMP. L.J. 763, 786 (1994) (citing 8 U.S.C. § 1182(a)(4) (1964 & Supp. II 1967)). “This Section has traditionally been interpreted to exclude homosexuals; before the term ‘sexual deviation’ was added to the Act, the term ‘psychopathic personality’ was interpreted to include ‘homosexuals and sex perverts’.” *Id.* This explicit intent by Congress to exclude homosexuals made it difficult for the court to justify an expansion of what had normally been considered a “spouse.” Congress expressed its concern for the overall integrity of the family through the passage of laws that facilitate the entry of heterosexual spouses into the United States. *See Adams*, 673 F.2d at 1042. This exclusion provision was eliminated, however, by a 1990 amendment to the INA. *See Brownstein, supra*, at 767 (citing 8 U.S.C. § 1182 (Supp. IV 1992)); *see also* D.L. HAWLEY, WEST GROUP, IMMIGRATION BRIEFINGS: GAYS, LESBIANS AND IMMIGRATION (1999).

21. *See* National Gay & Lesbian Task Force, *Majority of Americans Support Gay and Lesbian Rights: Task Force Releases Groundbreaking Public Opinion Report* (visited Jan. 26,

sex couples now have the same rights as married couples to adopt children.²² This was a recent landmark decision for the gay community because it was the first time that any state legally recognized the right of gays to adopt as a couple.²³ Similarly, a number of foreign countries have made considerable progress in their recognition of marital and immigration benefits.²⁴

This Comment proposes the creation of a distinct immigration preference category by the U.S. Congress. This category would permit gay and lesbian citizens or permanent residents to petition to have their partner immigrate to the United States. Part I considers some of the most recent legal changes within the United States concerning alternative families and the effect of these changes upon the rationale behind the *Adams* decision. This discussion examines the gradual yet awkward trend toward acceptance of alternative families in certain parts of the United States.²⁵

Part II examines a current allowance under U.S. immigration policy that provides certain gay and lesbian non-immigrants with the ability to petition for their partner to accompany them on a visitor visa. This provision demonstrates the INS' recognition and incorporation of same-sex couples within the context of a family for immigration purposes.

1999) <<http://www.ngltf.org/press/yang.html>>.

22. See *Holden v. New Jersey Dep't of Human Serv.*, No. C-203-97 (N.J. Super. Ct. Ch. Div. 1997). This was a class action suit settled with the state of New Jersey whereby unmarried co-habiting couples who wished to adopt a child would no longer be discriminated against based upon their marital status or sexual orientation. See *id.*

23. See American Civil Liberties Union, *New Jersey Becomes First State to Allow Joint Adoptions by Lesbian and Gay Couples* (visited Nov. 20, 1999) <<http://www.aclu.org/news/n121797a.html>>.

24. The following countries currently provide varying degrees of support for those same-sex couples in search of immigration benefits: Australia, Belgium, Canada, Denmark, Finland, France, Iceland, Namibia, Netherlands, New Zealand, Norway, South Africa, Sweden, and Great Britain. See Partners Task Force for Gay & Lesbian Couples, *Immigration Roundup: A Survey of Welcoming Countries* (visited Oct. 1, 1999) <<http://www.buddybuddy.com/immigr.html>>; Lesbian & Gay Immigration Rights Task Force, *New U.K. Immigration Policy Unites Couples: Progress Reports From Belgium, Canada, and France* (visited Nov. 20, 1999) <<http://www.lgirtf.org/newsletters/Summer98/SU98-1.html>>. South Africa has also recently been included in this list. See *Cape High Court Recognises Lesbian and Gay Relationships*, PRESS STATEMENT (NAT'L COALITION FOR GAY & LESBIAN EQUAL., Cape Town, S. Afr.), Feb. 12, 1999; *Court Gives Immigration Rights to Partners of S. African Gays*, AGENCE FR.-PRESSE, Feb. 12, 1999, available in 1999 WL 2545455.

25. Currently no state in the United States permits same-sex couples to legally marry. See *Analysis: Vermont Could Break Legal Ground on Issue of Gay Marriages* (CBS Morning News, Dec. 7, 1998). Legal marriage would provide gays and lesbians with the same benefits and obligations as heterosexual married couples. However, the passage of the Defense of Marriage Act (codified at 28 U.S.C.S. § 1738C (Law. Co-op. Supp. 1999)) by Congress, strictly defines marriage as a union between partners of the opposite sex. See Human Rights Campaign, *The Defense of Marriage Act / Public Law 104-199* (visited Nov. 20, 1999) <<http://www.hrc.org/issues/marriage/p1104-19.html>>. Same-sex couples, nevertheless, can now legally adopt children as a couple in New Jersey, and have been indirectly able to do so in many states for several years. See American Civil Liberties Union, *supra* note 23. This is an awkward progression in that same-sex partners have been legally deemed fit to raise children as a couple, but not to be married.

