

“Give Me Your Tired, Your Poor, Your Huddled Masses”—Just as
Long as They Fit the Heteronormative Ideal: U.S. Immigration Law’s
Exclusionary & Inequitable Treatment of Lesbian, Gay, Bisexual,
Transgendered, and Queer Migrants

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I. INTRODUCTION

In 1975, Richard Adams, a United States citizen, petitioned to sponsor his same-sex partner Anthony Sullivan, a citizen of Australia, for permanent residency in the United States.¹ In response, the Immigration and Naturalization Service (“INS”) denied Adams’ petition.² The legal reasoning for the denial? Adams had “failed to establish that a bona fide marital relationship can exist between two faggots.”³ At first blush, it may be tempting to excuse the INS’ incendiary policy and unabashed language as the action of a rogue INS official or the pardonable byproduct of an intolerant (and long forgotten) time-period. Yet as recently as 2005, the petition of a United States citizen to sponsor his Yugoslavian same-sex partner for a visa was denied because, as the visa officer explained, “they don’t give visas to fag couples.”⁴ Indeed, these two accounts are not isolated incidents of discriminatorily executed immigration denials. To the contrary, these accounts, and thousands more, poignantly illustrate the U.S. immigration legal system’s treatment of lesbian, gay, bisexual, transsexual, and queer (“LGBTQ”) migrants⁵ within the U.S. immigration legal system—a policy nearly two centuries in the making.⁶

* J.D., Gonzaga University School of Law, 2013; B.A., University of Utah, 2010. Managing Editor, *Gonzaga Law Review*, 2012-13. At its core, this article is about unconditional love and acceptance of all peoples. As such, I dedicate it to Michelle, London, and Jonah, who inspire love and acceptance unconditionally. I thank my dear friends and colleagues of the *Gonzaga Law Review*, not only for their tireless work in improving this article but for their friendship. I express sincere thanks and gratitude to Kim Pearson, Assistant Professor, Gonzaga University School of Law, for her tutelage, guidance, and assistance in researching and writing this article. Additional thanks go to Jason Gillmer, John J. Hemmingson Chair in Civil Liberties and Professor of Law, Gonzaga University School of Law, for his inspiration, insightful feedback, and guidance and to Mark DeForrest, Associate Professor of Law – Legal Research & Writing, Gonzaga University School of Law, for his honest criticisms, comments, and edits; and for teaching me how to write.

1. SCOTT LONG ET AL., IMMIGRATION EQUALITY & HUMAN RIGHTS WATCH, FAMILY, UNVALUED: THE DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 19 (2006), available at <http://www.hrw.org/reports/2006/us0506/FamilyUnvalued.pdf>. See also *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982).

2. Long, *supra* note 1, at 19.

3. *Id.* (citing Letter from Immigration and Naturalization Service to Richard Adams (Nov. 24, 1975) in STEPHEN H. LEGOMSKY, IMMIGRATION & REFUGEE LAW & POLICY 139 (2d ed. 1997)).

4. *Id.*

5. The term “migrant” is used throughout this article to mean any person who has crossed an international border – particularly to reach the United States – and makes no

Despite the inclusionary call for the tired, the poor, and the “huddled masses yearning to breathe free” from other nations,⁷ U.S. immigration law is, necessarily, founded in policies of exclusion and preclusion.⁸ Indeed, at its core, U.S. immigration law aims to include some and exclude others, effectively shaping and molding a preferred populace.⁹ In other words, U.S. immigration laws have historically acted to either embrace desired persons or reject those deemed “undesirable.”¹⁰ From the earliest onset of governmental regulation, immigration laws have carried out this objective by establishing immigration barriers for a myriad of “undesirables.”¹¹

Historically, such barriers were often constructed upon racial and ethnic lines, with the intent of constraining which races or ethnicities “could be

distinction between “legal” immigrants, refugees, asylum seekers, or undocumented immigrants.

6. As noted by Human Rights Watch, use of the hateful and derogatory term “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.” Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 28 IMMIGR. & NAT'LITY L. REV. 55 n.2 (2007).

7. Emma Lazarus, *The New Colossus* (1883). Engraved upon the Statute of Liberty at Ellis Island, Lazarus' poem has historically served as a maxim of U.S. immigration law and policy. See JOHN T. CUNNINGHAM, *ELLIS ISLAND: IMMIGRATION'S SHINING CENTER* 47 (2003).

8. Eithne Luibheid, *Heteronormativity, Responsibility, and Neo-liberal Governance in U.S. Immigration Control*, in *PASSING LINES: SEXUALITY AND IMMIGRATION* 69, 85-86 (Brad Epps ed., 2005). Shedding supplementary light on this distinction, Luibheid asserts:

Exclusion applies to categories of people who are explicitly barred from legally immigrating to the United States. Preclusion refers to people who are not explicitly barred from entry, but who, because they are unable to conform to aspects of law or procedure, nonetheless find themselves barred . . . [P]reference in immigration law has always been embedded in a matrix of exclusions and preclusions.

Id.

9. *Id.* at 89 (“[I]mmigration control provides the means to materialize the nation-state within very particular, restrictive parameters, and to re-articulate exclusionary constructions of ‘the people,’ ‘the citizenry,’ and the nation”).

10. LIONEL CANTU, JR., *THE SEXUALITY OF MIGRATION* 43 (Nancy A. Naples & Salvador Vidal-Ortiz eds., 2009) (A driving concern throughout the history of immigration law and policy has been to “identify ‘undesirable’ migrants who might pose a ‘threat’ to [the preferred] social order . . .”).

11. *PASSING LINES: SEXUALITY AND IMMIGRATION* 12-13 (Brad Epps ed., 2005) (In addition to persons belonging to disfavored racial or ethnic groups, persons historically excluded by immigration laws include, inter alia, criminals, prostitutes, beggars, anarchists, feeble-minded persons, persons afflicted with tuberculosis, persons suffering from mental or physical defects, the illiterate, and communists).

considered an actual or potential ‘American.’”¹² Yet while considerations of race and ethnicity have played major roles in shaping U.S. immigration law and policy, so too have considerations of sexuality—specifically in regards to LGBTQ persons.¹³ Indeed, U.S. immigration law and policy has historically regarded LGBTQ migrants as “undesirable” threats to a preferred populace exhibitivive of heteronormative ideals.¹⁴ As a result, the history of U.S. immigration law and policy is replete with both explicit and implicit efforts to turn LGBTQ migrants’ “sexualities, desires, and lifestyles into objects of interrogation, debate, censure, control, and exclusion.”¹⁵

The last two decades have brought significant reform to such explicitly discriminatory law and policy.¹⁶ On the surface, such steps may be lauded as progressive and inclusive of LGBTQ migrants. When analyzed more carefully, however, such supposed “advancements” in U.S. immigration law and policy—held out as made on behalf of LGBTQ migrants—often prove merely pretextual. Schematic and procedural requirements, coupled with legislative enactments, regularly replace the eliminated explicit grounds for exclusion with an identical, if not larger, obstacle than had previously existed.

In 1990, for example, a migrant’s sexual orientation was officially removed as a basis for exclusion.¹⁷ Years prior, however, U.S. immigration law shifted its focus towards a policy of “family reunification.” As a result of this policy shift, by the time sexual orientation was finally ousted as explicit grounds for exclusion in 1990, migrant sponsorship via direct family relationships was the most common method for becoming a legal permanent resident (“LPR”) within the United States. Yet under this procedural schema, relationships that include an LGBTQ migrant do not qualify as legitimate familial ties for sponsorship

12. See EITHNE LUIBHEID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* xiii (2002).

13. “Sexuality has long been a concern to the framers of U.S. immigration law and policy, and it has consistently comprised an important axis for the regulation of newcomers.” Luibheid, *supra* note 8, at 69.

14. *PASSING LINES: SEXUALITY AND IMMIGRATION*, *supra* note 11, at 7. See also Francoeur, *supra* note 6, at 57 (“U.S. immigration policy has perceived LGBT immigrants as threats . . . for over a century.”).

15. *PASSING LINES: SEXUALITY AND IMMIGRATION*, *supra* note 11, at 7.

16. While terminology such as homosexual, lesbian, gay, transgendered, bisexual, queer, intersexuality, etc., has never been explicitly included into exclusionary immigration legislation, such terms were nonetheless derisively “adumbrated in such concepts and categories as ‘constitutional psychopathic inferiority’ (1917), ‘psychopathic personality’ or ‘mental defect’ (1952), ‘sexual deviation’ (1965), and, most importantly, ‘good moral character’ (1940).” See *PASSING LINES: SEXUALITY AND IMMIGRATION*, *supra* note 11, at 17.

17. Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978 (1990) (eliminating earlier laws that permitted the Immigration and Naturalization Service (INS) to exclude migrants based solely on their sexual orientation).

purposes. Bolstering this exclusionary definition, Congress passed the Defense of Marriage Act in 1996, defining marriage at the federal level—and therefore for all immigration purposes—as a familial relationship between a man and a woman. The message was loud and clear: families consisting of LGBTQ migrants are not of the desirable and suitable type that U.S. immigration law and policy aim to “unify.” Thus, despite being removed as an explicit basis for exclusion in 1990, sexuality remains an effective impediment for LGBTQ migrants within the U.S. immigration system, revealing the enormous disparity between eliminating “explicit discrimination from the law and ensuring that equal access can be realized” in real-world application.¹⁸

Affording historical insight, this article first details the most significant developments of U.S. immigration law and policy pertaining to the regulation of sexuality. In so doing, it becomes clear that LGBTQ persons have long been considered “undesirable.” Second, this article examines the manner in which U.S. immigration laws and policies have been used as an effective tool to regulate and exclude LGBTQ migrants for more than 130 years. Third, this article posits that nearly all “progressive” advancements made for the benefit of LGBTQ migrants have been purely pretextual. Indeed, history is chockfull of instances of equally discriminatory changes elsewhere in the law, procedures, or culture following hot on the heels of any progressive advancement. As a result, LGBTQ migrants remain disenfranchised. Lastly, this article argues for a change in this historical pattern. The most recent policy shift appears, on the surface, to benefit LGBTQ migrants. However, unless official legislation solidifies this policy shift, the pendulum is bound to shift back towards discrimination, exclusion, and marginalization.

II. IMMIGRATION & SEXUALITY: AN HISTORICAL ANALYSIS OF REGULATING SEXUALITY AT THE BORDER

The reasons people migrate cannot be understood via uniform explanations. Indeed, behind the phenomena of migration are many driving motivations, individualized to each migrant. Immigration is almost always more than merely an escape from, or entry into, a different country. For many, migration provides “admission into, or exclusion from, a social group; it may be privilege, power, and profit, peace of mind, a better life, or just plain survival.”¹⁹ This is especially true for LGBTQ immigrants. Not until the midway point of the 20th Century did U.S. immigration law explicitly exclude

18. QUEER MIGRATIONS: SEXUALITY, U.S. CITIZENSHIP, AND BORDER CROSSINGS xiii (Eithbe Luibheid & Lionel Cantu, Jr. eds., 2005).

19. PASSING LINES: SEXUALITY AND IMMIGRATION, *supra* note 11, at 4.

LGBTQ migrants.²⁰ Indeed, prior to 1952, LGBTQ migrants were classified as “sexual perverts” or “degenerates” and were lumped into categories generally reserved for the racially inferior, the poor, or those with anatomical defects, and were excluded accordingly.²¹

A. *1875-1917: Establishing a Foundational Blueprint for Exclusion of LGBTQ Migrants*

Prior to 1875, immigration control belonged exclusively to the individual states. Throughout the decade succeeding the Civil War, various states enacted individualized immigration regulations and laws resulting in a hodgepodge of diverse immigration standards. Challenged in federal courts, the divergent state laws were invalidated on grounds of federal preemption,²² officially establishing, for the first time, federal supremacy in the arena of immigration control.²³ Soon thereafter, Congress passed the Page Act of 1875 in a direct response to a large migratory wave, marking the first major federal immigration measure to restrict the entry of migrants.²⁴ Passed partially out of fears “that promiscuous immigrant cultures would erode masculinity and femininity in middle-class America,”²⁵ the Page Act excluded all Asian migrant women believed to be prostitutes coming to the United States for “lewd and immoral” purposes.²⁶ In so doing, the Page Act established a precedential blueprint

20. MARGOT CANADY, *THE STRAIGHT STATE: SEXUALITY & CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 21 (2009).

21. See Zvi Triger, *Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism, and Recognition in Same-Sex Relationships*, 8 INT’L J.L IN CONTEXT (Special Issue 02) 268, 273 (2012).

22. See *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273 (1875); *Chy Lung v. Freeman*, 92 U.S. 275, 280-81 (1875). In invalidating the state immigration laws of California, New York, and Louisiana, the U.S. Supreme Court decisions made it expressly clear that state immigration regulation was preempted by federal law and that “immigration ‘belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments,’ and which therefore ‘must of necessity be national in its character.’” See Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 266 (2011).

23. For an historical review of U.S. immigration law prior to federal regulatory control, see generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

24. Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1943).

25. Francoeur, *supra* note 6, at 58.

26. See Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1943). The 1875 page Act had a particularly adverse impact upon working-class Chinese women as after the Act’s passage, it was assumed that such women “were all entering the United States to work in the

“through which the U.S. immigration system became transformed into an apparatus for regulating sexuality more generally, in relation to shifting gender, racial, ethnic, and class anxieties,”²⁷ and subsequent immigration laws followed suit.²⁸

In the decades following the passage of the Page Act, tens of millions of immigrants entered into the United States, bringing with them a vast diversity of cultural norms and traditions.²⁹ In response, strong preferences for nuclear, heteronormative and heteropatriarchal families made their way into the national, and therefore legislative, dialogue.³⁰ Demonstrating such preferences, Congressman John Corliss considered immigration restrictions necessary “to preserve the human blood *and manhood* of the American character by the exclusion of depraved human beings. The proximity of immigrants, with their exuberant excessive sexuality, [and] jumbled gender relations, produc[e] an impotent, decadent manhood.”³¹ Echoing Corliss’ derogatory sentiment, Commissioner-General of Immigration, Daniel Keefe, remarked in 1909 that “[n]othing can be more important than to keep out of the country . . . *the degenerate in sexual morality*.”³² Empowered with the Page Act’s “blueprint,” heteronormative and heteropatriarchal preferences began structuring U.S. immigration law and policy.³³ In 1912, for example, a young migrant man seeking entrance into the U.S. was deported as a “public charge” after he admitted during an interview by Immigration Service investigators that he had participated in “intercourse with men.”³⁴

Considered a threat to heteropatriarchal ideals, transgendered migrants were also excluded during this era. Upon arrival inspection at Ellis Island in New York, Alejandra Velas was found to be biologically female, after

sex industry” and were accordingly excluded from migrating into the United States. *See QUEER MIGRATIONS, supra* note 18, at xiv.

27. *See QUEER MIGRATIONS, supra* note 18, at xiv.

28. For example, in the early 1880’s, exaggerated stories about sex workers from China abounded. As a result, the Chinese Exclusion Act of 1882 was passed, banning scores of Chinese migrants. *See Francoeur, supra* note 6, at 59.

29. *Id.* at 58.

30. *See QUEER MIGRATIONS, supra* note 18, at xiv.

31. *See* Jeanne Petit, *Breeders, Workers, and Mothers: Gender and the Congressional Literacy Test Debate, 1896-1897*, 3 J. GILDED AGE & PROGRESSIVE ERA 35, 36 (2004).

32. *See* WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 35 (1999) (emphasis added) (quoting Immigration Service, *Annual Report* at 115 (1909)).

33. *See QUEER MIGRATIONS, supra* note 18, at xiv.

34. *See* Eskridge, *supra* note 32, at 35.

declaring to be a male.³⁵ When asked why she wore men's clothing, Velas replied "that she would rather kill herself than wear women's clothes."³⁶ Labeled a "cross-dresser," Velas was denied entry and sent to England.³⁷

Congress passed the Immigration Act of 1917 with the intent to synthesize all the previously established bases for exclusion into one piece of legislation. The Act also created a new basis for exclusion for any migrant found to be suffering from "constitutional psychopathic inferiority."³⁸ Designed to "prevent the introduction into the [United States] of strains of mental defect that may continue and multiply through succeeding generations,"³⁹ the "constitutional psychopathic inferiority" category for exclusion was nonetheless deemed to encompass "sexual perverts" and was subsequently used as an authoritative instrument to exclude the entry of LGBTQ migrants for several decades.⁴⁰

B. *1917-1990: Adherence to the Blueprint for Exclusion of LGBTQ Migrants*

Within the first few years following World War II ("WWII"), U.S. politics revolved around fears of leftism, communism, dissenters, and espionage. Entrenched in this "red scare" hysteria were anxieties regarding sexuality. Believed to share "with Communists the qualities of being gregarious yet secretive, concealing their true selves and loyalties, and creating coterie and collectives that evaded surveillance,"⁴¹ LGBTQ persons were considered to be communist sympathizers, and therefore an untrustworthy national threat. As Republican Senate Leader Kenneth Wherry illogically declared in 1950, "[y]ou can't hardly separate homosexuals from subversives A man of low morality is a menace in the government, and they are all tied up together."⁴² The impact of WWII on families only added fuel to the already irrational fire.

