

Some Suggestions for the UAFA: A Bill for Same-Sex Binational Couples

Timothy R. Carraher*

I. INTRODUCTION

¶1 There are over 36,000 same-sex binational couples living in the United States today.¹ Because the courts have ruled that, within the Immigration and Nationality Act (INA),² the term “spouse” does not include individuals in same-sex unions—even those who have been legally married in jurisdictions that recognize same-sex marriage—gay, lesbian, bisexual, and transgender (GLBT) U.S. citizens are prohibited from sponsoring their same-sex partners for permanent residence in the United States.³

¶2 In 2000, Congressman Jerrold Nadler (D-NY) introduced the Permanent Partners Immigration Act (PPIA) to address the issue of binational sponsorship.⁴ The PPIA would have amended the INA to give same-sex couples an avenue to sponsor their partners in the United States, adding “permanent partner” after references to “spouse,” and “permanent partnership” after references to “marriage.”⁵ The bill provided a comprehensive definition of “permanent partnership” that included same-sex couples.⁶ The PPIA never left committee.

¶3 The PPIA was rechristened The Uniting American Families Act (UAFA) and brought before Congress again.⁷ As of March 18, 2009, the bill had ninety co-sponsors in the House⁸ and fifteen co-sponsors in the Senate.⁹ This bill, which as law would

* This Comment is dedicated to the thousands of same-sex binational couples whose relationships have buckled under the weight of the United States Immigration and Nationality Act. Throughout this Comment, “same-sex” couples is preferred to “gay or lesbian” couples because of the significant number of gay and lesbian individuals in opposite-sex marriages.

¹ See SCOTT LONG ET AL., IMMIGRATION EQUALITY & HUMAN RIGHTS WATCH, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 173 (2006), available at <http://www.immigrationequality.org/uploadedfiles/FamilyUnvalued.pdf> [hereinafter FAMILY, UNVALUED] (citing 2000 U.S. Census figures that indicate that there are 35,820 same-sex, binational partners sharing residence in the United States). The actual number may be quite higher, as the census data do not include same-sex partners with one partner living abroad, or same-sex couples living together who, for whatever reason, chose not to identify their relationship as familial.

² Immigration and Nationality Act, 8 U.S.C. §§ 1181–89 (1982).

³ *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982) (holding that “spouse” is restricted to opposite-sex, married couples). See also Defense of Marriage Act of 1996, 1 U.S.C. § 7 (2006) (“In determining the meaning of any Act of Congress . . . the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

⁴ Permanent Partners Immigration Act, H.R. 690, 107th Cong. (2001).

⁵ *Id.*

⁶ *Id.*

⁷ Uniting American Families Act, H.R. 1024, 111th Cong. (2009). The Senate bill, first introduced by Sen. Patrick Leahy (D-VT) in 2003, uses language identical to House’s bill. Uniting American Families Act, S. 424, 111th Cong. (2009).

⁸ See <http://www.thomas.gov> (enter “H.R. 1024” under “Search Bill Summary and Status;” then follow “Cosponsors” hyperlink). For more detailed sponsorship analysis, see Immigration Equality Homepage,

revolutionize the treatment of same-sex couples in immigration and align U.S. policy with that of many other developed countries,¹⁰ has a very good chance of passing in the next few years; President Barack Obama is on record supporting the bill,¹¹ and opinion in scholarly and corporate circles is favorable.¹²

Arguments against the passage of the bill traditionally have centered on the same issues surrounding gay marriage—both moral and political—that led to the passage of the Defense of Marriage Act (DOMA), the 1996 legislation that defined marriage as between one man and one woman and released states from any obligation to recognize a state-sanctioned, same-sex relationship from another jurisdiction.¹³ Additionally, many members of Congress have been hesitant about the UAFA because they see the bill as vulnerable to marriage fraud.¹⁴ Recently, some opponents have even expressed concern that allowing GLBT individuals to sponsor their partners would create an immigration loophole that terrorists could exploit.¹⁵

Despite significant obstacles and a national history of discrimination against GLBT individuals in immigration and elsewhere, several factors, such as recent shifts in attitudes towards same-sex relationships and Democratic control of the White House and Congress, suggest that the UAFA could become law in the near future.¹⁶ Nonetheless, many lobbyists and supporters acknowledge that the bill's language is still up for discussion and open to compromise.¹⁷ This Comment hopes to assist lawmakers and lobbyists by discussing certain problems in the bill's current language and suggesting ways to improve it. To this end, the Comment will weigh some of the sacrifices that may be required of the bill, consider their varying implications, and finally endorse a

<http://immigrationequality.org/> (last visited Mar. 24, 2009).

⁹ See <http://www.thomas.gov> (enter "S.424" under "Search Bill Summary and Status;" then follow "Cosponsors" hyperlink).

¹⁰ See Lena Ayoub & Shin-Ming Wong, *Foreign and International Law in Gay Rights Litigation: Separated and Unequal*, 32 WM. MITCHELL L. REV. 559, 575 (2006) (describing immigration reform for same-sex binational couples in eighteen countries).

¹¹ HUMAN RIGHTS CAMPAIGN, WHERE THE DEMOCRATIC CANDIDATES STAND: AN ANALYSIS OF THE CANDIDATES' QUESTIONNAIRE ON ISSUES OF CONCERN TO THE GLBT COMMUNITY, <http://www.hrc.org/news/5207.htm> (follow "2008 Democratic presidential candidate questionnaire" hyperlink) (last visited Mar. 24, 2009).

¹² C.S. Muncy, *Uniting American Families Act Reintroduced Last Month: Same-sex Immigration Bill Gets Strong Support in House, Less in Senate*, SAN DIEGO NEWS, July 7, 2005, available at <http://www.gaylesbiantimes.com/?id=5331&issue=915> (quoting Intel Corporation and other companies in support of the UAFA). The technology sector has been particularly affected by the gay "brain-drain." See *id.*

¹³ Defense of Marriage Act of 1996, 28 U.S.C. § 1738C (2006).

¹⁴ President Barack Obama, for example, expressed concern about the bill while he was a candidate. See Human Rights Campaign, 2008 Presidential Questionnaire - Senator Barack Obama, available at http://citizenchris.typepad.com/citizenchris/files/obama_hrc.pdf ("I . . . believe that changes need to be made to the bill to minimize the potential for fraud and abuse of the immigration system.").

¹⁵ See Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J.C.R. & C.L. 345, 361–62 (2007).

¹⁶ Jeni Loftus, *American's Liberalization in Attitudes Toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762, 762 (2001) (analyzing trends that indicate a steady twenty-five year "decline in Americans' willingness to restrict the civil liberties of homosexuals" as well as a more recent liberalization of moral attitudes towards same-sex activity).

¹⁷ See, e.g., Obama & Gay Immigration Rights, <http://citizenchris.typepad.com/citizenchris/2007/09/obama-and-gay-i.html> (last visited Mar. 24, 2009) (describing some "draconian" compromises, such as a minimum cohabitation requirement, as potentially reasonable).

potentially controversial preference for expanding the bill's definition of "permanent partner."

¶6 Part II of this Comment will introduce the current procedure used in the sponsorship of foreign aliens. Part III will outline the historic treatment of the GLBT community, both as individuals and couples, in immigration law and practice. The Comment will then turn, in Part IV, to the UFAFA itself, examining its language and analyzing its coverage. After shedding light on the opposing factors and arguments facing the bill in Part V, the Comment will finally consider remedies to assuage those fears in Part VI.

II. IMMIGRATION SPONSORSHIP PROCEDURE

¶7 The process by which a foreign national proves eligibility to settle permanently in the United States is complex.¹⁸ Immigrant hopefuls must present themselves at a U.S. consulate abroad with documentation that demonstrates that a U.S. citizen or permanent resident (e.g. family member or employer) has sponsored the immigrant's application.¹⁹ Family-based sponsorship, which accounts for nearly two-thirds of all visa applications,²⁰ is available to parents, children, spouses, and siblings of citizens or permanent residents,²¹ provided that the applicant will not become a social liability or is not otherwise inadmissible.²²

¶8 Of particular interest for this discussion is the sponsorship process for spouses of U.S. citizens. The process begins when the U.S. citizen files a petition with the U.S. Citizenship and Immigration Services (USCIS, formerly the Immigration and Naturalization Service) on behalf of his or her spouse, after which the spouse may apply

¹⁸ See Immigration and Nationality Act, 8 U.S.C. §§ 1181-89 (1982); U.S. Department of State, Bureau of Council Affairs, http://travel.state.gov/visa/visa_1750.html (last visited Mar. 24, 2009) [hereinafter Department of State Website]; U.S. Citizen and Immigration Services, <http://www.uscis.gov/> (follow "Services & Benefits" hyperlink; then follow "Permanent Residence (Green Card)" hyperlink) (last visited Mar. 24, 2009). Scrutiny of applications for temporary residence in the United States intensified following the terrorist attacks of September 2001, but did not lead to a significant decrease in the number of successful applications for permanent residence. See Press Release, Migration Policy Inst., Coming to America Two Years After September 11, 2001: Permanent Immigration Remains Stable, But Temporary Admissions Decline and Refugee Admissions Drop Drastically (2003), available at http://www.migrationpolicy.org/pubs/Immigration_Since_9-11.pdf; see also Michael Janofksy, *9/11 Panel Calls Policies on Immigration Ineffective*, N.Y. TIMES, Apr. 17, 2004, at A8.