Part III takes a comparative look at the specific immigration policies of both Great Britain and Canada when balanced against those of the United States. While Great Britain currently provides such benefits to the same-sex partners of its citizens under certain conditions, "Canada has adopted the most open immigration policy with regard to homosexuals in a monogamous relationship."²⁶ Such changes reinforce the argument that countries are adapting to the evolving definition of "family," specifically through the facilitation of immigration processing. Each policy helps provide the United States with positive examples of adaptations within each country in response to the evolution of the family unit. Finally, this Comment concludes that a distinct immigration category for same-sex partners must be created to improve our current immigration system because of the values that the INS claims to promote, specifically, family unity.

I. THE EFFECTS OF SAME-SEX PARENT ADOPTION AND THE DEFENSE OF MARRIAGE ACT ON THE INTERPRETATION OF SPOUSE AND FAMILY

Within the United States, the majority of states allow individuals to adopt children regardless of their sexual orientation.²⁷ Until recently, however, no state allowed same-sex couples to jointly adopt a child under state custody within the same legal proceeding.²⁸ Same-sex couples are often advised to proceed with a single-parent adoption and subsequently petition for the other partner to become a second parent.²⁹ In New Jersey, however, a recent class action settlement resulted in landmark changes within that state's adoption policy. The consent judgement in *Holden v. New Jersey Depart-*

26. James R. Edwards, Jr., *Homosexuals and Immigration: Developments in the United States and Abroad*, BACKGROUND (CENTER FOR IMMIGR. STUD., Wash. D.C.), May 1999, at 4.

27. See MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 91 (1997).

28. In 1993, Vermont and Massachusetts were two of the first states to approve an adoption by a non-birth mother of a child born to her partner. See Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927, 963-64 (1994) (citing Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoption of Susan, 619 N.E.2d 323 (Mass. 1993)). In the Vermont decision, the court stated that

[i]t is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. . . . It is surely in the best interests of children, and the state, to facilitate adoptions in these circumstances so that legal rights and responsibilities may be determined now and any problems that arise later may be resolved within the recognized framework of domestic relations laws.

Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d at 1276, quoted in Leonard, *supra*, at 964-65.

29. See Ruth Padawer, *Victory for Gay Couple: Judge Sidesteps DYFS Rule to Allow Adoption*, REC., N. N. J., Oct. 23, 1997, at A1.

ment of Human Services³⁰ provided same-sex couples with the same rights of joint adoption as heterosexual couples.³¹ Thus, gay and lesbian couples are now given “equal footing” in that state under its adoption laws.³²

Previously, the New Jersey Department of Youth and Family Services had interpreted the state’s adoption statute such that “[i]n the case of an unmarried couple co-habiting, only one person c[ould] legally adopt a child.”³³ The consent judgment provided that “unmarried co-habiting couples seeking to adopt shall not be prohibited from jointly adopting due to their marital status or sexual orientation.”³⁴ The only restrictions placed upon same-sex couples are the very same restrictions that are placed upon married adoptive parents. This legitimization of alternative families within New Jersey is significant because it considers a family within the context of not just simply a man, woman, and child, but as a “group of people who love one another and take care of each other in good times and bad.”³⁵

In *Adams*, the court discussed family integrity as a concept that Congress was trying to maintain based on its laws.³⁶ One of the ways in which it chooses to do this is through the facilitation of immigration of heterosexual spouses.³⁷ Today, however, the maintenance of family integrity requires an incorporation of varied familial scenarios as opposed to solely heterosexual couples. The New Jersey decision was premised upon the best interests of the child.³⁸ As a result, same-sex couples have the same rights as married

30. No. C-203-97 (N.J. Super. Ct. Ch. Div. 1997).

31. See Ronald Smothers, *Accord Lets Gay Couples Adopt Jointly*, N.Y. TIMES, Dec. 18, 1997, at B4.

32. American Civil Liberties Union, *supra* note 23.

33. Consent Judgment, *Holden v. New Jersey Dep’t of Human Serv.* (N.J. Super. Ct. Ch. Div. 1997) (No. C-203-97).

34. *Id.* ¶ 4. “This Consent Judgment may be enforced by any lesbian or gay couple in New Jersey to the extent that they have been denied the right to adopt based on their marital status or sexual orientation as opposed to being evaluated based on their qualifications as prospective adoptive parents.” *Id.* ¶ 9.

35. John D’Emilio, *Family Matters* (visited Oct. 1, 1999) <<http://www.ngltf.org/press/famoped.html>>. In fact, “family” has already been defined by the New York Court of Appeals to include same-sex partners. See Sue Nussbaum Averill, Comment, *Desperately Seeking Status: Same-Sex Couples Battle for Employment-Linked Benefits*, 27 AKRON L. REV. 253, 266 (1993). Rather than focusing on family in a traditional or formal sense, the New York court instead looked toward the “totality of the relationship,” concentrating on “the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.” *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989). Recently, an appeals court decision within New Jersey was the first of its kind to grant visitation rights to a lesbian or gay non-biological co-parent. See American Civil Liberties Union, *Recognizing Lesbian and Gay Family Relationships, NJ Appeals Court Grants Visitation Rights to Woman’s Former Partner* (visited Oct. 1, 1999) <<http://aclu.org/news/1999/n030899d.html>>.