As the war effectively removed many men and women from the home, anxieties of changing gender roles and family structure rooted in heteropatriarchal ideals began to run rampant, much like the driving force behind anti-immigration fears some fifty years prior.⁴³ Combined, the

35. See QUEER MIGRATIONS, *supra* note 18, at xv.

36. *Id.*

37. *Id.*

38. Immigration Act of 1917, § 4, 39 Stat. 874, 875 (1917).

39. S. Rep. No. 64-352, at 5 (1916).

40. See Eskridge, *supra* note 32, at 36.

41. See Francoeur, *supra* note 6, at 62.

42. Max Lerner, *The Senator & the Purge*, N.Y. POST, July 17, 1950.

43. See JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 38 (1983) ("Because the war

fallacious conclusions of the “lavender scare”⁴⁴ and “red scare” culminated in a nationwide crusade against LGBTQ persons and served as an impetus for a new era of discrimination in the form of immigration regulation.⁴⁵

Championed by Senator Pat McCarran, a staunch anti-Communist and head of the immigration subcommittee, Congress passed the Immigration and Nationality Act (“INA”) of 1952.⁴⁶ As a proposed bill, the INA’s language originally excluded all “persons afflicted with psychopathic personality, or who are homosexuals or sex perverts.”⁴⁷ Yet the Public Health Service assured both the Senate and the House Judiciary Committee that such explicit delineation was not necessary as the term “psychopathic personality” was sufficiently broad to encompass all “pathologic behavior” such as “homosexuality or sexual perversion.”⁴⁸ Such rationale was based on the American Psychiatric Association’s recent addition of homosexuality as a “mental disorder” to its Diagnostic and Statistical Manual of Mental Disorders (“DSM”).⁴⁹ Satisfied, but so as to not have their sentiments of detest for LGBTQ persons be forgotten, the Senate Judiciary Committee made it clear that the removal of such explicit terminology “is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.”⁵⁰ Consequently, in its statutory form, the INA followed the blueprint established in the Immigration

removed large numbers of men and women from familial—and familiar—environments, it freed homosexual eroticism from some of the structural restraints that made it appear marginal and isolated.”). The panic also resulted in LGBTQ persons being removed from public office and government service, often through barbarous witch-hunts conducted by police and the FBI. *See Francoeur, supra* note 6, at 62.

44. Paralleling McCarthyism’s witch-hunt against alleged communists and communist sympathizers, the “lavender scare” refers to the persecution of and crusade against LGBTQ persons during the 1950s. *See generally* DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (Univ. of Chi. Press 2004).

45. *See Francoeur, supra* note 6, at 62.

46. *Id.*

47. S. 2550, 82d Cong., § 212(a)(13) (1952); Senate Report No. 81-1515, at 344-345 (1950).

48. *See Eskridge, supra* note 32, at 69-70. (citing H.R. REP. NO. 82-1365, at 47 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1701 (quoting original McCarran bill); S. REP. NO. 82-1137, at 9 (1952)).

49. *See* AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 38-39 (1952) (broadly categorizing “homosexuality” as a mental disorder of “Sexual deviation”).

50. S. REP. NO. 82-1137, at 9.

Act of 1917⁵¹ and excluded all “persons afflicted with psychopathic personality” from entry into the United States.⁵²

Not only did the INA bar the *entry* of LGBTQ migrants on the basis of “psychopathic personality,” it also bolstered the exclusion of LGBTQ persons *already living* in the United States as LPRs from the process of naturalization.⁵³ Incorporating naturalization standards established in 1940, the INA required, *inter alia*, that LPRs be “persons of good moral character.”⁵⁴ After the INA’s passage, any LPR applying for naturalization who identified as lesbian, gay, bisexual, transgendered, or queer would be categorized as a person suffering from “psychopathic personality,” and therefore would almost exclusively fail the “good moral character” requirement.⁵⁵ Indeed, in 1968, Olga Schmidt was denied her opportunity to become a citizen of the United States for lacking “good moral character” simply because she had engaged in a lesbian relationship.⁵⁶ As the judge in Schmidt’s case quipped, “[f]ew behavioral deviations are more offensive to American mores than is homosexuality.”⁵⁷

In 1962, George Fleuti, a LPR, was ordered deported by the INS on grounds that Fleuti originally entered the U.S. as a homosexual, thereby qualifying as a person suffering from “psychopathic personality.”⁵⁸ In hearing Fleuti’s appeal, the Ninth Circuit contemplated empirically-supported studies and the opinions of medical experts that cast doubt upon the legitimacy of the categorical term’s ability to encompass LGBTQ persons.⁵⁹ Persuaded, the

51. Excluding persons afflicted with “constitutional psychopathic inferiority.” *Id.*

52. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952) (repealed 1990). The INA also allowed for exclusion on ideological grounds. Of note, President Truman vetoed the bill, declaring it to be “neither a fitting instrument for our foreign policy nor a true reflection of what we stand for, at home and abroad.” Yet, Congress quickly overrode Truman’s veto. *See Francoeur, supra* note 6, at 63 n.33.

53. Naturalization is the process of becoming a United States citizen. Generally, there are two methods for a person to become a citizen of the United States. One is by operation of law, generally requiring no affirmative action by the individual entitled to citizenship. Examples of naturalization by operation of law include: birth in the U.S. or birth abroad to U.S. citizen parent. The other method is via naturalization, which requires an affirmative application and satisfaction of several statutory eligibility requirements, including: the status of lawful permanent resident; continuous, physical residency within the U.S.; and being deemed a person of “good moral character.” *See generally* INA § 316(a).

54. *See* INA §§ 316(a), 101(f).

55. *See* Eskridge, *supra* note 32, at 132.

56. *In re Schmidt*, 289 N.Y.S.2d 89, 92 (Sup. Ct. 1968).

57. *Id.* (quoting *H. v. H.*, 157 A.2d 721, 727 (N.J. Super. 1959)).

58. *See Fleuti v. Rosenberg*, 302 F.2d 652, 654-56 (9th Cir. 1962), *vacated*, 374 U.S. 449 (1963).

59. *Id.* at 657-58.

Ninth Circuit held that “psychopathic personality” was unconstitutionally vague when used for the immigration exclusion of LGBTQ migrants, and invalidated Fleuti’s deportation order.⁶⁰

Rather than taking a cue from the Ninth Circuit’s *Fleuti* decision and the data supporting it, Congress, at the urging of both the U.S. Public Health Service (“PHS”) and the INS, quickly moved to “shore up the heterosexuality of the immigrant population” by amending the INA to comport with constitutional standards.⁶¹ Consequently, in 1965 the INA’s unconstitutionally vague “psychopathic personality” term was amended to include a new, broader, and more explicit basis for exclusion by categorically barring the entry of migrants “afflicted with . . . sexual deviation”⁶² in order to “resolv[e] any doubt on [the] point.”⁶³ Over the next thirty-five years, LGBTQ migrants were effectively barred from entry into the United States and from becoming a citizen of the United States simply because of their sexuality.⁶⁴

III. REFUGE IN THE COURTHOUSE? THE JUDICIARY’S APPROACH TO EXCLUSIONARY IMMIGRATION LAWS & POLICIES

From the INA’s passage in 1952 to the early 1980s, the discriminatory immigration laws and policies aimed at LGBTQ migrants received very little attention from the judiciary.⁶⁵ In fact, aside from the Ninth Circuit’s *Fleuti* decision in 1962, before 1983 nearly all judicial attention given to LGBTQ migrants, scant as it was, merely reinforced the inequitable treatment and fortified the exclusionary laws and policies previously established.

A. *Boutilier v. INS: Not Welcome—The Judiciary’s Sanctioning of Exclusionary Immigration Laws & Policies*

In 1955, Clive Boutilier, a twenty-one year old Canadian national, moved to the United States to live with his mother, stepfather, and three siblings

60. *Id.* at 658.