¹⁹ Department of State Website, *supra* note 18 (Follow "Immigrants to the U.S.: Visa Types For Immigrants" hyperlink). Some immigrants are eligible for an employment-based visa without an employer sponsor if they can demonstrate "international acclaim and recognition in [a] field of expertise" such as business, the arts, or athletics, or if they are specially trained in a field that is suffering a recognized labor shortage. *Id.* at http://travel.state.gov/visa/immigrants/types/types_1323.html. Other treaty-based exceptions exist. *Id.*

²⁰ NANCY F. RYTINA, DEP'T OF HOMELAND SECURITY, U.S. LEGAL PERMANENT RESIDENTS: 2004, 1 (2005), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/FlowReportLegalPermResidents2004.pdf>.

²¹ Department of State Website, *supra* note 18, at http://travel.state.gov/visa/immigrants/types/types_1306.html.

²² Applicants must show that the family-sponsor has the financial means to support them. Medical exams and criminal background checks are also routine. U.S. Department of State, Family Based Immigrants, http://travel.state.gov/visa/immigrants/types/types_1306.html (last visited Mar. 24, 2009).

for lawful permanent residency.²³ Lawful permanent residents may live and work in the United States indefinitely.²⁴

¶9 Before qualifying for lawful permanent resident status, however, applicants must demonstrate both that they are otherwise eligible for admission into the United States (i.e., that they are not members of a statutorily banned class of applicants)²⁵ and that the qualifying marriage is legal and genuine.²⁶ The National Visa Center, after receiving an Affidavit of Support and a processing fee from the sponsoring U.S. citizen, schedules an interview for the immigrant applicant.²⁷ It is at the applicant's interview that the "genuine marriage" question is investigated.²⁸

¶10 Applicants are told to bring a number of documents to the interview, including their marriage certificate,²⁹ proof of the dissolution of any previous marriages, and any evidence to substantiate that the marriage is real (i.e., not fraudulently³⁰ undertaken solely for immigration purposes).³¹ The USCIS suggests bringing wedding photos to prove that the marriage is genuine, though the interviewing agent can ask other questions and may demand more information or documentation.³² There is no minimum requirement for the length of the marriage,³³ and spouses of U.S. citizens are not subject to the yearly caps that limit immigration rates for other types of visas.³⁴

¶11 The Department of Homeland Security also grants visas for foreign fiancé(e)s who live outside the United States.³⁵ The process for a foreign national fiancé(e) is quite similar to the process for spouses. At the interview, however, the fiancé(e) must also demonstrate that the couple has met in person at least once within the previous two years³⁶ and that the couple intends to wed when the non-citizen arrives in the United States.³⁷

²³ Department of State Website, *supra* note 18, at http://travel.state.gov/visa/immigrants/types/types_2991.html.

²⁴ *Id.* at http://travel.state.gov/visa/immigrants/types/types_1306.html.

²⁵ Immigrants married to U.S. citizens are nonetheless ineligible for lawful permanent residence if they have committed certain crimes, belong to certain terrorist organizations, or have overstayed a previous stay in the United States. *See* Immigration and Nationality Act, 8 U.S.C. § 1182 (2006).

²⁶ Department of State Website, *supra* note 18, at http://travel.state.gov/visa/immigrants/types/types_2991.html.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* There is a waiver for common-law marriages if the home country treats such marriages as identical to licensed ones. *Id.*

³⁰ There are substantial penalties for marriage fraud. *See* 8 U.S.C. § 1325(c) (1994) ("Marriage fraud. Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than \$ 250,000, or both.").

³¹ Department of State Website, *supra* note 18.

³² *Id.*

³³ *Id.* In response to the problem of sham marriages, Congress passed the Immigration Marriage Fraud Amendment in 1986. Pub. L. No. 99-639, § 5, 100 Stat. 3537 (requiring that an immigrant's green card is considered temporary until the applicant has been married to a citizen for at least two years, and that at the end of the two years, the spouses must again demonstrate the continuing genuineness of the marriage); *see also* CHARLES GORDON, IMMIGRATION LAW AND PROCEDURE, 4-42 § 42.07 (2007).

³⁴ There are an unlimited number of visas for the immediate relatives of U.S. citizens. 8 U.S.C. § 1151(2)(A)(i); *see also* Department of State Website, *supra* note 18.

³⁵ *See* Department of State Website, *supra* note 18.

³⁶ *Id.* (noting that this requirement is waivable in limited circumstances, such as for arranged marriages).

³⁷ *Id.*

¶12 The family-based sponsorship program reflects the proposition that the United States immigration policy should keep the immigrant family intact. This bedrock principle of immigration law—the underlying policy that informs all aspects of U.S. immigration decision-making—stresses the reunification of immigrant families as a key social value.³⁸ Notwithstanding Congressional overtures about familial stability,³⁹ however, same-sex couples are excluded from the U.S. government’s understanding of “family,” even those that have been recognized as marriages in foreign jurisdictions.⁴⁰ This discrimination against same-sex couples naturally follows the trajectory of the United States’ long history of prejudice against GLBT individuals in immigration policy.

III. HISTORY OF THE U.S.’S ANTI-GAY IMMIGRATION POLICIES

¶13 Active discrimination against same-sex couples, and GLBT individuals in general, is an important thread of U.S. immigration history, and echoes of these historical biases deeply inform many of the attitudes that remain substantial obstacles for same-sex binational couples today. Conformist forces, in varying social contexts, have equated the homosexual with the subversive threat of every generation in post-modern history.⁴¹ In the late nineteenth century, xenophobic sentiment⁴² and popular acceptance of the basic assumptions of social Darwinism led legislators to use immigration policy in their efforts

³⁸ 8 U.S.C. § 1153(a) (2001); *see also* U.S. SELECT COMM’N ON IMMIGR. & REFUGEE POL’Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 112–13, 205–07 (1981) (“[R]eunification of families serves the national interest . . . [and] the reunion of family members with their close relatives promotes the health and welfare of the United States.”); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1637–38 (2007) (noting that prior to 1965, family reunification had been limited by quotas setting the total number of immigrants that could be admitted from each country).

³⁹ *See, e.g.*, 136 CONG. REC. H8631 (daily ed. Oct. 2, 1990) (statement of Rep. Raymond McGrath) (“[P]rolonging the separation of spouses from each other . . . is inconsistent with the principles on which this nation was founded.”); 136 CONG. REC. H8629 (daily ed. Oct. 2, 1990) (statement of Rep. John Bonior) (“The wait for family reunification can be long and painful . . . Not only is it anti-family 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.”) *both reprinted in* Christopher A. Dueñas, Note, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 815 (2000).

⁴⁰ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *see infra* notes 41–79 and accompanying text. *Adams* and *Howerton*’s application was denied because, as the government report explained, they had “failed to establish that a bona fide marital relationship can exist between two faggots.” *See* FAMILY, UNVALUED, *supra* note 1, at 19 (quoting Letter from Immigration and Naturalization Service to Richard Adams (Nov. 24, 1975)).

⁴¹ One of the popular myths of gay history is the liberation narrative: the homosexual, after centuries in the closet, threw off his yoke in the 1960s and has won a string of political victories because the more enlightened forces of tolerance (or moral relativism, depending on one’s view) are winning the Culture Wars. The view is remarkably simplistic, suspiciously gendered, and patently untrue. *See generally* GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* (1995) (documenting how the out world of *fin-de-siècle* New York was driven into the closet); WILLIAM ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (2002) (analyzing the GLBT community’s fight for legal recognition); NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* (2006) (providing an overview of major themes in GLBT history).