36. See *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982).

37. See *id.* at 1042.

38. See Smothers, *supra* note 31.

couples when adopting children in that state.³⁹ Under a reevaluation of *Adams*, the court would be forced to address such alternative familial scenarios and grapple with the hypocritical “family unity” notion, which the INS professes to promote.⁴⁰

In *Holden*, one of the main issues in the Complaint concerned the fact that New Jersey was treating adoptive parents differently by allowing married couples to adopt jointly, while requiring non-married couples to go through a two-step process.⁴¹ First, one of the partners was required to petition as a single parent with the consent of the state.⁴² Second, the other partner was required to file a “second-parent adoption” with the court.⁴³ This was alleged to undermine the purpose of the state’s adoption statute, namely, to serve “the best interests of the child.”⁴⁴ Similarly, Congress has made the interests of family a top priority in the INA’s preference system.⁴⁵ As a result, every effort should be made to allow individuals to maintain alternative familial relationships without governmental interference. Nevertheless, the immigration rights of alternative families⁴⁶ here in the United States have been poorly addressed by virtue of the lack of familial petition options available to same-sex couples.

An analysis today under *Adams* must reexamine the legal definition of “family.” Because Congress passed immigration laws for the purpose of facilitating family immigration, the INS should interpret the INA according to what is considered a “family.” The truth behind its definition is being revealed more often by a growing number of gay and lesbian parents who are

39. *See id.*

40. *See* U.S. OFFICE OF POLICY AND PLANNING, IMMIGR. AND NAT. SERV., STRATEGIC PLAN TOWARD INS 2000: ACCEPTING THE CHALLENGE 7 (1994).

41. *See* Complaint ¶¶ 1-4, *Holden v. New Jersey Dep’t of Human Serv.* (N.J. Super. Ct. Ch. Div. 1997) (No. C-203-97); *see also* Consent Judgment, *Holden*, No. C-203-97.

42. *See* Complaint ¶ 29, *Holden*, No. C-203-97.

43. *See id.*

44. *Id.* ¶ 25. In reaching its consent judgement, the court stated that “unmarried cohabitating couples seeking to adopt shall not be prohibited from jointly adopting due to their marital status or sexual orientation.” Consent Judgment ¶ 4, *Holden*, No. C-203-97.

45. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 131 (2d. ed. 1997). A recent study by the University of Houston Center for Immigration Research demonstrates, however, that such claims by the INS may simply be rhetoric. “[T]he study concluded that the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 inhumanely separated families and curtailed due process of law.” Jo Ann Zuniga, *Immigration Laws Creating Climate of Fear*, HOUST. CHRON., Mar. 16, 1999, at 17. In fact, certain immigration scholars argue that the focus of immigration policy within the United States should not necessarily be on family unity, but rather on the recruitment of higher skilled laborers who will be less likely to drain public services and instead contribute more to the economy. *See* Steven A. Camarota, *Impact of Immigration on a Different America*, SAN DIEGO UNION-TRIB., Feb. 2, 1999, at B7.

46. Alternative families also include non-married heterosexual couples. However, for the purposes of this comment, the focus of such analysis relates specifically to same-sex couples and the unfairness of U.S. immigration policy, in that, same-sex couples do not have the option of marriage.

very open about their sexual orientation.⁴⁷ By allowing joint same-sex couple adoptions, New Jersey has indirectly legitimized the legality of a same-sex couple.

The progression of alternative family acceptance within the United States has been awkward. New Jersey now considers same-sex couples to be equally qualified parents when compared with heterosexual couples for the purposes of joint adoption.⁴⁸ In addition, at least twenty-one states allow for second-parent adoptions by same-sex partners.⁴⁹ Nonetheless, same-sex couples are still unable to petition for same-sex immigration benefits for their partners.⁵⁰

Despite New Jersey's recent landmark decision, several states expressly deny adoption rights to same-sex couples attempting to jointly adopt a child. For example, Texas recently passed legislation explicitly providing that only a man and a woman may be listed as parents on a child's birth certificate.⁵¹ In addition, New Hampshire and Florida categorically bar gay men and lesbians from adopting at all.⁵² Nevertheless, alternative families with gay and

47. See JANE DRUCKER, *FAMILIES OF VALUE: GAY AND LESBIAN PARENTS AND THEIR CHILDREN SPEAK OUT* 36 (1998).

[B]etween 1977 and 1983, studies revealed that 40 to 60 percent of gay men were in steady relationships, and 75 percent of lesbians made the same claim, and over 80 percent of these couples had been together for over 1 year, with the average duration of their relationships being 6 years.

Id. at 37 (citing GAY AND LESBIAN STATS (Bennet L. Singer & David Deschamps eds., 1994)). "The average heterosexual marriage now lasts 7 years." *Id.* (citing L.A. TIMES, Aug. 18, 1996).

48. See American Civil Liberties Union, *supra* note 23.

49. See American Civil Liberties Union, *ACLU Fact Sheet: Overview of Lesbian and Gay Parenting, Adoptions and Foster Care* (visited Apr. 6, 1999) <<http://www.aclu.org/issue/gay/parent.html>>.