61. Luibheid, *supra* note 8, at 86-87 (seeking “to shore up the heterosexuality of the immigrant population,” the 1965 revisions to the INA prioritizing the family, “reiterated a ban on [LGBTQ] immigrants [by] barring the entry of ‘sexual deviants.’”). *See also* Eskridge, *supra* note 32 at 132.

62. Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965).

63. *See Hill v. INS*, 714 F.2d 1470, 1472 n.1 (9th Cir. 1983) (quoting S. REP. NO. 748, 89th Cong., 1st Sess. 19).

64. Long, *supra* note 1, at 25.

65. *See Francoeur, supra* note 6, at 63.

already living in the U.S.⁶⁶ Eight years later in 1963, Boutilier applied for naturalization.⁶⁷ In his application, Boutilier admitted that he had been arrested for sodomy a few years prior.⁶⁸ Based on this admission, Boutilier was found to be a “person afflicted with psychopathic personality” lacking “good moral character” under the INA.⁶⁹ As a result, Boutilier’s application for naturalization was promptly denied and he was ordered deported back to Canada.⁷⁰

Boutilier appealed the decision, eventually reaching the United States Supreme Court. In deciding whether the term “psychopathic personality” encompasses LGBTQ persons,⁷¹ the Court was given the opportunity to reaffirm the Ninth Circuit’s well-reasoned decision in *Fleuti*. Instead, the *Boutilier* majority looked to Congressional intent and reasoned:

It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. Here Congress commanded that homosexuals not be allowed to enter. The petitioner was found to have that characteristic and ordered deported It may be, as some claim, that “psychopathic personality” is a medically ambiguous term, including several separate and distinct afflictions. But the test here is what the Congress intended, not what differing psychiatrists may think. It was not laying down a clinical test, but an exclusionary standard which it declared to be inclusive of those having homosexual and perverted characteristics. It can hardly be disputed that the legislative history of [the INA] clearly shows that Congress so intended.⁷²

Based on such reasoning, a 6-3 majority speciously held that the term “psychopathic personality” was chosen by Congress to “effectuate its purpose to exclude from entry all homosexuals and other sex perverts” and upheld Boutilier’s deportation.⁷³ In so holding, the *Boutilier* majority merely brushed aside the Ninth Circuit’s *Fleuti* concerns with unconstitutional vagueness.⁷⁴

66. See *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 119 (1967).

67. *Id.*

68. *Id.*

69. *Id.* at 120.

70. *Id.*

71. *Id.*

72. *Id.* at 123-24.

73. *Id.* at 122.

74. *Id.* Moreover, the *Boutilier* majority “failed even to mention equal protection problems with reading a broad sexual orientation classification into an ambiguous statute.” Eskridge, *supra* note 32, at 132.

Consequently, Boutilier was forcibly stripped from the love of his life, with whom he had spent eight years.⁷⁵

Perhaps no case better illustrates the very real and sorrowful devastation that such exclusionary and discriminatory laws (and subsequent enforcement) can wreak in a person's life. Soon after the Court's decision, Boutilier, heartbroken and distraught, attempted to take his own life before returning to Canada.⁷⁶ The suicide attempt resulted in a coma, permanent brain damage, and several disabilities.⁷⁷ Boutilier's parents were forced to leave the United States to take care of their son in Canada for the next twenty years.⁷⁸

B. Hill v. INS: *An Inclusionary Olive Branch from the Judiciary*

In 1974, the American Psychiatric Association ("APA") eliminated "homosexuality" as a mental disease from the DSM.⁷⁹ Soon thereafter, APA President John Spiegel counseled the INS "to refrain from the exclusion, deportation or refusal of citizenship to [LGBTQ migrants]."⁸⁰ Yet Spiegel's counsel fell on deaf ears, as the INS was not eager to comply, pointing to the *Boutilier* decision and the INA's 1965 amendment for constitutional support.⁸¹ Following the APA's elimination of homosexuality as a mental disease, the U.S. PHS followed suit and, in 1979, the U.S. Surgeon General declared that the PHS would no longer deem "homosexuality per se to be a mental disease or defect."⁸² This drastic shift in policy, the Surgeon General explained, was based on empirical data, studies, and medical opinions⁸³—conspicuously the

75. See Francoeur, *supra* note 6, at 64.

76. See Mark Stein, *Forgetting and Remembering a Deported Alien*, HISTORY NEWS NETWORK, Nov. 3, 2003, available at <http://hnn.us/articles/1769.html>.

77. *Id.*

78. *Id.* Of note, Boutilier died in Canada in 2003, just two months prior to the legalization of same-sex marriage throughout all of Canada. *Id.*

79. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1967) (rev. 1974). See also *Not Sick: The 1973 Removal of Homosexuality from the DSM*, MIND OF MODERNITY BLOG (Mar. 22, 2010), <http://www.mindofmodernity.com/not-sick-the-1973-removal-of-homosexuality-from-the-dsm> (last visited Dec. 18, 2012).

80. See Eskridge, *supra* note 32, at 133 (1999) (citing Letter from John Spiegel, APA, to Leonard Chapman, INS Director, July 17, 1974.).

81. *Id.* (stating that the "INS General Counsel responded that *Boutilier* and the 1965 statute precluded such a change in the immigration exclusion and that the medical evidence did not speak to the good character issue involved in the citizenship exclusion").

82. Long, *supra* note 1, at 27.

83. See *id.* Citing the "current and generally accepted canons of medical practice," the Surgeon General acknowledged that "the determination of homosexuality is not made through a medical procedure." See *Hill v. INS*, 714 F.2d 1470, 1472-73 (9th Cir. 1983).

same evidential support relied upon by the Ninth Circuit in *Fleuti* and subsequently rejected by the U.S. Supreme Court in *Boutilier* sixteen years prior.⁸⁴

Because the INA's categorical exclusions of LGBTQ migrants under its "psychopathic personality" and "sexual deviancy" standards were heavily influenced by the PHS's backing at their inception,⁸⁵ the PHS's decision to no longer consider homosexuality as a mental disease or defect meant that the legitimacy of the INA's basis for discrimination of LGBTQ migrants was in jeopardy.⁸⁶ In response, the INS remained stalwart in its exclusionary policy, but conceded a little ground by establishing a new procedure: INS officials were to no longer inquire into a migrant's sexuality, but if homosexuality was admitted or revealed at any stage in the immigration process, the migrant would be eligible for deportation.⁸⁷ In 1983, this adjustment in INS policy came into direct conflict with legal scrutiny.

In 1980, Carl Hill, a British citizen, revealed to immigration officials that he was a homosexual upon his arrival in the United States.⁸⁸ Swiftly labeled a person with "psychopathic personality," Hill was excluded from migrating to the United States based on the INS newly enacted policy.⁸⁹ On appeal, the Ninth Circuit held that the INS could not bar non-citizen persons from entering the country for reasons based solely on their own admission of LGBTQ sexualities.⁹⁰ By invalidating the INS's guidelines, the *Hill* court unanimously declared that any exclusion based on one's sexuality would require supporting medical certification, a requirement that the INS was not permitted to circumvent via its own guidelines.⁹¹ In theory, the 1983 *Hill* decision appeared

84. See *supra* notes 58-60 and accompanying text.

85. See *supra* notes 61-64 and accompanying text.

86. See Francoeur, *supra* note 6, at 65.

87. *Id.* See also Eskridge, *supra* note 32, at 133 & n.153 (referencing a Telegraph Memorandum from David Crosland, Acting INS Commissioner, to All Regions, Sept. 8, 1980). See also Press Release, Dep't of Justice, Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual (Sept. 9, 1980). Under the INS' new policy, should any migrant make a voluntary admission of LGBTQ behaviors, the migrant would be interrogated, alone, by an INS official. *Id.* During the isolated interrogation, the INS official would request that the migrant confess to their homosexuality in writing, which would then be used by immigration judges as an evidentiary basis for the migrants' exclusion from the United States. *Id.*

88. See *Hill v. INS.*, 714 F.2d 1470, 1473 (9th Cir. 1983).

89. *Id.*

90. *Id.*

91. *Id.* at 1480.

to send a clear and progressive signal: any exclusion of LGBTQ migrants on account of their sexual identity would be subject to rigorous legal scrutiny.⁹²

IV. TWO STEPS FORWARD, TWO STEPS BACK: PROGRESSIVE MEASURES PROVE MERELY PRETEXTUAL

In 1990, seven years after the Ninth Circuit's *Hill* decision, Congress officially decided that migrants could no longer be excluded on the basis of sexual orientation.⁹³ In passing the Immigration Act of 1990, Congress formally eliminated the INA's exclusionary categories of "psychopathic personality" and "sexual deviancy."⁹⁴ For the first time since 1875, LGBTQ migrants could no longer be excluded for simply being who they were. At first blush, the 1990 Immigration Act seemed to be an enormous step towards LGBTQ immigration equality. Such a belief proved purely pretextual. While Congress' 1990 elimination of sexual identification as grounds for exclusion was certainly noteworthy, a new immigration procedural framework laid out in the same Act, coupled with new pieces of legislation, rendered the progressive measure ineffective. Indeed, the removed exclusionary obstacle was simply replaced with another, furthering the historical reality of U.S. immigration law and policy: LGBTQ migrants are not of the "desirable" type.