⁴² *See generally* DAVID H. BENNETT, *PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* (1995) (describing xenophobia in the United States before World War I). *See also* Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 440–47 (1994) (discussing the tie between historical xenophobia and anti-gay policies in mid-century eugenics).

to eliminate ‘genetic pollution’ in general.⁴³ The homosexual as moral pollutant became increasingly threatening as sexual deviants supposedly weakened the nation’s moral fiber and sapped societal resources.⁴⁴ In the early twentieth century, homosexuals were swept up in anti-communism hysteria and subsequent reforms.⁴⁵ More recently, legislators have resisted same-sex sponsorship out of fears of abuse by Islamic terrorists.⁴⁶ As this Comment is ultimately about confronting resistance to solving the binational, same-sex issue, an understanding of the anti-GLBT history of immigration is vital for this discussion.

¶14 In 1952, Congress passed the Immigration and Nationality Act (INA).⁴⁷ Moral threats—like prostitutes—had been explicitly prohibited from immigrating to the United States since 1875.⁴⁸ Also prohibited, since 1917, were “[a]ll idiots, imbeciles, feeble-minded persons, epileptics, [and] insane persons.”⁴⁹ It was not until the INA, however, that Congress specifically contemplated the active exclusion of homosexuals.⁵⁰ Reflecting the Diagnostic and Statistical Manual’s recent addition of homosexuality to its catalogue of mental disorders,⁵¹ Congress exchanged the 1917 ban on “persons of constitutional psychopathic inferiority”⁵² for the homosexual/pervert-inclusive language of “aliens afflicted with psychopathic personality, epilepsy or a mental defect.”⁵³ The choice to exclude the genetically defective homosexual reflected not only the nineteenth and early twentieth century’s obsession with genetic purity,⁵⁴ but also the newly enflamed, anti-communist fervor that was sweeping the nation.⁵⁵ The homosexual, nearly universally closeted and fearing pariah status, was said to be uniquely susceptible to blackmail by communist forces and could not, therefore, be trusted.⁵⁶

⁴³ Francoeur, *supra* note 15, at 348–350.

⁴⁴ William Eskridge, Jr., *Law & the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1047 (1997) (discussing the story of Nicholas P., who was deported in 1909 as a “public charge” after admitting to “unnatural intercourse with men” and to having been in the “habit of abusing himself, committing masturbation”).

⁴⁵ See Francoeur, *supra* note 15, at 351–353; see also GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* 53 (1997) (noting how one’s identification as homosexual created a presumption of communist sentiment, and vice-versa). The communist-homosexual association continues today, particularly in Catholic natural law and Thomist circles. See TPF COMMITTEE OF AMERICAN ISSUES, *HIGHER LAW: WHY WE MUST RESIST SAME-SEX “MARRIAGE” AND THE HOMOSEXUAL MOVEMENT* 16 (2004) (“[Harry Hay] made friends with movie director George Oppenheimer, who introduced him to the homosexual network in the movie capital. Communism was also making deep inroad into artistic circles . . .”).

⁴⁶ Francoeur, *supra* note 15, at 361–62.

⁴⁷ Immigration and Nationality (McCarren-Walter) Act, ch. 477, 66 Stat. 182 (1952); 8 U.S.C. § 1182(a)(4) (2008).

⁴⁸ Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (amended 1917). See Eskridge, *supra* note 44, at 1045–46.

⁴⁹ Act of Feb. 3, 1917, ch. 29, 39 Stat. 875 (1917) (amended 1952).

⁵⁰ See *Boutilier v. INS*, 387 U.S. 118, 121 (1967).

⁵¹ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 38–39 (1952) (listing homosexuality under the mental disorder of Sexual Deviation).

⁵² Act of Feb. 3, 1917, ch. 29, 39 Stat. 875 (1917) (amended 1952).

⁵³ Immigration and Nationality (McCarren-Walter) Act, ch. 477, 66 Stat. 182 (1952) (amended by Immigration Act of 1990).

⁵⁴ Foss, *supra* note 42, at 446–47.

⁵⁵ FAMILY, UNVALUED, *supra* note 1, at 24–25.

⁵⁶ *Id.* at 34.

¶15 When the Ninth Circuit ruled in 1962 that the term “psychopathic personality” was too vague to uphold an automatic exclusion of all homosexuals,⁵⁷ Congress amended the section “to include the words ‘sexual deviate’ in order to ‘serve the purpose of resolving any doubt on [the] point.’”⁵⁸ The Supreme Court consequently demurred and held in *Boutilier v. INS* that the legislative history conclusively dictated that homosexuals were “psychopathic personalities” under the statute, and thus homosexuals were barred from admission to the United States.⁵⁹

¶16 In an important 1975 precedent, the Ninth Circuit ruled in *Adams v. Howerton* that “spouse” in the INA applied exclusively to opposite-sex marriages.⁶⁰ Richard Adams lived with his Australian partner, Anthony Sullivan, in Colorado. Armed with a marriage license from their sympathetic county clerk, the couple sought recognition of Sullivan as a “spouse” so he could avoid deportation.⁶¹ Although less personally offensive than the INS agent’s response (the agent reported that the claimants “have failed to establish that a bona fide marital relationship can exist between two faggots”),⁶² the court’s decision laid the foundation for future rejections of marriage licenses in same-sex immigration proceedings.

¶17 In 1979, the Surgeon General directed to the U.S. Public Health Service (UPH) that homosexuality would no longer be considered a per se “mental defect or disease.”⁶³ Because INS agents relied on the UPH to diagnose suspected homosexuals and to issue the “mental defect” certificates that were the bases for immigrants’ removal, a new evidentiary standard for excluding homosexuals had to be designed. After temporarily lifting the ban on homosexuals while working through the UPH’s policy change,⁶⁴ the INS in 1980 released a uniform guide on the procedures for handling suspected homosexuals.⁶⁵ Under the new guidelines, arriving aliens were not to be questioned about sexual orientation but could be denied admission into the United States if they or a third party arriving at the same time voluntarily indicated the alien’s homosexuality.⁶⁶ When immigrants made such an acknowledgement, they had to meet privately with an

⁵⁷ *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963).

⁵⁸ *Hill v. INS*, 714 F.2d 1470, 1470 n.1 (9th Cir. 1983) (quoting S. REP. NO. 748, 89th Cong., 1st Sess. 19).

⁵⁹ *Boutilier v. INS*, 387 U.S. 118, 122 (1967). Clive Boutilier, a twenty-one-year old from Canada, came to the United States in 1955 to join his mother and siblings already here. *Id.* at 119. During his citizenship application process, he admitted to having been arrested for sodomy four years earlier. *Id.* A failed suicide attempt following the Supreme Court’s deportation ruling left Boutilier permanently brain damaged. FAMILY, UNVALUED, *supra* note 1, at 26.

⁶⁰ *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982).

⁶¹ Deuñas, *supra* note 39, at 821–23.

⁶² FAMILY, UNVALUED, *supra* note 1, at 19.

⁶³ *Hill v. INS*, 714 F.2d 1470, 1472 (9th Cir. 1983). The Surgeon General cited the “current and generally accepted canons of medical practice,” as well as the problem surrounding the difficulty that “the determination of homosexuality is not made through a medical procedure.” *Id.* at 1472–73 (citation omitted). Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders in 1974. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1967) (rev. 1974).

⁶⁴ The Department of Justice advised that a permanent lifting of the ban was illegal in light of the Congress’s explicit inclusion of homosexuals on its exclusion lists. See *Hill*, 714 F.2d at 1473; 8 U.S.C. § 1182(d)(5) (1976 & Supp. V 1981).

⁶⁵ 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 *Hill*, 714 F.2d at 1473.

⁶⁶ Guidelines and Procedures, *supra* note 65.

immigration official, who asked them to confess to their sexuality in writing.⁶⁷ Immigration judges would then use this written acknowledgement to constitute the exclusion.⁶⁸ The UPH, unwilling to issue medical certificates, was thus removed from the process.