50. It is interesting to note that there are approximately twice as many countries that recognize same-sex relationships for the purposes of immigration compared with those that allow same-sex couples to adopt children. See International Lesbian & Gay Association, *World Legal Survey: Countries in Which Same-Sex Relationships Are Recognised for Purposes of Immigration* (visited Sept. 19, 1999) <http://www.ilga.org/Information/le...ognition_of_immigration_right.htm>; International Lesbian & Gay Association, *World Legal Survey: Countries Where Same-Sex Couples Are Allowed to Adopt Children* (visited July 7, 1999) <http://www.ilga.org/Information/le...information/adoption_rights.html>. In addition, all of the countries that allow same-sex couples to adopt children, except for the United States, also recognize same-sex relationships for the purposes of immigration. See *id.*

51. See National Gay & Lesbian Task Force, *Task Force Applauds NJ Gay and Lesbian Adoption Settlement: Predicts Family Issues to Be a Hot Topic in 1998T* (sic) (visited Apr. 6, 1999) <<http://www.nglft.org/press/adoption.html>>.

52. See *Smothers*, *supra* note 31. In addition, the Mississippi Supreme Court recently denied a gay man custody rights of his son based on what the dissent and other groups considered to be a discriminatory rationale. See generally *Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999); American Civil Liberties Union, *Mississippi Supreme Court Denies Child Custody to Gay Father in Favor of Violent Stepdad* (visited Feb. 8, 1999) <<http://www.aclu.org/news/1999/n020899b.html>>; American Civil Liberties Union, *Mississippi Supreme Court Made a Tragic Mistake in Denying Custody to Gay Father, Experts Say* (visited Feb. 17, 1999) <<http://www.aclu.org/news/1999/n021799b.html>>.

lesbian parents exist in strong numbers throughout this country.⁵³

Although no states currently permit marriages between partners of the same sex, certain foreign countries do allow same-sex couples to legally marry.⁵⁴ This raises a potential dilemma for the INS. For example, the foreign marriage of a bi-national same-sex couple may result in a situation where that same couple applies for a U.S. immigration benefit based on their relationship.⁵⁵ Such a situation has yet to be tested in the courts.

Despite this gradual inclusion of same-sex families under the family laws of certain states and other countries, the clearest and most recent expression by Congress of the definition of "spouse" is in the Defense of Marriage Act.⁵⁶ This statute defines the terms "marriage" and "spouse," under any congressional act, as referring to a relationship between two people of the opposite sex.⁵⁷ These definitions demonstrate quite clearly that Congress intends to exclude same-sex partners from any legal definition of marriage. Although the Act itself has been deemed by some to be unconstitutional,⁵⁸ it has yet to be challenged in the courts.

One of the main arguments behind the Defense of Marriage Act's passage was to encourage the responsibility of child rearing and procreation.⁵⁹ This argument has also been "used as a weapon by Christian churches to argue theologically against the acceptance of same-sex relationships"⁶⁰ However, the notion of procreation and child rearing fails to account for the large number of same-sex parent families that already exist in this country. In many of these families, children are born and raised on account of artificial insemination of one parent, surrogate parenthood, adoption, or because

53. Experts have "estimated that approximately three million gay men and lesbians in the United States were parents, and between eight and ten million children were raised in gay or lesbian households." WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 801 (1997) (citing *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 FAM. L. REP. (BNA) 1512, 1513 (1987)).

54. Denmark and Norway were the first two countries to legalize gay marriages. See Brownstein, *supra* note 20, at 767-69 (1994) (citing Julian Isherwood, *Denmark Legalizes Homosexual Marriages*, UPI, May 26, 1989 and Fiona Smith, *Norway Legalizes Gay Marriages*, IRISH TIMES, Aug. 4, 1993).

55. See generally Brownstein, *supra* note 20, at 770-71.

56. Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C.S. § 1738C (Law. Co-op. Supp. 1999)).

57. See Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 841 (1998).

58. See STRASSER, *supra* note 27, at 127.

59. See Butler, *supra* note 57, at 867 (citing H.R. Rep. No. 104-664, pt. 5, at 12-13 (1996)) ("House Report No. 664 on the Defense of Marriage Act specifies as one of the principal government interests in passing DOMA [Defense of Marriage Act] the need to defend and nurture 'the institution of traditional, heterosexual marriage' in order to 'encourage responsible procreation and child rearing.'").

60. Robert E. Goss, *Queering Procreative Privilege: Coming Out as Families*, in OUR FAMILIES, OUR VALUES: SNAPSHOTS OF QUEER KINSHIP 3, 7 (Robert E. Goss & Amy Adams Squire Strongheart eds., 1997).

of custody privileges from a previous marriage.⁶¹ Nevertheless, the attitude of both the INS⁶² and Congress appears clear when it comes to immigration benefits for same-sex couples, namely, such benefits are reserved for married couples of the opposite sex. Therefore, were *Adams* reconsidered today, the court's decision would likely be expected to remain the same. The court would most probably have few grounds to reassess its previous decision that Congress did not intend to extend spousal-immigration benefits to same-sex partners.⁶³

II. ACCOMMODATION FOR SAME-SEX COUPLES UNDER U.S. IMMIGRATION POLICY

As the Defense of Marriage Act provides the definition of spouse under federal law, perhaps a more likely way for same-sex partners to obtain immigration benefits under the INA would be through the creation of a separate immigration classification category. This new category should be structured in such a way as to provide same-sex partners with the same benefits as immediate relatives.⁶⁴