A. *No Longer Categorically Excluded, but Certainly Not Included: Dismissal LGBTQ Persons from Family Unification*

In addition to strengthening the exclusion of LGBTQ migrants from entry and naturalization, the INA of 1952 established an immigration quota system, permitting preferences to be given for immigrants with special skills and for familial relatives of people already within the United States. It also, for the first time, allowed for a broader, quota-free reunification process between

92. In stark contrast to the Ninth Circuit's *Hill* decision, the Fifth Circuit held in 1983 that the INS' exclusionary "psychopathic personality" classification was a term of art, which could be utilized as the INS saw fit—in other words, with or without medical certification. *See In re Longstaff*, 716 F.2d 1439, 1447 (5th Cir. 1983).

93. The United States was the last industrialized country to cling to a ban on the entrance of LGBTQ migrants. *See Francoeur*, *supra* note 6, at 66.

94. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-78 (1990) (codified at 8 U.S.C. § 1182 (1990)). Signed by President George W. Bush, the 1990 Act resulted from the aggressive and determined pressure of various advocates, including multiple lobbying organizations and Massachusetts Representative Barney Frank (D). *See* Shannon Minter, Note, *Sodomy and Public Morality Offenses Under U.S. Immigration Laws: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, n.5 (1993).

husbands and wives. Building off of the 1952 INA's established framework, the Immigration Act of 1990 aimed to further this institutional policy of "family unification"⁹⁵ by constructing a thorough, family-based procedural configuration.⁹⁶ In so doing, the Immigration Act of 1990 established an arrangement of "preference categories" that guide the order in which immigrant petitions for lawful permanent residency are to be processed.⁹⁷ Importantly, the Immigration Act of 1990 included additional family-based categories and created the "immediate relative" category, which the Act defined as "the children, spouses, and parents of a citizen of the United States."⁹⁸ In effect, immigrant visas—those that offer the promise of citizenship and the full benefits therewith—are preferentially administered largely to those who have

95. "Family Reunification" was an immigration policy goal since the early 1920s, and was imbedded in both the Quota Law of 1921 and the revised Quota Law of 1924. *See* CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES at 1 (2006), available at <http://cbo.gov/ftpdocs/70xx/doc7051/02-28-immigration.pdf> (last visited Dec. 20, 2012) (further stating that the Quota Laws of 1921 and 1924 "favored immediate relatives of U.S. citizens and other family members, either by exempting them from numerical restrictions or by granting them preference within the restrictions. Subsequent laws continued to focus on family reunification as a major goal of immigration policy."). During the 1960s, the "family reunification" policy was reinforced, especially illustrated in the 1965 amendment to the INA. *See* Luibheid, *supra* note 8, at 86-87 ("The revised laws substantially reallocated immigration preferences, so that family reunification came overwhelmingly to predominate in immigration flows.").

96. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); *see also* Immigration and Nationality Act of 1952 (McCarran-Walter Act), 8 U.S.C. §§ 1101-1537; *see also* Francoeur, *supra* note 6, at 67 ("Through reforms made to the Immigration and Nationality Act in 1990, immigration policy is now, more than ever, structured to encourage family unification and family-based immigration policies are one of its most central constructions.").

97. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). Additionally, the Act established annual numerical limitations for each of the newly created "preference categories" to which "immediate relatives" are exempt. *Id.* *But see* Luibheid, *supra* note 8, at 98-99 & n.5. Shedding further light on the numerical system, Luibheid states:

There are no quotas limiting the admission of parents, spouses and unmarried minor children of U.S. citizens, who are technically eligible for immediate immigration—although bureaucratic processing can entail significant delays. Spouses and unmarried children of legal permanent residents, and adult children and adult siblings of citizens, are also given preference, but quotas limit their numbers to such an extent that, for example, eligible siblings from countries that send many immigrants to the U.S. each year may wait a decade or more before the system begins to process them.

98. *See id.*; *see also* Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741 (1998).

familial ties. “[W]hile for the first time in American immigration legislation (as opposed to de facto policy) the [LGBTQ migrant] was barred from entrance, the heterosexual couple enjoyed unprecedented increased recognition and protection.”⁹⁹

As a result of the 1990 Act’s procedural restructuring, family-based sponsorship became the most effective, and thus most common, method for legal immigration, as it has accounted “for approximately 75% of all legal immigration to the U.S. each year” since its inception in 1990.¹⁰⁰ Of this 75%, sponsorship of a foreign spouse by a U.S. citizen has been the most common type of family-based immigration.¹⁰¹ Indeed, the Immigration Act of 1990 radically altered the U.S. immigration arena, all in the name of “family unification.” Yet, due to definitional nomenclature, petitions of U.S. citizens to sponsor their LGBTQ migrant partner or spouse were promptly denied, leaving LGBTQ migrants out of the “family” discussion.¹⁰² Soon thereafter, Congress would once again legitimize and reinforce this exclusionary immigration policy through ill-conceived legislative action.

B. *Defense of Marriage Act: Deciding Exactly Who Qualifies as a Family Worthy of Unification and Who Does Not*

In 1990, the same year Congress officially declared that LGBTQ migrants could no longer be excluded based on their sexual orientation, three same-sex Hawaiian couples applied for marriage licenses, which were statutorily denied on account of their being gay.¹⁰³ The couples challenged the denials, arguing that the Hawaiian marriage statute was violative of their constitutionally protected right to privacy and equal protection.¹⁰⁴ A variety of Hawaiian courts were sympathetic to the same-sex couples’ legal claims, signaling, for the first

99. Triger, *supra* note 21, at 273.

100. See CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES (2006), available at <http://cbo.gov/ftpdocs/70xx/doc7051/02-28-immigration.pdf> (last visited Dec. 20, 2012); Luibheid, *supra* note 8, at 80.

101. See *id.*

102. See Luibheid, *supra* note 8, at 87 (“Revisions to immigration law in 1990 lifted the ban on lesbian and gay immigrants, but they did not make lesbians and gays eligible for family reunification through their intimate relationships with U.S. citizens and legal residents.”). See also Long, *supra* note 1, at 19; *supra* note 1 and accompanying text.

103. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

104. *Id.*

time in the United States, a progressive shift in the prohibition of same-sex marriage.¹⁰⁵ The shift did not go unnoticed.

Perceived as a threat to state sovereignty, heteronormative ideals, and religious mores, Congress moved quickly to counter Hawaii's legalization of same-sex marriage. Congressional action was believed necessary to uphold and reinforce the heteronormative structure, as illustrated by a U.S. House of Representatives Report declaring Hawaii's decision as a threat to "upholding traditional morality, encouraging procreation in the context of families, encouraging heterosexuality, . . . and other legitimate purposes of government."¹⁰⁶ Congress additionally feared that Hawaii's decision would open the proverbial floodgates to gay marriage in other states.¹⁰⁷ Consequently, in 1996, Congress enacted a pre-emptive strike in the form of the Defense of Marriage Act ("DOMA").¹⁰⁸

Of importance, DOMA established two particularly significant provisions. First, DOMA declared, "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."¹⁰⁹ In other words, after DOMA's passage, no state is required to recognize a same-sex marriage legitimized in another state. Second, DOMA explicitly defines "marriage" at the federal level as only between one man and one woman.¹¹⁰ Additionally, DOMA defines the word "spouse," for federal purposes, as a "person of the opposite sex who is a husband or a wife."¹¹¹ The fact that perpetuation of heteronormative ideals steered DOMA's charge cannot be understated. Laying out DOMA's rationales, the U.S. House of Representatives Report declared DOMA

105. *Id.* See also Rebecca S. Paige, *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage, Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices*, 47 AM. U. L. REV. 165, 170-71 (1997).