¶18 The policy did not survive long. In *Hill v. INS*, the Ninth Circuit threw out the guidelines and unanimously held that the INA required that an arriving alien's exclusion for having a "psychopathic personality" or "mental defect" be based on a medical certificate (i.e., an actual medical diagnosis).⁶⁹ In holding that the INS could not circumvent public law with its own procedures, the ban on homosexuals was significantly weakened.⁷⁰

¶19 Seven years later, under intense pressure from various lobbying groups and a championing Representative Barney Frank (D-MA), President George H. W. Bush signed the Immigration Act of 1990 (1990 Act), making the United States the last industrialized nation in the world to lift its official ban on alien-homosexuals.⁷¹ Even after the 1990 Act, however, homosexuals continued to be deported, excluded, and denied citizenship for having violated state morality and anti-sodomy statutes.⁷² Only since 2003, when the Supreme Court struck down laws restricting private, consensual sodomy as violations of the Fourteenth Amendment's Due Process Clause, have individual homosexuals had a reprieve from the U.S.'s discriminatory immigration policies.⁷³

¶20 While individual homosexuals have made great strides towards eliminating the myriad barriers to equal treatment under U.S. immigration law, same-sex couples, bound by the Ninth Circuit's interpretation in *Adams* that "spouse" refers exclusively to opposite-sex couples,⁷⁴ remain unable to sponsor each other for family-based visas.⁷⁵ Thousands of U.S. citizens find themselves in situations where they must choose between whom they love and what they love, between family and country. Some couples suffer the strain of distance while one partner awaits a coveted employer-sponsored visa or selection in the perverse "diversity lottery,"⁷⁶ the mechanism by which a very small

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Hill*, 714 F.2d at 1480.

⁷⁰ *But cf. In re Longstaff*, 716 F.2d 1439, 1447 (5th Cir. 1983) (holding that "psychopathic personality" was a term of art that excluded homosexuals with or without medical approval). Although homosexuals were thus still excluded in some circuits, the restriction could be bypassed through a prudent choice of entry.

⁷¹ Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-78 (1990) (codified at 8 U.S.C. § 1182 (1990)); see 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).

⁷² Minter, *supra* note 71, at 783-98; see also Scott C. Titshaw, U.S. Immigration Law: Denying the Value of Gay and Lesbian Families, <http://www.abanet.org/irr/hr/winter01/titshaw.html> (last visited Mar. 24, 2009).

⁷³ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁷⁴ *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982).

⁷⁵ This is true, so long as the sponsor is a U.S. citizen and not a non-native immigrant. Then-Secretary of State Colin Powell, under pressure from corporations who were struggling to attract GLBT employees because of U.S. policy towards same-sex couples, directed the creation of a special class of B-2 Visas in a 2001 communiqué. Department of State Website, *supra* note 18, at http://travel.state.gov/visa/laws/telegrams/telegrams_1414.html. The special entrées effectively allow non-U.S. citizens to sponsor their same-sex couples for permanent residency even while U.S. citizens cannot. *Id.* See Chris Crain, *Demoted to Fourth-Class Citizenship*, SAN FRAN. BAY TIMES, May 10, 2007, http://www.sfbaytimes.com/index.php?sec=article&article_id=6389 (last visited Mar. 24, 2009).

⁷⁶ The diversity lottery is the mechanism by which a small number of applicants without employer or

number of visas are distributed at random. In others, the U.S. citizen agrees to live abroad, *ex patria* in one of the nineteen industrial countries that recognizes their relationship. Undoubtedly, some foreign partners live here illegally, risking deportation and a permanent ban on reentry into the United States.⁷⁷

¶21 In addition to the direct effects of the government's official policy on same-sex families, the lack of recognition for same-sex couples in the immigration context has also led to a systemic casualness towards anti-gay intolerance. Just as the legality of anti-sodomy statutes was used to validate other forms of GLBT discrimination,⁷⁸ so too has the Department of Homeland Security's policy regarding GLBT individuals and same-sex couples fermented an unofficial tolerance of anti-gay sentiment, subtly sanctioning otherwise inappropriate and harmful behavior. As Human Rights Watch has documented, "[t]he word faggot has been used with surprising regularity by immigration officers, consular officials, and other agents of the government when interacting with lesbian, gay, bisexual, and transgender individuals and immigrants."⁷⁹ Some members of the bureaucracy, in other words, have interpreted the legal inequality of same-sex couples as a signal that a certain level of harassment is permissible. Legislation is necessary to begin to effect fairer treatment for binational same-sex couples.

IV. THE UNITING AMERICAN FAMILIES ACT

¶22 The Uniting American Families Act represents a timely opportunity to reverse the eighty-year history of a destructive and discriminatory policy of exclusion. First introduced as the Permanent Partners Immigration Act (PPIA), the UAFA is the best hope for the reunification of same-sex families.

¶23 The express aim of the bill is to correct the United States' current policy of dissimilar treatment of opposite-sex and same-sex couples. The Act's purpose is:

To amend the Immigration and Nationality Act to eliminate discrimination in the immigration laws by permitting permanent partners of United States citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents and to penalize immigration fraud in connection with permanent partnerships.⁸⁰

The bill begins by defining permanent partner as:

[A]n individual 18 years of age or older who—

family sponsor are randomly granted visas. See Department of State Website, *supra* note 18, at http://travel.state.gov/visa/immigrants/types/types_2991.html.

⁷⁷ See Dueñas, *supra* note 39, at 826–27.

⁷⁸ See *Lawrence*, 539 U.S. at 581–82 (2003) (“Texas’ [sic] sodomy law brands all homosexuals as criminals Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law ‘legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.”) (citing *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994)).

⁷⁹ Francoeur, *supra* note 15, at 346 n.2.

⁸⁰ Uniting American Families Act, H.R. 1024, 111th Cong. (2009); S. Res. 424, 111th Cong. (2009).

(A) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment;

(B) is financially interdependent with that other individual;

(C) is not married to or in a permanent partnership with anyone other than that other individual;

(D) is unable to contract with that other individual a marriage cognizable under this Act; and

(E) is not a first, second, or third degree blood relation of that other individual.⁸¹

¶24 The bill then proceeds through the entirety of the Immigration and Nationality Act and adds “permanent partner” after references to “spouse,” and “permanent partnership” after references to “marriage.”⁸² Suspected fraudulently-entered permanent partnerships would be investigated and, if confirmed, punished in the same fashion as suspected and confirmed acts of opposite-sex marriage fraud.⁸³

¶25 On the macro level, the bill is meant to create a marriage-proximate for same-sex couples in immigration. Intimacy, life-long commitment, and the intermingling of finances (plus a blood-relative exclusion) combine to neatly align with notions of traditional marriage. The obvious disconnect, of course, is that binational same-sex couples are unlikely to completely resemble the mononational opposite-sex marriage. Requiring financial interdependence may be particularly troublesome if international immigration laws have forced the pair to maintain separate domiciles in different countries. Realistically, same-sex couples in this situation could not be expected to have developed financial interdependence any more than opposite-sex fiancés or newlyweds, who face no such requirement. The bill, thus, already excludes some couples who no doubt were meant to be included.

¶26 Another aspect of the bill is that permanent partnerships are only available to those who are “unable to contract with th[e] other individual a marriage cognizable under this Act.”⁸⁴ The consequence of the language is to disqualify, without explicitly stating so, all opposite-sex couples from becoming permanent partners under the amendment. Because all opposite-sex couples are, with the exception of incestuous relationships, able to marry, the bill is exclusively targeted to GLBT individuals.

¶27 More importantly, however, the language indicates that same-sex couples with valid marriage certificates, whether issued in foreign or domestic jurisdictions, can only apply for visas as permanent partners; *Adams v. Howerton*’s limited definition of “spouse” will remain good law. Because marriage licenses issued to same-sex couples in Spain or South Africa or Massachusetts are not “cognizable [marriages] under this Act,” because they were not recognized before the UFAFA amendment, same-sex spouses will

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

have to demonstrate that they have a genuine relationship under permanent partnership standards.⁸⁵

¶28 The UAFA’s language then is both under- and over-inclusive in its attempt to mirror traditional marriage. On the one hand, an applicant has to demonstrate financial interdependence with a U.S. citizen, an obligation that opposite-sex couples neither have to fulfill nor, in a genuine marriage, necessarily could. The bill is under-inclusive in not reaching the perhaps thousands of same-sex couples who, as a result of the exigencies of modern living (and American law), have not sufficiently intermingled assets.

¶29 On the other hand, the bill is over-inclusive because same-sex couples that live in states or countries where same-sex marriage is legal would be eligible for family-based, permanent-partner visas even if they were unwed; the bill thus reaches same-sex couples that have actively chosen not to be married. Opposite-sex couples in the same situation (e.g. girlfriends and boyfriends) would be ineligible to sponsor their partners. From an evidentiary and practical point of view, if one accepts the premise that the only difference between spouses and permanent partners *under the Act* is the availability of a marriage certificate (i.e. state-certified evidence), then the Act is inconsistent.