Despite its current denial of spousal-immigration benefits to same-sex partners, the INS has acknowledged the importance of alternative family unification. It has recognized a need for accommodation of certain gay non-immigrants and their partners in the issuance of non-immigrant visas.⁶⁵

On January 12, 1993, the INS Deputy Assistant Commissioner of Adjudications responded to a letter from a Boston attorney who was seeking advice regarding the issue of non-spouses accompanying aliens.⁶⁶ The Deputy explained that non-spouse partners of non-immigrants classified as E,⁶⁷ H,⁶⁸

61. See Butler, *supra* note 57 (citing H.R. Rep. No. 104-664, pt. 5, at 12-13 (1996)).

62. The INS considered a recent demonstration organized by the Lesbian and Gay Immigration Rights Task Force to be misguided. See Verena Dobnik, *Gays and Lesbians Protest Government Immigration Policies*, ASSOCIATED PRESS, Feb. 11, 1999. INS spokesman, Russ Bergeron, stated that protests over U.S. refusal to recognize same-sex partnerships for immigration purposes were "'not an immigration issue . . . [but instead] a question of 'the invalidity of same-sex marriage under existing U.S. law.'" *Id.* This was because "'[a]ny person who is legally married has the right to file a petition for their spouse to immigrate.'" *Id.*

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

64. See Cynthia R. Reed, *When Love, Comity and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 131 (1996).

65. See *B-2 Visa Available for Non-Spouse, Same-Sex Partner of L-1*, INS SAYS, INTERPRETER RELEASES, Mar. 29, 1993, at 441. The Author thanks Lavi Soloway, National Coordinator of the Lesbian and Gay Immigration Rights Task Force, for pointing out this unique and ironic immigration accommodation for same-sex couples which is recognized by the INS.

66. See *id.*

67. 8 U.S.C.S. § 1101(a)(15)(E) (Lexis L. Pub. 1997). Section 1101(a)(15)(E) provides in part that the term "immigrant" includes every alien except one who is:

an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, including

or L⁶⁹ under the INA, including those of the same-sex, “may be classifiable as a visitor for pleasure [(B-2), so long as they are] . . . not otherwise excludable under current immigration laws.”⁷⁰ Although the individual is unable to work during their residency in the United States, they are allowed to remain as a visitor for the duration of the residency of their non-immigrant partner.⁷¹

This is a noteworthy allowance provided under immigration policy. It is an exception that stems from the same provisions provided under non-immigrant classifications, in which a spouse is permitted to accompany the non-immigrant.⁷² Such a provision is important because it is a strong example of the INS’ attempt to incorporate alternative relationships and families into its policies. Although the visa does not identify the same-sex partner as such in the classification that is issued, the rationale behind both policies remains the same. Each requires that the visa only be issued when the spouse or partner will be accompanying the principal alien,⁷³ indicating a derivative

trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital[.]

Id.

68. 8 U.S.C.S. § 1101(a)(15)(H) (Lexis L. Pub. 1997). Section 1101(a)(15)(H) provides in part that the term “immigrant” includes every alien except one who is:

an alien (i)(a) who is coming temporarily to the United States to perform services as a registered nurse, . . . or (b) subject to section 212(j)(2) . . . who is coming temporarily to the United States to perform services (other than services described in subclause (a) . . .) in a specialty occupation described in section 214(i)(1) . . . or as a fashion model, . . . or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor . . . , of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country

Id.

69. 8 U.S.C.S. § 1101(a)(15)(L) (Lexis L. Pub. 1997). Section 1101(a)(15)(L) provides in part that the term “immigrant” includes every alien except one who is:

an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge

Id.

70. *B-2 Visa Available for Non-Spouse, Same-Sex Partner of L-1, INS Says, supra* note 65.

71. *See id.* at 422.

72. *See* 8 U.S.C.S. § 1101(a)(15)(E), (H) & (L) (Lexis L. Pub. 1997).

73. *See id.*; *B-2 Visa Available for Non-Spouse, Same-Sex Partner of L-1, INS Says, supra* note 65.

relationship between the B-2 non-immigrant and their partner. As a result, both policies reflect the importance of family unity, one of the “central value[s] that U.S.] immigration laws have long promoted”⁷⁴

It is interesting to note that this is a policy that benefits the partners of non-immigrants seeking to accompany the principal alien. However, U.S. citizens and permanent residents are not entitled to such a privilege when they seek to immigrate their same-sex partner.