106. See Luibheid, *supra* note 8, at 75.

107. *Id.*

108. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996). U.S. House of Representatives vote: 342 (yea) 67 (nay). U.S. Senate vote: 85 (yea) 14 (nay). See also Luibheid, *supra* note 8, at 75.

109. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 1738(c), 110 Stat. 2419, 2419 (2006).

110. *Id.* at § 3, broadly proclaiming:

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.

111. *Id.*

necessary for “defending and nurturing the institution of traditional, heterosexual marriage” and “defending traditional notions of morality.”¹¹² Consequently, DOMA cannot be seen as anything other than the promotion of heterosexuality as the “right disposition of sexuality . . . and the proper disposition of social, moral, and civilizational responsibility.”¹¹³ Indeed, DOMA achieved little else than the favoring of heterosexuality over homosexuality—the preferred and desirable over the unsuitable and undesirable.

In the context of immigration law and policy applied to LGBTQ migrants, DOMA proved particularly harmful.¹¹⁴ The federal government has exclusive control over U.S. immigration law, policy, regulation, and enforcement.¹¹⁵ As is likely apparent, any reference to the terms “spouse” or “marriage” within immigration law is categorically governed by DOMA. Consequently, despite a U.S. immigration policy of “family unification,” DOMA deprives LGBTQ migrants of the most advantageous—and often only—method of legal immigration available: familial sponsorship. This is true even if a U.S. citizen or lawful permanent resident and his/her same-sex migrant partner were married in a state¹¹⁶ or foreign country¹¹⁷ that recognizes same-sex marriage,

112. Luibheid, *supra* note 8, at 97 n.7.

113. *Id.* at 75-76.

114. *See id.* at 90 (DOMA is an institutional tool used to both “reanimate the heterosexual norm to which all people are expected to aspire” and “generate categories of ‘problem subjects,’ including immigrants, who then need to be controlled, disciplined, or excluded”).

115. *See DeCanas v. Bica*, 424 U.S. 351 (1976); *Toll v. Moreno*, 458 U.S. 1 (1982) (superseded by statute as stated in *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011)).

116. At the time of this article’s writing, nine states and the District of Columbia recognize same-sex marriages. These states include: Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, Maine, Maryland, and Washington. *See Freedom to Marry, States*, (last visited Dec. 3, 2012, 9:45 AM), *available at* <http://www.freedomtomarry.org/states/>.

117. Internationally, thirty-one nations recognize same-sex relationships for purposes of immigration: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Japan, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. *See Steve Ralls, As Momentum for Comprehensive Immigration Reform Grows, Nadler and Bipartisan Coalition Introduce Uniting American Families Act to Provide Immigration Equality for LGBT Families*, IMMIGRATION EQUALITY (Feb. 5, 2013, 5:50 PM), <http://immigrationequality.org/2013/02/as-momentum-for-comprehensive-immigration-reform-grows-nadler-and-bipartisan-coalition-introduce-uniting-american-families-act-to-provide-immigration-equality-for-lgbt-families/#comments>. While outside the scope of this article, it has been aptly argued that U.S. immigration law’s exclusionary and discriminatory

and despite seemingly problematic impediments established by the Full Faith and Credit Clause of the Constitution.¹¹⁸

In addition to excluding same-sex bi-national couples, DOMA rejects transgendered migrants from the immigration process.¹¹⁹ Despite the lack of express language, DOMA's definition of "spouse" as a "person of the opposite sex who is a husband or a wife"¹²⁰ apparently requires that both the husband and the wife be *biologically* born male and female.¹²¹ True to form, immigration officials have both interpreted and applied DOMA's definition in this discriminatory manner.¹²² Such inequitable interpretation and application is not isolated. To the contrary, it is official policy:

In an interoffice memorandum, William R. Yates, Associate Director for Operations of the U.S. Citizenship and Immigration Services (CIS)

treatment of LGBTQ persons likely runs afoul of international law. *See* Lena Ayoub & Shin Ming Wong, *Separated and Unequal*, 32 WM. MITCHELL L. REV. 559, 582 (positing that treaties such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights—treaties to which the United States is a signatory— confer a positive duty on the United States to protect the internationally recognized right to family and familial unity). *See* Universal Declaration of Human Rights, art. 16(1), G.A. Res. 217 (III), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 23, Mar. 23, 1976, 999 U.N.T.S. 171. While appeal to international law as support is likely to be swiftly dismissed as idealistic and unauthoritative, it is important to note the U.S. Supreme Court's recognition of such international law in its watershed 2003 *Lawrence* decision. *See* *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (relying on both international treaties and trends to hold that the right to private sexual autonomy is a fundamental right protected by the due process clause).

118. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). Rooted in notions of comity, the Full Faith and Credit Clause establishes uniformity amongst the non-federal laws, claims, and court rulings of the states. However, a long-established "public policy" exception to the Full Faith and Credit Clause exists. *See* *Pacific Employers Ins. Co. v. Industrial Accident Comm'n of Cal.*, 306 U.S. 493, 502 (1939). Whether DOMA is protected by this exception or other legal reasons is currently under consideration by the U.S. Supreme Court. *See* *United States v. Windsor*, No. 12-307 (argued Mar. 27, 2013), *available at* <http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/> (determining whether section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to legally married same-sex couples who are married under the laws of their state).

119. *See* Luibheid, *supra* note 8, at 87 ("DOMA further specified that spousal reunification provisions could not include same-sex couples or married couples in which one person was transsexual.")

120. *See* Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 1738(c), 110 Stat. 2419, 2419 (2006).

121. *See* Luibheid, *supra* note 8, at 80.

122. *Id.* at 77.

announced that in its adjudication of spousal and fiancé petitions, the agency would not recognize a marriage or intended marriage where either party claims to be a transsexual. Whether or not either party plans or actually undergoes sex reassignment surgery has no bearing on this decision.¹²³

Despite no longer being excluded on the explicit basis of sexuality, DOMA's definitional exclusion of LGBTQ migrants from the most practical and proper method of legitimate immigration—familial sponsorship—often results in calamitous consequences when played out in peoples' lives. Indeed, DOMA disproportionately disrupts the lives of more than an estimated 40,000 same-sex bi-national couples each year.¹²⁴ In reality, however, the number of bi-national same-sex couples discriminatorily impacted by DOMA is likely much higher, as census data fails to account for same-sex bi-national couples who choose not to self-identify as “familial” or same-sex couples with one partner living outside the United States.¹²⁵ A 2011 Williams Institute study estimates that:

As of 2010, nearly 79,200 same-sex couples living in the United States include at least one partner who is currently not a U.S. citizen or was naturalized as a citizen. Of the nearly 650,000 same-sex couples in the US: 4.4% or 28,574 are bi-national couples (one partner is a U.S. citizen and one is not); 1.8% or 11,442 are dual non-citizen couples; and 6.1% or 39,176 are dual citizen couples with at least one naturalized partner.¹²⁶

123. CIS Announces Policy on Transsexual Applicants, *available at* <http://www.visalaw.com/04aug2/11aug204.html>.

124. See Craig J. Konnoth and Gary J. Gates, *Same Sex Couples and Immigration in the United States*, THE WILLIAMS INSTITUTE Nov. 2011 at 1, *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf>.

125. See Timothy R. Carraher, *Some Suggestions for the UAFA: A Bill for Same-Sex Binational Couples*, 4 NW. J. L. & SOC. POL'Y 150 n.1 (2009). Further illustrating the reality of higher numbers of same-sex relationships (bi-national or otherwise) than those currently available is the fact that census questions do not inquire into sexual orientation or sexual behaviors. See Konnoth *supra* note 124, at 3. Instead, answers provided to two census questions—the ‘relationship to Person 1’ and the sex of all household members”—identify same-sex relationships. *Id.* “Same-sex couples are those where a person aged 15 or older is identified as the ‘husband/wife’ or ‘unmarried partner’ of Person 1 and both persons are of the same sex.” *Id.*

126. See Konnoth *supra* note 124, at 1.

It is estimated that nearly half of the 40,000 bi-national couples are raising children.¹²⁷ In an ironic display of unintended consequences, the real-world ramifications of DOMA's discriminatory impact on LGBTQ migrants have, in effect, undermined DOMA's heteronormative aim of upholding and strengthening the so-called nuclear, traditional family unit.