¶30 The bill’s language places the definitional center of marriage within the INA’s general provisions, thus forcing same-sex couples who are legally married in other jurisdictions to justify their existence under the higher evidentiary standards of permanent partners (with its “financially interdependent” burden). At the same time, however, the bill also gives unwed same-sex couples from countries where same-sex marriage is legal an easier route to family sponsorship than unwed opposite-sex couples. In ignoring that some countries recognize same-sex marriage, inequities for both same- and opposite-sex couples are created.⁸⁶

¶31 Nonetheless, the rejection of same-sex couples with valid marriage certificates as spouses makes perfect sense in light of *realpolitik* concerns. The bill has a much better chance of becoming law if it does not explicitly contradict the Defense of Marriage Act.⁸⁷ DOMA states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁸⁸

Although a thorough analysis of whether DOMA contradicts the UAFA is beyond the scope of this Comment, it seems unlikely that a narrower interpretation would have to be applied to DOMA because of the permanent partner language.⁸⁹ While the permanent

⁸⁵ H.R. 1024, 111th Cong. (2009).

⁸⁶ A similar tension would exist if private or state government employers in Massachusetts continued to extend domestic partner benefits to same-sex couples who had chosen not to get married.

⁸⁷ Defense of Marriage Act of 1996, 1 U.S.C. § 7 (2006).

⁸⁸ *Id.*

⁸⁹ Those who have more thoroughly analyzed the question agree. *See, e.g.*, Desiree Alonso, Note, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN’S L.J. 207, 218–19 (2002) (contrasting the scope of DOMA and PPIA).

partnership structurally parallels marriage in the INA, there are some key differences,⁹⁰ the UAFA's explicit limitation of the scope of a permanent partnership to those unable to "contract with that other individual a marriage cognizable under this Act"⁹¹ seems to sufficiently separate the two classifications.

¶32 If the bill is passed in its current form, however, there is a question of how a same-sex marriage certificate would figure into the determination of the genuineness of a permanent partnership. On the one hand, an immigration agent could justify excluding all evidence regarding the marriage certificate because it is both unrelated to financial interdependence and potentially because DOMA forbids it. On the other hand, that same agent could conclude that the lack of a marriage certificate, when one was available to the same-sex couple, is evidence against the couple's intention to maintain a lifelong commitment.⁹² Given the INS's long history of anti-gay policies and the judiciary's historical presumption of Congress's anti-gay intent in immigration,⁹³ it is possible that immigrants from countries that recognize same-sex marriage may find it legally more difficult to qualify for sponsorship than immigrants from countries without same-sex marriage.

V. OPPOSITION TO THE UAFA

¶33 Despite an relatively favorable forecast from LexisNexis for the upcoming term, the UAFA still faces significant opposition to passage.⁹⁴ This part of the Comment will outline the main obstacles that confront the UAFA. The arguments against the bill are presented here in order to contextualize the forces that may require changes in the bill's language. In addition, they will establish a basis by which the necessity of certain changes can be measured against increasing the bill's chances of passage.

¶34 The bill faces a number of short-term challenges. The urgency of the current financial crisis and the magnitude of American military presence abroad limit many politicians' ability to tackle certain domestic problems. Additionally, the bill, at the intersection of sexual orientation issues and immigration reform, overlaps two hot button topics. Congress may be particularly wary of returning to the immigration issue after its spectacular failure to pass a compromise on comprehensive reform in the summer of 2007.⁹⁵ Further, the focus of gay-rights lobbyists in the near future will probably continue to be directed more towards fighting discrimination in employment and ending

⁹⁰ See *supra* notes 81–89 and accompanying text.

⁹¹ Uniting American Families Act, H.R. 1024, 111th Cong. (2009).

⁹² *Id.* at (A) (noting that such commitments are required under UAFA).

⁹³ See *supra* notes 41–79 and accompanying text.

⁹⁴ The forecast gives the bill a sixty-one percent chance of passing the House floor and a forty-two percent chance in the Senate. Lexis Congressional Bills Legislative Forecasts, Current Congress, H.R. 1024, 111th Cong. (1st Sess. 2009). By comparison, the bill's chances of passage in November, 2007, before election-year distractions, were only twenty percent in the Senate. Lexis Congressional Bills Legislative Forecasts, H.R. 2221, 110th Cong. (1st Sess. 2007). In January, 2001, one year after the bill's initial introduction, its legislative forecast for the Senate stood at ten percent. See Sara A. Shubert, *Immigration Rights for Same-Sex Partners Under the Permanent Partners Immigration Act*, 74 TEMP. L. REV. 541, 545 n.35 (citing Lexis Congressional Bills Legislative Forecasts, Current Congress, H. R. 3650, 106th Cong. (2d Sess. 2000)).

⁹⁵ See Robert Pear, *Proposals From Both Sides Fail in Immigration Debate*, N.Y. TIMES, June 28, 2007, at A18.

the military's Don't-Ask-Don't-Tell policy than towards addressing discrimination in immigration.

¶35 Nonetheless, looking forward to the 111th Congress, the future opposition to the UAFAs is quite discernible. A certain portion of the Congress will oppose the bill either out of genuine nativist sentiment⁹⁶ or from a general opposition to the USCIS's stated policy of familial reunification.⁹⁷ Other members of Congress, regardless of the context, can consistently be depended upon to vote against any and all pro-GLBT bills and to vote in favor of any anti-GLBT ones.⁹⁸ There may be, of course, some overlap between these two factions. For the purposes of this Comment, it is assumed that these individuals would not be responsive to any changes in the UAFAs, and so are outside this discussion.

¶36 As Adam Francoeur, former Policy Coordinator for Immigration Equality, observed, after "four years lobbying Congress to pass the UAFAs, fraud has been the most cited reason for not supporting the UAFAs."⁹⁹ Although all of the candidates for the Democratic Presidential nomination were on record supporting the UAFAs,¹⁰⁰ both Secretary of State Hillary Clinton¹⁰¹ and President Barack Obama¹⁰² have expressed concerns about the bill's fraud provisions. Then-Senator Clinton, in responding to the Human Rights Campaign's Presidential Questionnaire, said of the UAFAs, "[w]hile I'm supportive of this proposal in principle, I have been concerned about fraud and believe implementation of this provision could strain the capacity of our Citizenship and Immigration Services."¹⁰³ Then-Senator Obama likewise commented,

As someone who believes that homosexual couples should have the same legal rights as married couples and that our immigration laws should unite families, I support the Uniting American Families Act in concept. But I also believe that changes need to be made to the bill to minimize the potential for fraud and abuse of the immigration system.¹⁰⁴

These responses are common despite the fact that the fraud provisions in the UAFAs are more demanding for same-sex couples than they currently are for married, opposite-sex

⁹⁶ See VANESSA B. BEASLEY, WHO BELONGS IN AMERICA? PRESIDENTS, RHETORIC, AND IMMIGRATION 10 (Vanessa B. Beasley ed., 2006) ("Even today, nativism continues to be present within political rhetoric in the United States, whether it takes an explicit form (such as . . . Patrick Buchanan's suggestion that we build a fence around the country's borders) or less obvious iterations.").

⁹⁷ Family reunification is often criticized for undervaluing skilled immigrants in favor of applicants whose sole qualification for entry is that some family members are already here. *Tell Me More: Immigration: Family Reunification vs. Point System* (National Public Radio broadcast June 1, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10614195>.

⁹⁸ For example, while certainly not a definitive indicator, the Human Rights Campaign gave 21 Senators and 103 Members of the House a score of zero for their voting Scorecard for each of the last three consecutive sessions of Congress. Human Rights Campaign, Congressional Scorecard, 2006, <http://www.hrc.org/documents/HRCscorecard2006.pdf> (last visited Mar. 24, 2009). These numbers do not include Congressional members who have served less than six full years in Congress. *Id.*

⁹⁹ Francoeur, *supra* note 15, at 373.

¹⁰⁰ HUMAN RIGHTS CAMPAIGN, *supra* note 11.

¹⁰¹ Human Rights Campaign, 2008 Presidential Questionnaire: Hillary Clinton, http://www.politico.com/pdf/PPM42_benhrc.pdf (last visited Mar. 24, 2009).

¹⁰² HUMAN RIGHTS CAMPAIGN, *supra* note 11.

¹⁰³ Human Rights Campaign, *supra* note 101.