III. IMMIGRATION POLICY FOR SAME-SEX COUPLES IN CERTAIN FOREIGN NATIONS

Although the United States does not fully recognize the importance of alternative families within its immigration policy, many developed Western countries do. Currently, Australia, Belgium, Canada, Denmark, Finland, France, Iceland, Namibia, the Netherlands, New Zealand, Norway, South Africa, Sweden, and Great Britain all have immigration policies of varying degrees that allow for certain same-sex benefits.⁷⁵

A. Immigration Policy Within Great Britain

In the fall of 1997, Great Britain implemented a new provision allowing for the immigration of unmarried partners.⁷⁶ Prior to the change, British immigration law provided benefits to the partners of non-married heterosexuals who were able to demonstrate their involvement in a two-year “common

74. LEGOMSKY, *supra* note 45.

75. See Partners Task Force for Gay & Lesbian Couples, *supra* note 24; see also *Fairer Rule for Same-Sex Immigrants*, DOMINION (Wellington), Dec. 23, 1998, available in 1998 WL 24050249; Lesbian & Gay Immigration Task Force, *Belgian Immigration Policy* (visited Jan. 29, 1999) <<http://www.lgirtf.org/newsletters/Summer98/SU98-13.html>>; *Cape High Court Recognises Lesbian and Gay Relationships*, *supra* note 24; *Court Gives Immigration Rights to Partners of S. African Gays*, *supra* note 24; Linda Nielsen, *Family Rights and the 'Registered Partnership' in Denmark*, 4 INT'L J. L. & FAM. 297, 300 (1990); International Lesbian & Gay Association, *World Legal Survey: Iceland* (visited May 31, 1999) <http://www.ilga.org/Information/le...ey/Europe/iceland.htm#*Partnership>; International Lesbian & Gay Association, *World Legal Survey: Finland* (visited May 31, 1999) <http://www.ilga.org/Information/le...ey/Europe/finland.htm#*Partnership>; International Lesbian & Gay Association, *World Legal Survey: Namibia* (visited May 31, 1999) <http://www.ilga.org/Information/legal_survey/africa/namibia.htm>; International Lesbian & Gay Association, *World Legal Survey: New Zealand* (visited May 31, 1999) <http://www.ilga.org/Information/legal_survey/Asia_Pacific/new_zealand/htm#*Partnership>; National Coalition for Gay & Lesbian Equality & 13 Others v. The Minister of Home Affairs & Others, Case No. 3988/98, High Court of South Africa, Cape of Good Hope Provincial Division (Feb. 12, 1999) <<http://www.law.wits.ac.za/docs/gayaliens.pdf>>; Lesbian & Gay Immigration Rights Task Force, *supra* note 24. Sweden has actually proposed permitting same-sex couples (where both partners are foreigners) who live in the country to register such partnerships and be entitled to the same rights as heterosexual couples. See *Sweden May Allow Foreign Gay Couples to Register*, REUTERS, Mar. 19, 1999.

76. See Lesbian & Gay Immigration Rights Task Force, *supra* note 24.

law” relationship.⁷⁷

During 1993, 400 “common-law” heterosexual couple petitions were approved while every single homosexual couple petition was denied.⁷⁸ A proposal by the Stonewall Immigration Group⁷⁹ to extend such benefits to same-sex couples resulted in a backlash reaction by the Immigration Ministry.⁸⁰ As a result, the entire provision was removed.⁸¹ The Immigration Minister at the time, Timothy Kirkhop, flatly rejected any proposed change.⁸² He argued that immigration benefits based on same-sex relationships would not be possible because marriage was the true test of a relationship’s strength.⁸³

With the introduction in 1997 of the new Labour Government headed by Prime Minister Tony Blair, however, came a complete reversal in policy.⁸⁴ The new procedure called for reinstatement of immigration benefits for non-married partners, including those of the same sex.⁸⁵ Despite its inclusiveness of same-sex partners as recipients of immigration benefits, this new immigration policy nevertheless held non-married couples to a higher standard of proof. It did so by providing that the co-habitational relationship must have

77. See Lesbian & Gay Immigration Rights Task Force, *Victory in Britain: Government Will Change the Law to Allow Immigration of Same-Sex Partners of British Citizens; Deportations Halted* (visited Oct. 1, 1999) <<http://www.lgirtf.org/newsletters/summer97/SU3.html>>.

78. See Lesbian & Gay Immigration Rights Task Force, *supra* note 24.

79. “The Stonewall Immigration Group is a campaigning organisation in London which offers personal and political support to gay and lesbian couples seeking to live together in the UK.” *Immigration Advice and Information for Lesbians and Gay Men Who Want to Live in the UK With a Partner From Overseas*, IMMIGR. ADVICE & INFO. (GREATER MANCHESTER IMMIGR. AID UNIT, Manchester, U.K., & STONEWALL IMMIGR. GROUP, London, U.K.), Sept. 1998.

80. See Lesbian & Gay Immigration Rights Task Force, *supra* note 77.

81. See *id.* (“[T]he government reacted vindictively, ending the immigration provision for heterosexual unmarried partners rather than accommodate lesbian and gay couples.”).

82. See Lesbian & Gay Immigration Rights Task Force, *British Activists Fight Immigration & Asylum Bill Demand Admission of Gay Partners* (visited Oct. 1, 1999) <<http://www.lgirtf.org/newsletters/Spring96/SP2.html>>.

83. See *id.*

84. See *id.*

85. See *id.* The following requirements must be fulfilled in order to receive the reinstated benefits: All applicants must

have a relationship akin to marriage with a person (of either sex) who is present and settled in the U.K. (or is here in a category leading to settlement or has been granted asylum); any previous marriage (or similar relationship) by either partner has permanently broken down; [applicants] are legally unable to marry (other than by reason (of) consanguineous relationships or age); . . . [and applicants] can maintain and accommodate themselves adequately without recourse to public funds.