Being excluded from familial sponsorship by DOMA, LGBTQ bi-national couples are often left with little recourse.¹²⁸ Unable to plan for their futures, these couples must face their bleak—and almost certainly impractical—options. Some may choose to split up entirely or shuttle between countries should they want to stay together.¹²⁹ Quite unrealistically, the United States citizen or LPR (who would otherwise be the sponsoring spouse in a heterosexual relationship) may consider relocation to the migrant-partner's home country.¹³⁰ Whatever the choice, lives are disrupted. Being strong-armed into choosing between compliance with perceivably unjust and discriminatory laws¹³¹ and a life with the person they love, many choose to enter in an unauthorized manner or remain undocumented.¹³² Many resort to arranging fraudulent *heterosexual* marriages.¹³³

Despite affording an LGBTQ migrant with the opportunity to remain in the United States, or to remain united with their same-sex partner if entered into for such a purpose, counterfeit marriages too often subject the LGBTQ migrant to heightened risk of exploitation and abuse.¹³⁴ Additionally, those who enter into

127. See S. 598, *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before the Comm. on the Judiciary United States S.*, 112th Cong. 231 (2011) (written testimony of Victoria F. Neilson, Legal Director, Immigration Equality, Washington D.C.) available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg70639/pdf/CHRG-112shrg70639.pdf>.

128. See QUEER MIGRATIONS, *supra* note 18, at xiii.

129. See *id.*

130. See *id.*

131. See Martin Luther King, Jr., *Letter from Birmingham City Jail* 6 (1963) (quoting St. Thomas Aquinas and St. Augustine). While imprisoned for participating in a non-violent protest, Dr. King penned a response to critics who had questioned his peaceful methods of civil disobedience:

“One may well ask, ‘How can you advocate breaking some laws and obeying others?’ The answer is found in the fact that there are two types of laws: There are *just* laws and there are *unjust* laws. I would be the first to advocate obeying just laws. One has not only a legal but moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that ‘An unjust law is no law at all.’” *Id.*

132. See QUEER MIGRATIONS, *supra* note 18, at xiii.

133. See *id.*

134. See *id.*

counterfeit marriages risk severe legal consequences.¹³⁵ If an LGBTQ migrant marries someone of the opposite sex in order to remain with his or her partner, effectively circumventing discriminatory laws and policies, such marriages are prone to be deemed “marriages of convenience,” or “sham marriages.”¹³⁶ A marriage is one of “convenience” or a “sham” if it is found that the couple “did not intend to establish a life together at the time they were married.”¹³⁷ To determine the couple’s intent, governmental immigration officials examine the parties’ “conduct and lifestyle before and after the marriage.”¹³⁸ Evidence of one’s homosexuality or LGBTQ identification is likely to be considered *prima facie* evidence of a sham heterosexual marriage. Drastic ramifications follow marriages found to be “shams” or entered into out of “convenience.” Indeed, the LGBTQ migrant faces deportation and an indefinite bar from returning to the United States.¹³⁹ Conversely, the United States citizen or LPR faces a \$250,000 fine and up to five years’ imprisonment.¹⁴⁰

V. NOT CONSTITUTIONAL: THE OBAMA ADMINISTRATION’S AND THE DEPARTMENT OF JUSTICE’S TREATMENT OF DOMA.

In early 2011, the Obama Administration announced that the Department of Justice (“DOJ”) would no longer defend DOMA in federal court challenges.¹⁴¹ As Attorney General Eric Holder explained, the Obama Administration considered certain provisions of DOMA to be unconstitutional.¹⁴² Demonstrating this commitment, the DOJ filed a brief in one of the many cases challenging DOMA, arguing that DOMA “was motivated in significant part by animus towards gays and lesbians and their

135. 8 U.S.C. § 1325(c) (2006) (“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.”).

136. See NAN D. HUNTER, ET AL., *THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDERED PEOPLE, THE AUTHORITATIVE ACLU GUIDE TO A LESBIAN, GAY BISEXUAL, OR TRANSGENDERED PERSON’S RIGHTS* 64 (4th ed. 2004).

137. *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (citing *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975)).

138. *Id.*

139. See 8 U.S.C. § 1325(c) (2006).

140. *Id.* (“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.”).

141. See Letter from Eric H. Holder, Jr., Attorney General, to John H. Boehner, Speaker, U.S. House of Representatives, Re: Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

142. See *id.*

intimate and family relationships,” and therefore fails heightened constitutional scrutiny.¹⁴³

Yet despite the DOJ’s own admission that DOMA unconstitutionally infringes on a person’s equal protection rights, and despite the commitment to no longer *defend* DOMA, the DOJ promised to remain committed to *enforce* DOMA until either Congress chooses to repeal the law or the judiciary strikes it down as unconstitutional.¹⁴⁴ Simply put, when applied to the immigration context, the 40,000 bi-national couples seeking equal treatment of the law would have to wait for action by a Legislature or a Judiciary that, if history is any indication, cares very little about their plight.¹⁴⁵ Predictably, neither has yet responded, resulting in case after case of exclusion of LGBTQ migrants from the immigration process and their removal from the United States—and consequently, from their beloved partners—in an admittedly unconstitutional manner. For example, soon after the Obama Administration’s announcement, a same-sex partner of a United States citizen was deemed removable (i.e., “deportable”) because he had overstayed his visa. Despite the fact that the two individuals had entered into a civil union in New Jersey, the immigration judge found the LGBTQ migrant ineligible for a type of relief from deportation called “cancellation of removal” because his U.S. citizen partner was not considered a “spouse” under DOMA.¹⁴⁶

A. *Progress? Department of Homeland Security Directive Recognizes Relationships Involving LGBTQ Migrants.*

Remaining steadfast to their commitment to enforce DOMA until either the Legislature or Judiciary take progressive action, yet acutely aware of both the Legislature’s and Judiciary’s failure to do so, the Obama Administration took

143. Defendant’s Brief in Opposition to Motions to Dismiss at 18, *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2011) (No. C 3:10-00257-JSW), available at <http://www.clearinghouse.net/chDocs/public/PB-CA-0031-0003.pdf>.

144. See Letter from Eric H. Holder, Jr., *supra* note 141.

145. See Victoria F. Neilson, *Addressing Inequality in the Law for Permanent Partners*, testimony submitted to the U.S. Senate Committee on the Judiciary, S. 598 The Respect for Marriage Act: Assessing the Impact of DOMA on American Families, July 20, 2011.

146. See *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011). For further illustration of DOMA’s continued discriminatory—and admittedly unconstitutional—impact upon same-sex binational partners after the Obama Administration’s announcement, see the stories of Edwin Blesch & Timothy Smullian; Frances Herbert & Takako Ueda; Heather Morgan & Maria del Mar Verdugo; Santiago Ortiz & Pablo Garcia; and Kelli Ryan & Lucy Truman. *Taking Our Case to Court*, IMMIGRATIONEQUALITY.ORG, <http://immigrationequality.org/lawsuit/plaintiffs/>.

matters into its own hands and instigated a seemingly progressive change. Prodded by a coalition of eighty-four minority-members of Congress,¹⁴⁷ the Obama Administration directed immigration officials to recognize same-sex relationships as familial ties for all immigration purposes in September 2012.¹⁴⁸ As such, Department of Homeland Security Secretary Janet Napolitano declared that use of the term “family relationship” for immigration purposes “includes long-term, same-sex partners.”¹⁴⁹ In effect, the Obama Administration did an end-around of DOMA.

The move was seen as progressive, effectively championing in a new era for LGBTQ migrants. Calling the Obama Administration’s announcement a “watershed” moment for LGBTQ immigration, Rachel B. Tiven, Executive Director of Immigration Equality, wrote, “[i]t is the first time the immigration system will categorically recognize an American citizen’s relationship with an immigrant as a positive factor in an immigration case.”¹⁵⁰ As a result of the announcement, others went so far as to naively declare same-sex bi-national couples as the “same as straight couples” for immigration purposes.¹⁵¹ Such declarations echoed those made in 1990 after Congress officially removed one’s sexuality as a basis for immigration exclusion and indeed ignored the historical realities that LGBTQ migrants are up against.

While certainly “a huge step forward,” and no doubt “one of the very first times [LGBTQ] families have been recognized within federal immigration policies,”¹⁵² the Obama Administration’s direction to the DHS nonetheless remains at the whims, mercies, and discretions of ever-shifting ideologies and policies. Indeed, if history is any indication, just as DOMA quickly undid the progressive policy step made in 1990, the Obama Administration’s progressive step is susceptible to the same fate.