¹⁰⁴ HUMAN RIGHTS CAMPAIGN, *supra* note 11.

couples.¹⁰⁵ It seems, then, that any genuine concerns about immigration fraud in this respect would have to center on fears of an increase, either proportionate or disproportionate, in the number of “sham marriages.” A fear of a proportionate increase supposes a raw increase in marriage fraud attempts as the total number of applications rises, presumably because there exists a certain number of criminals on the margin whose efforts have been limited by an inability to find opposite-sex accomplices.¹⁰⁶ One would expect also that such a concern over raw increases would taper off as the total number of new applicants falls after some initial spike.¹⁰⁷

¶37 A disproportionate increase also supposes a raw increase, presumably because of an increased success rate under a permanent partnership scheme. An increased success rate for fraudulent permanent partners is rational only if the existing mechanisms at the National Visa Center fail under the weight of increased applications,¹⁰⁸ or if immigration agents, despite the added evidentiary test of financial interdependence, are less likely to properly identify a sham same-sex relationship than a sham opposite-sex one.

¶38 The uncertainty of proportionate versus disproportionate increases in marriage fraud successes and attempts is an empirical question beyond the scope of this Comment, though either scenario seems unlikely. To the contrary, common experience would suggest that there would be a *decrease* in the proportion of sham marriages. Under the current law, it is possible that some GLBT individuals have entered sham marriages to be with their American same-sex partners; an avenue for same-sex couples to legally remain in the United States would remove an obvious incentive for same-sex couples to use illegal means to stay with their loved ones. Additionally, even if the existence of permanent partnerships is seen as an opportunity for perpetrators of marriage fraud in general, experience suggests that, by proportion, homosexuals are more comfortable feigning intimate relationships with members of the opposite sex than heterosexuals would be with someone of the same sex.

¶39 Another type of fraud concern is the bill’s role in the “War on Terror.” There is a fear that permanent partnership fraud could be used not by individual opportunists but rather by terrorists.¹⁰⁹ Putting aside the homosexual-as-communist/subversive and homosexuals-as-Islamic-fascist parallel,¹¹⁰ it is not surprising that any new way of obtaining a coveted visa would, after September 11, receive added scrutiny.¹¹¹ As the

¹⁰⁵ See *supra* notes 82–92 and accompanying text.

¹⁰⁶ This poses an empirical question that is beyond the scope of this Comment.

¹⁰⁷ There are over 36,000 binational same-sex couples in the United States. FAMILY, UNVALUED, *supra* note 1. The couples currently waiting in the wings would undoubtedly compose the majority of initial permanent partnership requests.

¹⁰⁸ In light of the one million other family-based applications, it is uncertain what effect 36,000 additional applications would have. Although beyond the scope of this Comment, it seems that a one-year, 3.6% increase in applicants is unlikely to strain and break the USCIS structure.

¹⁰⁹ The language of the “War on Terror” may even purposefully conflate the terrorist threat to American values and the threat to values that same-sex couples allegedly pose. See Francoeur, *supra* note 15 (arguing that anti-terror policies are intentionally broad to target GLBT immigrants).

¹¹⁰ There is a significant amount of evidence that suggests that the government has used the War on Terror generally, and the Patriot Act specifically, to unfairly target GLBT citizens and immigrants, especially transgender individuals. See Francoeur, *supra* note 15 (documenting the targeting of GLBT couples with harboring provisions); Lloyd de Vries, *Ala.: Anti-Abortion, Gay Rights “Terror,”* CBSNEWS, May 27, 2007, <http://www.cbsnews.com/stories/2007/05/27/national/main2856311.shtml> (last visited Mar. 24, 2009).

¹¹¹ Many saw the government’s failure to catch the terrorists who were in the United States with expired

9/11 Commission noted, “[f]raud in identification documents is no longer just a problem of theft.”¹¹² Tellingly, immigration marriage fraud is now listed as part of the government’s terror statistics.¹¹³

¶40 Another practical consideration that may have to be addressed is the bill’s reference to “financial interdependence.”¹¹⁴ President Obama’s campaign, for example, raised the issue in a response to a constituent who was angry with Obama’s allegedly shifting position on the UAFA. “[Senator] Obama also wants to make sure there is a good mechanism for determining who qualifies for that status. He would like to see the Act get more specific with regards to defining ‘financial interdependence’ and the documentation required as proof in order to establish relationships.”¹¹⁵ “Interdependent” is definitely a vague term. Does it mean that the couple must maintain a living style that neither individual could afford without the other? Or does it just mean “intermingled,” like shared bank accounts? If the USCIS is unwilling to investigate whether permanent partners are actually intimate, would the agency try to use “financial interdependence” as a proxy for judging intimacy? Then how can an immigration agent separate business partners from life partners? While hardly insurmountable, the bill’s vagueness is an obstacle that will ultimately have to either be addressed or, potentially, punted to the judiciary.

¶41 A final major argument that will be advanced against the bill is that gay rights advocates are just using immigration rights in the UAFA to stealthily advance their ultimate goal of same-sex marriage. This line of debate, popular on political blogs and cable talk-shows, at Congressional floor debates and kitchen tables, usually follows a predictable path: opponents will say that the bill is a dishonest attempt to circumvent the laws that have established opposite-sex marriage as the foundation of an ordered society, and supporters will emphasize the human element of the bill.¹¹⁶ Many such debates often reach what may be the central source of most gay rights disagreements—the social acceptability of the homosexual and *his* lifestyle.¹¹⁷

visas as an immigration failure. See Mark Krikorian, *Keeping Terror Out: Immigration Policy and Asymmetric Warfare*, THE NAT’L INT., Spring 2004, available at <http://www.cis.org/articles/2004/mskoped050104.html> (discussing the validity of claimed connections between terrorism and a failed immigration policy).

¹¹² NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 387–90 (2004), available at <http://www.9-11commission.gov/report/911report.pdf>.

¹¹³ See Francoeur, *supra* note 15, at 373 n.119 (citing Dan Eggen, *Justice Department Statistics on Terrorism Faulted*, WASH. POST, Feb. 21, 2007, at A8).

¹¹⁴ Uniting American Families Act, H.R. 1024, 111th Cong. (2009).

¹¹⁵ Citizen Crain, An Independent Gay Blog, Obama and Gay Immigration Rights, <http://citizenchris.typepad.com/citizenchris/2007/09/obama-and-gay-i.html> (last visited Mar. 24, 2009).

¹¹⁶ The argument is made in a variety of contexts. For example, against recognizing the same-sex marriages of foreign jurisdictions as equivalent to local civil unions: “I think [the bill] is a back door to gay marriage.” Lisa Wagnsness, *Civil Unions Advance in N.H.: Governor says he will sign bill now in Senate*, THE BOSTON GLOBE, Apr. 20, 2007, at B1, available at http://www.boston.com/news/local/articles/2007/04/20/civil_unions_advance_in_nh/ (quoting Republican State Senator Robert E. Clegg Jr.’s opposition to recognizing same-sex marriages from Massachusetts as civil unions in New Hampshire). As for statements against allowing same-sex partners to make medical decisions for each other: “We know it’s a back-door way for homosexual activists to get gay marriage.” Russell Shorto, *What’s Their Real Problem with Gay Marriage? (It’s the Gay Part)*, N.Y. TIMES, June 19, 2005, at § 6 (quoting anti-gay activist Laura Clark).

¹¹⁷ Many have observed the misogynistic undertones that often accompany anti-gay rhetoric. See, e.g., ELIZABETH STUART & ADRIAN THATCHER, CHRISTIAN PERSPECTIVES ON SEXUALITY AND GENDER 358

¶42 To be sure, the similarities between a state-sanctioned, same-sex permanent partnership that grants one of the rights currently given only to opposite-sex married couples and a state-sanctioned, same-sex marriage are not illusory. But the same-sex marriage debate is happening on both a public policy level and a social justice level. In the matter of public policy, there is spirited disagreement over whether GLBT couples have a sufficient need for the benefits of gay marriage that would justify the societal costs.¹¹⁸ At the same time, on the social justice level, there is the question of whether gay people should or should not get the benefits of marriage regardless of some cost-benefit test because same-sex marriage is or is not the right thing to do.¹¹⁹

¶43 The UAFA debate in its limited history has already begun to follow this trajectory. Some commentators have touched on the public policy paradigm¹²⁰ while many others have emphasized social justice.¹²¹ Winning the UAFA debate, however, cannot only be about denying that permanent partnerships are related to same-sex marriage or that binational same-sex couples are sympathetic. These emphases may help give Congressional leaders political will, but they will not go far in convincing undecideds on the margin that the need for a practical solution to the binational issue is too great to ignore. Additionally, many opponents will be tempted to suggest potentially burdensome amendments to the UAFA to broaden the gap between permanent partnerships and traditional marriage.