Mark Watson, *Immigration Policy in the UK - A Result* (visited Nov. 20, 1999) <<http://www.math.oxjy.edu/qrd/world/immigration/UK.immigration.policy.recognizes.same.sex.couples-10.10.97>>. Finally, applicants must “have been living together in a relationship . . . which has subsisted for four years or more [and] . . . intend [on] living together permanently.” *Immigration Advice and Information for Lesbians and Gay Men Who Want to Live in the UK With a Partner From Overseas*, *supra* note 79.

subsisted for four years, as opposed to the two-year time period previously required of heterosexual couples.⁸⁶ This lengthy cohabitation requirement made obtaining such benefits particularly difficult. While heterosexual couples almost always have the option of marriage, homosexual couples do not. They were therefore stuck with a harsh cohabitation requirement that many were unable to meet.⁸⁷

However, government officials within the Great Britain began to recognize the “unnecessary hardship” which many bi-national gay couples had to endure in order to obtain such immigration benefits.⁸⁸ On June 16, 1999, the policy was changed, and the cohabitational requirement for non-married partners was reduced from four years to that of two, placing “same-sex couples on equal ground as legally married partners” under British immigration policy.⁸⁹ Currently, the Home Office and British Consulates have been approving the applications of eligible gay and lesbian partners and plan to continue to do so in the future.⁹⁰

The new immigration provision in Great Britain reflects a gradual acceptance of alternative families within that country. Previously, the inability of gays to marry gave the Immigration Ministry a supposed reason to deny immigration benefits to same-sex couples. Marriage, however, is currently not a necessary element within the meaning of family. As a result, the introduction of immigration benefits for heterosexual non-married partners made the exclusion of same-sex couples entirely indefensible.⁹¹

Although the United States currently has no existing immigration benefits similar to Great Britain’s policy concerning “common law” couples, alternative families still exist. Great Britain is an example of how evolving familial structures have molded modern legal changes within immigration policy. Similarly, the United States should recognize this evolution among its own families by restructuring its immigration policy in a way that better reflects the true constitution of a family.

86. See *Immigration Advice and Information for Lesbians and Gay Men Who Want to Live in the UK With a Partner From Overseas*, *supra* note 79.

87. See Stephen Pettitt, *Gay Rights: Free to Leave; Stephen Pettitt Wants His Hong Kong-Born Lover to Live Permanently With Him in the UK. Straightforward? Not to Immigration Officials*, *GUARDIAN* (London), Jan. 27, 1999, at 9, available in LEXIS, News Library, GUARDN File; see also *Immigration Advice and Information for Lesbians and Gay Men Who Want to Live in the UK With a Partner From Overseas*, *supra* note 79.

88. Alison Gordon, *Bid to Let in Gay Lovers: Better Immigration Rights for Homosexual Partners*, *MAIL ON SUNDAY*, Mar. 14, 1999, available in 1999 WL 5100545 (“More than 200 gay immigrants apply for British residency every year but only about a quarter are successful.”).

89. *United Kingdom: Mission Accomplished; Gay Group Wins Another Major Immigration Reform*, *NEWSLETTER (LESBIAN & GAY IMMIGR. RTS. TASK FORCE, New York, N.Y.)*, Summer 1999, at 1.

90. See *Lesbian & Gay Immigration Rights Task Force*, *supra* note 24.

91. See *id.*

B. Redefining the Canadian Family

Dramatic changes in immigration policy have recently taken place in Canada. Same-sex and common-law couples have been permitted to immigrate in certain circumstances through the humanitarian and compassionate provision of Canada's Immigration Act.⁹² In fact, it is not required that either partner be a citizen or permanent resident of Canada.⁹³ Under humanitarian and compassionate grounds, a stable same-sex relationship is generally recognized as a compelling circumstance in which the foreign partner is permitted to stay in the country.⁹⁴ Nevertheless, in its proposed policy directions for the twenty-first century, Citizenship and Immigration Canada recognized the discretionary character with which the humanitarian and compassionate provision was being applied.⁹⁵ This has raised questions of potential discrepancies among petition approvals.⁹⁶ Furthermore, the absence of any provision for same-sex immediate relative immigration benefits within Canada has led certain Canadians to argue that a new immigration category should be created for same-sex partners.⁹⁷

Census figures as of 1996 showed that approximately twelve percent of the families in Canada were comprised of "common-law" couples.⁹⁸ This

92. See CITIZENSHIP AND IMMIGRATION CANADA, MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES, BUILDING ON A STRONG FOUNDATION FOR THE 21ST CENTURY: NEW DIRECTIONS FOR IMMIGRATION AND REFUGEE POLICY AND LEGISLATION 22 (1998).

93. See Edwards, *supra* note 26 ("If one partner can qualify for 'landed immigrant,' or permanent resident, status, his or her same-sex partner may seek consideration of the relationship and thus to immigrate on humanitarian and compassionate grounds. Such recognition is a matter of administrative discretion, not a matter of law."); see also Partners Task Force for Gay & Lesbian Couples, *supra* note 24; Marc Ramirez, *Immigration Law Leaves Gay, Lesbian Couples No Place to Call 'Home'*, SEATTLE TIMES, Oct. 26, 1998, at E1.