147. See Letter from Nancy Pelosi, House Minority Leader, et. al., to Janet Napolitano, Sec’y of the United States Dep’t of Homeland Sec., available at <http://pelosi.house.gov/news/press-releases/2012/08/pelosi-nadler-honda-and-house-democrats-urge-department-of-homeland-security-again-to-recognize-lgbt.shtml>.

148. See Ronnie Cohen, *Same-Sex Immigration Policy: U.S. to Treat Gay Partners as Relatives*, THE HUFFINGTON POST (Sept. 28, 2012), http://www.huffingtonpost.com/2012/09/28/same-sex-immigration-reform_n_1924763.html.

149. *Id.*

150. See Rachel B. Tiven, *Napolitano’s Same-Sex Couples Directive: A Milestone in Immigration Justice*, THE GUARDIAN (Oct. 1, 2012), <http://www.guardian.co.uk/commentisfree/2012/oct/01/napolitano-same-sex-couples-directive>.

151. See Lucy Steigerwald, *It’s Official: Gay Couples Same as Straight Couples When Weighing Immigration Deportation*, REASON.COM (Oct. 2, 2012, 7:40 PM), <http://www.reason.com/blog/2012/10/02/janet-napolitano-and-dhs-will-consider-g>.

152. See Cohen, *supra* note 148 (quoting Rachel B. Tiven, Executive Director of Immigration Equality).

VI. RECOMMENDATION: PASS THE UNITING AMERICAN FAMILIES ACT
TO ENSURE THE DHS DIRECTIVE DOES NOT FALL VICTIM
TO AN HISTORICAL REPEAT

To ensure that the Obama Administration's directive to the DHS remains protected from yet another regressive twist in policy, procedure, or legislation, the Uniting American Families Act ("UAFAs") must be passed, thereby bringing the United States into alignment with the developed world,¹⁵³ and, more importantly, ensuring that the rights of more than 40,000 bi-national same-sex couples remain protected.¹⁵⁴

Championed by LGBTQ activists and immigration equality activists alike, the UAFAs aims to eliminate DOMA's exclusionary impact upon those LGBTQ migrants seeking to participate in immigration law's "family reunification" policy by amending several sections of the INA, thereby establishing the official recognition of permanent partnerships and permanent partners for immigration purposes.¹⁵⁵ The proposed bill defines a "permanent partner" as, *inter alia*, "an individual 18 years of age or older who . . . is in a committed, intimate relationship with another individual 18 years or older in which both parties intend a lifelong commitment."¹⁵⁶ Additionally, the UAFAs defines "permanent partnership" as "the relationship that exists between two permanent partners."¹⁵⁷

Legislative support for the UAFAs has ebbed and flowed over the course of the bill's life,¹⁵⁸ almost exclusively from the Democratic side of the political aisle.¹⁵⁹ Yet opposition tides are changing. Perhaps driven by the Democrat's

153. *See supra* note 117 and accompanying text.

154. *See supra* notes 124-27 and accompanying text.

155. *See* The Uniting American Families Act, S. 821, 112th Cong. § 2 (2011).

156. *See id.* The UAFAs fully defines a "permanent partner" as

[A]n individual 18 years of age or older who—(A) is in a committed, intimate relationship with another individual 18 years 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, any individual 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.

157. *Id.*

158. Originally proposed as the "Permanent Partners Immigration Act" in 2000, Congressional support for the UAFAs has expanded from 59 co-sponsors (106th Congress in 2000) to 144 (112th Congress in 2011). Senate support has likewise increased over the years, receiving 12 co-sponsors in 2000 and 29 in 2011. *See* Francoeur, *supra* note 6, at 82-83 & n.114-17 and accompanying text.

159. *See* David Guavey Herbert, *Uniting American Families Act*, NATIONAL JOURNAL (Jan. 13, 2010), http://www.nationaljournal.com/njonline/no_20100113_1390.php.

sweeping and overwhelming support from minority voters—particularly from Latino voters—in the 2012 election, Republican lawmakers are beginning to support the UAFA’s passage.¹⁶⁰

While support for the UAFA has steadily increased over the last thirteen years, oppositional rationale has remained constant. Not surprisingly, the same heteronormative concerns surrounding DOMA’s passage¹⁶¹ lie at the heart of many arguments against the UAFA¹⁶² and, if the UAFA is to pass, such anxieties must be diffused. Illustrating such anxieties, Bishop John C. Wester, Chairman of the Catholic Bishop’s Committee on Migration—historically very supportive of immigration equality movements—declared the UAFA to be an affront to the nation’s supposed heteronormative ideals by “erod[ing] the institution of marriage and family” and by taking a position “that is contrary to the very nature of marriage which pre-dates the Church and the State.”¹⁶³

Ironically, such rationale overlooks DOMA’s impact on the very “institution” the rationale seeks to protect: the family. As detailed above, when faced with the unpleasant options caused by DOMA’s exclusionary application, many same-sex bi-national couples enter into “sham” or “fraudulent” heterosexual marriages in order to enter or remain within the U.S., thereby remaining together. As Bishop Wester and those supportive of his heteronormative motivation ideals would surely agree, few things can be more “contrary to the very nature of marriage” than a marriage entered into noncommittally. Indeed, perhaps nothing erodes the “institution of marriage and family” more than a marriage founded on deceit and trickery. Yet DOMA facilitates and fosters these very actions.

While DOMA increases the amount of fraudulent marriages, the UAFA would reduce the amount of “sham” marriages by providing an inclusionary alternative—the “permanent partner” classification. In effect, the UAFA seeks to gather those LGBTQ migrants excluded by DOMA and encourages the use of “legal and properly established channels to obtain lawful permanent residency.”¹⁶⁴ When provided with avenues respectful of their sexual identities that recognize legal relationships, LGBTQ migrants gladly comply with

160. See Elise Foley, *Uniting American Families Act Wins Support from Two Republicans*, THE HUFFINGTON POST (Dec. 18, 2012), http://www.huffingtonpost.com/2012/12/18/uniting-american-families-act-republicans_n_2322779.html?1355856892.

161. See *supra* notes 104-13 and accompanying text.

162. See Carraher, *supra* note 125, at 151 (“Arguments against the passage of the [UAFA] 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” in 1996).

163. See Julia Preston, *Bill Proposes Immigration Rights for Gay Couples*, THE NEW YORK TIMES (June 2, 2009), <http://www.nytimes.com/2009/06/03/us/politics/03immig.html>.

164. Francoeur, *supra* note 6, at 84.

immigration laws.¹⁶⁵ Consequently, UAFA's "permanent partner" category in fact bolsters and strengthens the institution of a heteronormative marriage.¹⁶⁶ Indeed, passage of the UAFA would solidify the DHS's directive to consider same-sex relationships worthy of familial reunification consideration and would serve to counteract any historical repeats aimed to undo the progressive measure.

VII. CONCLUSION

Heteronormative ideals have long been a concern to the framers of United States immigration law and policy, and sexuality has consistently comprised an important consideration for the regulation of newcomers. Consequently, from the earliest forms of immigration regulation, LGBTQ migrants have been systematically excluded from the immigration process. Time after time, immigration laws and policies have labeled LGBTQ migrants with various forms of derogatory terminology, always with the goal of exclusion and always for the purpose of building a preferred populace. There was no mistaking the message: LGBTQ persons do not belong. Even when progressive measures have been taken in what appears to be advantageous for LGBTQ migrants, such measures prove merely pretextual and fleeting.

Every day LGBTQ migrant families suffer the consequences of the United States' unfair laws that do not permit U.S. citizens and legal permanent residents to petition for lawful permanent residence for their same-sex spouses or partners. While important steps toward equality for LGBTQ immigrant families have recently been taken, it is naïve to assume that history will not repeat itself. Until the Uniting American Families Act is passed, many of these families continue to live with the daily fear of forced separation and marginalization. Indeed, until then, the inclusionary call for the "tired, poor, and huddled masses yearning to breathe free" comes with an exclusionary caveat: "except for those who are LGBTQ migrants."

165. *Id.*

166. *Id.* Additionally, the UAFA would simultaneously "eliminate a major cause of many LGBT immigrants' undocumented status and thus reduce the overall undocumented population in the United States," further reducing ancillary concerns.