(1996) (“When most people who oppose softening societal restriction against gay people talk about what they fear, it becomes clear that they have in mind male homosexuality and not female: is this because gay women are thought to be climbing out of their inferior female role into the desirable male one . . . ?”); Will, Grace and Angels in Brokeback America: Straight Women, Gay Men and Mormonism (the introduction), Oct. 30 2006, http://holly.mclo.net/archives/2006/10/will_grace_and.html (last visited Mar. 24, 2009) (“During the six years I’ve attended Sunstone, I’ve noticed that sessions there discussing homosexuality tend to focus on male sexuality, and that discussants, regardless of orientation, are generally male.”).

¹¹⁸ Compare RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* (2002) (arguing that discriminating against GLBT individuals prevents the thriving gay communities that are necessary to attract the creative classes), and ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002) (exploring legal arguments for gay marriage and the propriety of extending marriage to same-sex couples), with Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL’Y 949 (2006) (arguing that extending opposite-sex marriage and its incentives to same-sex couples would lead to sub-optimal law) and Adam Kolasinski, *The Secular Case Against Gay Marriage*, THE TECH (Boston), Feb. 17, 2004 (arguing that same-sex marriage does not further the state interest of population propagation because fertility treatment is inefficient).

¹¹⁹ Compare KOPPELMAN, *supra* note 118, with ERWIN W. LUTZER, *THE TRUTH ABOUT SAME-SEX MARRIAGE: 6 THINGS YOU NEED TO KNOW ABOUT WHAT’S REALLY AT STAKE* (2004) (arguing that the legalization of gay marriage will lead to the destruction of traditional marriage).

¹²⁰ See Ayoub & Wong, *supra* note 10.

¹²¹ See, e.g., Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813, 814 (2007) (“The marriage discussion is not only about marriage, but about the place of gay people in our civil society in the context of a century’s worth of official anti-gay discrimination.”). The UAFA is not yet on the anti-gay radar, and articles against the bill have yet to be written. It is sometimes mentioned, however, in general articles about Democrats acceptance of the so-called homosexual agenda and limits on Christian free speech. See, e.g., Focus on the Family, Citizen, *Gay Activists Get Plenty of Help from Dems: An Interview with Ashley Horne*, <http://www.citizenlink.org/citizenMag/A000005206.cfm> (last visited Mar. 24, 2009).

VI. SUGGESTIONS FOR CHANGE

¶44 The bill as it currently stands, even with its moderately higher evidentiary standards for same-sex couples, is in the most politically viable form. It addresses the legal dilemma facing tens of thousands of GLBT citizens and their foreign partners while simultaneously balancing fraud concerns (the bill incorporates the Marriage Fraud Act) and respect for traditional marriage (it creates an entirely separate category for same-sex couples instead of folding them into “spouses”). The political realities, however, may require changes and sacrifices, and some are preferable to others.

¶45 Some of the changes that commentators have advanced are, despite strong arguments in their favor, perhaps too radical for today’s political climate. Commentators across disciplines have pointed to contemporary civil marriage itself as a fundamentally unsound and unworkable paradigm and have argued that marriage as an organizing and regulating force has simply failed in the modern context.¹²² It is no longer permanent,¹²³ socially necessary for co-habitation,¹²⁴ or aligned with society’s child rearing customs.¹²⁵ Some of these commentators have even suggested abolishing civil marriage completely.¹²⁶

¶46 Whatever the implications of these observations and no matter the merits of these writers’ claims, their insights might not be helpful in seeking a compromise within the immigration context. From a political perspective, legislators are far more likely to tweak marriage than eliminate it. “Traditional marriage” has entered the inner-workings of the American imagination and, like the family farm, will command political reverence long after the modern world has moved on.¹²⁷ The more that the problems that binational

¹²² See, e.g., Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990) (arguing that divorce statutes that treat marriage like a partnership of equals fails to accommodate the real needs of women and children); Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001) (arguing that no legal structure exists that conforms to the needs of the modern family). Many commentators, of course, point to failings in the system with an eye towards correction. See, e.g., Kimberly Menashe Glassman, *Balancing the Demands of the Workplace with the Needs of the Modern Family: Expanding Family and Medical Leave To Protect Domestic Partners*, 37 U. MICH. J.L. REFORM 837 (2004) (arguing that modern realities support the extension of the Family and Medical Leave Act’s protections to domestic partnerships); Leah Ward Sears, *The “Marriage Gap”: A Case for Strengthening Marriage in the 21st Century*, 82 N.Y.U. L. REV. 1243 (arguing that modern realities require a renewed focus on creative ways to encourage the traditional family).

¹²³ Forty-three percent of first marriages end in the first fifteen years. Press Release, Ctr. for Disease Control & Prevention, *Forty-three Percent of First Marriages Break-up Within 15 Years* (May 24, 2001), available at <http://www.cdc.gov/od/oc/media/pressrel/r010524.htm>.

¹²⁴ As of the 2000 Census, eleven million people were living with an unmarried partner in the United States. Eleven percent of those were same-sex couples (i.e., legally ineligible for marriage). See Alternatives to Marriage Project, *Statistics*, <http://www.unmarried.org/statistics.html#households> (last visited Mar. 24, 2009).

¹²⁵ Forty-one percent of unmarried partner households have children. *Id.* Also, only two-thirds of births are to married women. *Id.*

¹²⁶ See, e.g., Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007) (arguing for the abolition of marriage in favor of the business partnership model).

¹²⁷ In the United States, there are more prisoners than farms (2.3 million versus 2.1 million, respectively). See U.S. Department of Justice, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Mar. 24, 2009); U.S. Environmental Protection Agency, <http://www.epa.gov/oecaagct/ag101/demographics.html> (last visited Mar. 24, 2009). The family farm is nonetheless a fixture of America’s self-image.

same-sex couples face in arranging their lives can be addressed without directly addressing the larger issue of the changing dynamic of the modern relationship, the better chances the UAFA has for passing.

¶47 Other outside-the-box solutions have been suggested for assisting binational same-sex couples. One suggestion involves the creation of a national same-sex registry that could substitute for a marriage certificate as proof of a genuine relationship.¹²⁸ While the idea has merit, monitoring costs would still be high and the potential for fraud unaffected. Besides, many GLBT individuals would be wary of listing their name and sexuality on government-controlled lists. For older U.S. citizens with same-sex partners from Europe, the hesitancy will undoubtedly be that much greater; some countries, such as France, still refuse to record such data precisely because of its potential for abuse.¹²⁹

¶48 Still others have wondered whether binational same-sex couples could be given their own type of visa that can be guaranteed a certain allotment in the diversity lottery.¹³⁰ While this seems to make sense historically, given that GLBT individuals were excluded from immigration because of the same xenophobic forces that led to the underrepresentation of many Asian and African nations,¹³¹ it ignores the importance of family reunification as the stated goal of U.S. immigration policy. Additionally, the diversity lottery, with its cap of 50,000 visas,¹³² is based on the premise that demand vastly outstrips supply, with the rationale of allowing entry for some even if there is not room for all. With binational same-sex immigration, the initial demand would be finite and the long-term demand low.

¶49 In light of the prevalence of fraud concerns in the bill, the impetus for reform will undoubtedly be in the direction of further raising or modifying the evidentiary standards required for same-sex couples to prove that their relationship is genuine. This solution has the dual political benefit of allaying fraud concerns while simultaneously marking “permanent partners” as separate from “spouses.” This route has been taken by many other countries that have already extended immigration rights to binational same-sex couples.¹³³

¶50 One possible evidentiary increase would be a requirement that the applying alien has cohabitated with the U.S. citizen for some substantial period of time. The United Kingdom requires “unmarried partners” (which includes those in a same-sex civil union) to, among other requirements, have “been living together as if married for at least two years.”¹³⁴ While cohabitation may speak to the conjugal nature of a relationship, it would certainly exclude many same-sex couples who have not been able to live together

¹²⁸ Dueñas, *supra* note 39, at 813.

¹²⁹ See PIERRE SEEL, I, PIERRE SEEL, *DEPORTED HOMOSEXUAL: A MEMOIR OF NAZI TERROR* (1995) (recounting how the Vichy regime used government records to find the author and deport him to a concentration camp on account of his homosexuality).

¹³⁰ See *supra* note 76; Brian McGloin, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT’L L.J. 159, 174 (1999).

¹³¹ For a discussion of xenophobia’s general effect on U.S. immigration policy, see FAMILY, UNVALUED, *supra* note 1, at 19–24.

¹³² See Department of State Website, *supra* note 18, at http://travel.state.gov/visa/immigrants/types/types_1322.html.