94. See *Briefing Paper* (STONEWALL IMMIGR. GROUP, London, U.K.), 1996.

95. See CITIZENSHIP AND IMMIGRATION CANADA, MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES, STRENGTHENING FAMILY REUNIFICATION (1999). Citizenship and Immigration Canada is part of the Ministry of Public Works and Government Services within the Canadian Government. See *id.*

96. See Lesbian & Gay Immigration Rights Task Force, *Vancouver Attorney, Rob Hughes, Outlines Canadian Immigration Under Humanitarian & Compassionate Grounds* (visited Oct. 1, 1999) <<http://www.lgirtf.org/newsletters/Spring97/15.html>>. A section on common-law and same-sex partners has recently been added to the processing manual on humanitarian or compassionate grounds for immigration officers. The section specifically states that "[t]he separation of common-law or same-sex partners who reside together in a genuine conjugal-like relationship is grounds for [humanitarian or compassionate] consideration." CITIZENSHIP AND IMMIGRATION CANADA, MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES, IMMIGRANT APPLICATIONS IN CANADA MADE ON HUMANITARIAN OR COMPASSIONATE (H&C) GROUNDS § 8.2 (1999).

97. See Smith & Hughes, *Immigration for Same-Sex Couples Where One Partner is Canadian and One Partner Is Immigrating* (visited Oct. 1, 1999) <<http://www.smith-hughes.com/papers/love.htm>>.

98. See Lesbian & Gay Immigration Rights Task Force, *Excerpt From "Not Just Numbers: A Canadian Framework for Future Immigration"* (visited Oct. 1, 1999) <<http://www.lgirtf.org/newsletters/Summer98/SU98-12.html>>.

represented a fifty-percent increase within a ten-year period.⁹⁹ Based on factors such as growing diversification of families, the State's commitment to family unity, and the movement by other countries toward a liberal interpretation of family, Citizenship and Immigration Canada plans to restructure its own immigration policy.¹⁰⁰ Family unity under immigration policy is to be interpreted within a "functional rather than a purely categorical basis" in an attempt to eliminate the "ethnocentric and discriminatory" view of family that Canada had previously taken.¹⁰¹ In addition to recognizing the inconsistency of its current immigration policy, Canada is dedicating itself to the promotion and creation of a more effective and fair policy.¹⁰² Citizenship and Immigration Canada is committed to "expand[ing] the definition of spouse to include common-law and same-sex couples."¹⁰³

Canada is a strong example of a country struggling with the recognition, treatment, and definition of family within its legislative agencies. Its open acknowledgement of the need for alternative family policies demonstrates a commitment to the basic family unity needs of its citizens. Likewise, based upon its similar emphasis of family unity,¹⁰⁴ the United States should take such an approach to heart by reexamining its immigration policies in a similar fashion. It should also look at the fact that a "growing number of gay Americans are moving" to Canada based on the restrictive nature of U.S. immigration laws when compared with those of Canada.¹⁰⁵ In the meantime, however, same-sex couples continue to be torn apart by the United States' refusal to recognize their relationships.¹⁰⁶

CONCLUSION

The acceptance of alternative families within the United States has been a long and arduous process that varies from state to state. It has awkwardly progressed to a point where same-sex relationships qualify for adoption purposes, but not for marriage. By acknowledging such relationships as familial, it is only logical that same-sex couples should be entitled to the benefits of marriage.

One of the greatest benefits of marriage for those partners from different countries is the ability to petition to immigrate one's spouse. Such preferences were established to maintain the integrity of the family, a concept that

99. *See id.*

100. *See id.*

101. *Id.*

102. *See* MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, *supra* note 92.

103. CITIZENSHIP & IMMIGRATION CANADA, *supra* note 95.

104. *See* LEGOMSKY, *supra* note 45.

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

106. *See id.*

has changed dramatically over the last few decades. At least 10,000 gay couples throughout the United States stand to benefit from a change in immigration policy that currently discriminates against them.¹⁰⁷ Nevertheless, recognition of same-sex partners as “spouses” under the INA is currently unlikely. The Defense of Marriage Act has clearly expressed Congress’s intent to define marriage as a union between persons of the opposite sex.

It is for these reasons that Congress should create a new category allowing for the immigration of same-sex partners. The INS already recognizes the need for such family unity in certain circumstances.¹⁰⁸ It issues visitor visas to partners of certain gay or lesbian non-immigrants who intend to accompany their non-immigrant partner to the U.S. Congress needs to take this accommodation one step further and permit the issuance of immigration benefits to the same-sex partners of its own citizens and permanent residents. In addition, the United States needs to look at foreign countries as positive examples of changes that need to occur within its own immigration policy. As more and more developed nations incorporate alternative families into the equation of immigration benefits, so too should the United States.

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107. See Dobnik, *supra* note 62.

108. See *B-2 Visa Available for Non-Spouse, Same-Sex Partner of L-1, INS Says*, *supra* note 65. In fact, President Clinton recently recognized such gay and lesbian immigration dilemmas as something “that ought to be changed.” *Clinton Speaks at Gay Event in New York City, Opposes U.S. Immigration Policies*, *ADVOCATE*, Oct. 8, 1999.

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