¹³³ See *infra* notes 141–144 and accompanying text.

¹³⁴ Mara Schulzetenberg, *U.S. Immigration Benefits for Same Sex Couples: Green Cards for Gay Partners?*, 9 WM. & MARY J. WOMEN & L. 99, 110 (2002) (discussing evidentiary standards in various common law countries).

because of existing immigration laws. It would be an unfortunate irony if Congress used the effects of the current immigration regulations to prohibit same-sex couples from demonstrating that they qualify under reform laws.

¶51 A variation of this minimum cohabitation requirement is based on length of relationship. Immigration candidates would have to show that their relationship with the U.S. citizen has spanned some fixed period of time before they would be allowed admittance into the United States. Photos, letters, and supporting affidavits would provide the proof. This seems preferable to the cohabitation requirement because “financial interdependence” is unlikely to have truly occurred without the passage of at least some length of time. Additionally, whereas a cohabitation rule could exclude many genuine same-sex couples because the Immigration and Nationality Act made it impossible to live together in the United States, a length of time requirement of two years, for example, would hardly be a burden of the same degree. A time requirement, while perhaps unjustly widening the evidentiary gap between same-sex and opposite-sex couples,¹³⁵ is much better than a cohabitation requirement and is a more reasonable concession.

¶52 But any additional requirements need not so dramatically decrease the pool of eligible couples. In Canada, for example, immigration agents look at the relationship as a whole to determine if it is bona fide, and do not hold any specific documentation to be dispositive.¹³⁶ “Joint bank accounts, joint real estate holdings, other joint property ownership, wills, insurance policies, [and] letters from friends and family” are all helpful in determining whether a quasi-conjugal relationship exists, and the immigration agent has the discretion to decide if circumstances reasonably justify a suspicious living arrangement.¹³⁷

¶53 If adding a time requirement, even along with a Canadian-style list of relevant documents, is still not enough to secure passage of the UFAA, supporters should entertain a different type of concession. If compromises must be made, the bill’s coverage should widen to cover more than same-sex couples. Under an expanded bill, all life-long, financially-interdependent relationships—including opposite sex, familial relationships—would be eligible for immigration sponsorship. The definition of permanent partner would have to be amended to remove the blood relative restriction and the “committed, intimate” descriptive, but would retain the requirement that only couples otherwise “unable to contract with that other individual a marriage cognizable under this Act” could qualify.¹³⁸ The effect of the change would be to extend permanent partnership status to the limited number of family members who have not obtained family-based status but who nevertheless have formed the type of financially-interdependent relationship that would justify removing them from a long family list.

¶54 Such a compromise would be internally consistent with the overall goals of U.S. immigration policy of family reunification and would only minimally expand the number

¹³⁵ A time requirement rule would replace the Marriage Fraud Amendment for permanent partners. See Pub. L. No. 99-639 § 5, 100 Stat. 3537, 3543 (1986).

¹³⁶ Schulzetenberg, *supra* note 134, at 107.

¹³⁷ *Id.* If executive agencies, however, are given discretionary powers to decide the fate of all same-sex couples, the question could very well become a political issue. Some administrative review would be necessary.

¹³⁸ See Appendix for the proposed change to the definition of permanent partner.

of qualified immigrants.¹³⁹ Whereas immigration law currently gives siblings and aunts and uncles a lower preference number in immigration, allowing family members *who are financially-interdependent* to form permanent partnerships will rightfully allow them into the United States earlier. Most importantly, by opening the bill to some family members, including opposite-sex “partners,” lawmakers can shift some of the discussion away from gay rights and towards the legal benefits conferred to people in a particular situation. Generally, compromises that expand gay-rights bills to include non-intimate opposite-sex relationships have worked in France,¹⁴⁰ Quebec,¹⁴¹ New Zealand,¹⁴² and Uruguay.¹⁴³ Removing the “stigma” of homosexuality would allow promoters to discuss the UAFA more in terms of family than just in terms of the “homosexual agenda.”¹⁴⁴ Under these circumstances, the bill would be less of a victory for the gay-rights activists, who could not claim social recognition because of the bill. Members of Congress with more conservative constituents can say that the law offers no evidence of some wider “legislative intent” of support for the “gay agenda.”

¶55

Expanding the bill to include some opposite-sex relationships may be desirable. One of the UAFA’s major deficiencies is that it legally sanctions a voluntary association of individuals whose membership is restricted by gender. Although gender discrimination arguments in favor of same-sex marriage (i.e., forbidding same-sex marriage is gender discrimination because the only reason one woman cannot marry another is because of her sex) have been less successful than family-centered or child-centered arguments like those employed in *Goodridge* (i.e., forbidding same-sex marriage is not in the best interest of the child),¹⁴⁵ supporters of legally sanctioning same-sex marriages should tread carefully before backing a bill that undermines an important

¹³⁹ The exact number of applicants cannot be known, but there are reasons to suspect that this expansion would not result in a substantial increase. Most “public charges” that would be eligible under the new permanent partnership rules would already qualify under other family provisions. Also, the Department of Homeland Security has recently softened its policy of public charge deportations, suggesting that more of those who would qualify have been arriving in recent years regardless. See SHAWN FREMSTAD, *CTR. ON BUDGET AND POLICY PRIORITIES, THE INS PUBLIC CHARGE GUIDANCE: WHAT DOES IT MEAN FOR IMMIGRANTS WHO NEED PUBLIC ASSISTANCE?* (2000), available at <http://www.cbpp.org/1-7-00imm.htm>.

¹⁴⁰ Pacte Civil de Solidarité, *Loi n°99-944 du 15 novembre 1999*, (1999) (a civil-union type compromise for cohabitating adults).

¹⁴¹ Predating same-sex marriage, Quebec’s civil union contract creates more obligations than the Pacte Civil de Solidarité in France or the permanent partnership in the UAFA. See Civil Code of Quebec [CCQ] (Book 2: ‘The Family’, Title One.1, arts. 521.1 to 521.19).

¹⁴² New Zealand Department of Internal Affairs, Civil Union, http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Civil-Union?OpenDocument (last visited Mar. 24, 2009).

¹⁴³ See Hilary Burke, *Uruguay OKs Gay Unions in Latin American First*, REUTERS, Dec. 18, 2007. Under the law, any couple, same-sex or opposite-sex, is eligible to form a civil union after five years of cohabitation. See *id.*

¹⁴⁴ *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (raising the specter of the “so-called homosexual agenda”).

¹⁴⁵ See *Goodridge v. Dep’t of Public Health*, 798 N.E.2d. 941, 963-64 (Mass. 2003) (holding that restricting marriage to opposite-sex couples was impermissible even under the deferential rational basis standard, in part because same-sex couples have children in need of marriage protection). *But cf. id.* at 970-74 (J. Greaney, concurring) (preferring a gender discrimination and equal protection analysis). The gender discrimination argument worked well in the 1990s. See *Baehr v. Lewin*, 852 P.2d 44, 69 (Haw. 1993) (holding that sex-based classifications are subject to strict scrutiny under the state constitution, thus significantly heightening the state’s burden for justifying the limiting of marriage to opposite-sex couples). Some commentators still believe that the gender discrimination argument is the best legal argument for same-sex marriage recognition. See Koppelman, *supra* note 118.

item in their toolkit. Allowing the bill to include non-sexual, opposite-sex relationships will maintain as viable the gender discrimination argument for the future. Gay marriage advocates can and should continue to argue that restricting marriage is gender discrimination regardless, but one would hope that the UAFA's embracing of gender-specific limits would not affect a successful challenge on those grounds.

VII. CONCLUSION

¶56 The Uniting American Families Act represents an important opportunity to help the tens of thousands of same-sex binational couples who have been unable to enjoy the simple liberty of planning their lives with the people they love. After years of discrimination, the immigration policy of the United States can finally make the family reunification aspiration more of a reality. The provisions of the UAFA may already sufficiently prevent marriage fraud, but the binational same-sex dilemma is important enough to justify some concessions to the UAFA so that these couples might survive and flourish. If need be, the right to claim victory must be sacrificed so couples might enjoy the security of knowing that neither partner will be forced to leave the country.

VIII. APPENDIX

A. Proposed Change to the Definition of Permanent Partner

¶57 [A]n individual 18 years of age or older who—

- (A) is in a relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment;
- (B) is financially interdependent with that other individual;
- (C) is not married to or in a permanent partnership with anyone other than that other individual; and
- (D) is unable to contract with that other individual a marriage cognizable under this Act.