

Sheltering and Discriminating:
Homosexuality and Immigration Law in the United States

By Claire O'Sullivan

In the United States, there exists an uneasy relationship between homosexuality and the law. The Supreme Court's finding in *Lawrence v. Texas* that sodomy laws are unconstitutional¹ has left in place institutional discrimination against same-sex individuals on many fronts.² One area in which this discrimination has tangible and often heart-wrenching consequences is immigration law. Currently, there is no mechanism by which citizens and legal permanent residents (LPRs) of the United States can obtain a legal immigration status for their same-sex partners, married or otherwise.³ This stands in obvious contrast to the rule for heterosexual couples; the opposite-sex spouses of American citizens and LPRs can obtain visas for permanent residency and, ultimately, United States citizenship.⁴ This discriminatory treatment can have harsh consequences for individuals in same-sex relationships where one partner lacks immigration status. These individuals may be forced to make difficult choices between leaving the U.S. to

¹ 539 U.S. 558 (2003).

² The most visible site of discrimination is marriage (see Defense of Marriage Act, Public Law No. 104-199, 110 Stat. 2419), but homosexuals are also discriminated against in the military (under the policy commonly referred to as "Don't ask, don't tell," codified at 10 U.S.C. § 654); in matters of adoption (see *Lofton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004) (upholding law prohibiting homosexual individuals from adopting children); and in intestacy proceedings, see *New York Estates, Powers and Trust Law*, Section 4-1.1 (preventing domestic partners from inheriting upon the death of the other partner).

³ See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) *cert. denied*, 458 U.S. 111 (1982) (ruling that a same-sex partner cannot be considered a "spouse" for the purposes of the INA).

⁴ 8 U.S.C. §1151 (2006).

live with their partners in another country,⁵ committing immigration fraud,⁶ or giving up on the relationship.

While U.S. immigration law denies homosexual Americans the right to sponsor their partners for immigration, it does now allow grants of asylum for homosexual individuals who face persecution in their home countries.⁷ Since 1994, homosexuals have been officially considered a “particular social group” for the purposes of the Immigration and Nationality Act (INA), and if they can demonstrate that they will face persecution in their home countries on those grounds, they may be allowed to remain in the United States.

Meanwhile, a bill has been introduced in both houses of Congress that would create a path for American citizens and LPRs to sponsor their same-sex partners for immigration to the U.S.⁸ This bill, called the Uniting American Families Act (UAFAs), would allow the same benefits granted to “spouses” to be granted to same-sex “permanent partners.” The bill faces opposition, however, both on the traditional anti-homosexual grounds⁹ and due to concerns about fraud.¹⁰

⁵ See, e.g., Jacobs, Andrew, “Gay Couples Split by Immigration Law; Under 1996 Act, Personal Commitments Are Not Recognized,” *N.Y. Times*, March 23, 1999, at B1 (describing phenomenon of couples moving to Canada for more permissive immigration laws, and quoting one such individual as saying “Imagine being forced by your government to leave behind family and friends because your relationship has no value....It’s wrenching.”).

⁶ See Christopher A. Dueñas, *Coming to America: The Immigration Obstacle Facing Binational Same-sex Couples*, 73 S. Cal. L. Rev. 811, 811 (2000) (quoting personal ads in newspapers from binational same-sex couples seeking binational same-sex couples of the other sex for “mutually beneficial” marriages).

⁷ See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-23. (BIA 1990) (granting asylum to a Cuban national based on his legitimate fear of persecution on the basis of his homosexuality if returned to Cuba, and declaring homosexuals a “particular social group” for the purposes of asylum law). This decision was adopted as precedent for all future cases by Attorney General Janet Reno in 1994, see *See Att’y Gen. Ord. No. 1895-94* (June 19, 1994) (Declaring *Matter of Toboso-Alfonso* to be controlling precedent for all future decisions).

⁸ Uniting American Families Act, H.R. 1024, 111th Cong. (2009); S. Res. 424, 111th Cong. (2009).

⁹ See Timothy A. Carraher, Note and Comment, *Some Suggestions for UAFAs: A Bill for Same-Sex Binational Couples*, 4 N.W. J. L. & Soc. Pol’y 150, at *4 (2009) (noting that opponents have relied on the same moral and political arguments used in the same-sex marriage debates).

¹⁰ Many politicians have expressed concerns about fraud, including President Barack Obama. See Human Rights Campaign, *2008 Presidential Questionnaire – Senator Barack Obama* 4 (“I...believe that changes

In this paper, I will argue that America's relationship with homosexuality is defined by a willingness to tolerate homosexuality (to an extent) but an unwillingness to view homosexuals as actual equals. I will also argue that the interplay between these three phenomena – the exclusion of the same-sex partners of Americans, the right of asylum for persecuted homosexuals, and the UFAA – demonstrates that the distinction America seeks to draw between tolerance and the granting of full equal rights, while politically useful, is at least partly false when applied to immigration laws. Finally I will put forth the UFAA as an example of the difficulty of expanding homosexual rights in America under a tolerant regime.

I. Background: Homosexual Immigration in the United States

Immigration laws have long discriminated against homosexuals. Prior to 1875, there was no specific prohibition – rather, “moral threats” were excluded under an 1875 law.¹¹ However, with the passage of the INA in 1952, Congress excluded “aliens afflicted with psychopathic personality, epilepsy or a mental defect.”¹² Because homosexuality was included in the Diagnostic and Statistical Manual as a mental disorder, homosexuals fell under the exclusion provision.¹³ Following a Ninth Circuit ruling in 1962 holding that the “psychopathic disorders” language was too vague to be applied automatically to all homosexuals,¹⁴ Congress amended the language to include

need to be made to the bill to minimize the potential for fraud and abuse of the immigration system.”) available at http://citizenchris.typepad.com/citizenchris/files/obama_hrc.pdf.

¹¹ See Act of March 3, 1875, ch. 141, 18 Stat. 477 (1875).

¹² Immigration and Nationality Act, ch. 477, 66 Stat. 182 (1952).

¹³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 38-39 (1952).

¹⁴ See *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963).

the term “sexual deviate,” hoping that would “serve the purpose of resolving any doubt point.”¹⁵

With the determination by Surgeon General in 1979 that homosexuality would no longer be considered a “defect or disease,”¹⁶ a kind of ‘don’t ask, don’t tell’ policy emerged, under which Immigration and Nationalization Services (INS) officials were instructed not to ask about sexual orientation, but were told to initiate exclusion proceedings if the would-be immigrant volunteered the information.¹⁷ However, shortly after the issuance of those guidelines, they were struck down by a Ninth Circuit finding that an exclusion for “psychopathic personality” or “mental defect” needed to be based on an actual medical certificate.¹⁸ This essentially robbed the ban on homosexuals of any real applicability.¹⁹

Nonetheless, if there was any hope created that the spousal provisions in the INA were applicable to same-sex couples, it was extinguished by *Adams v. Howerton*, a Ninth Circuit decision holding that the term “spouse” in the INA did not apply to the same-sex partner of a Colorado man, despite the fact that they had managed to procure a marriage license from a county clerk.²⁰ Though the ban on homosexual immigration was finally

¹⁵ S. Rep. No. 748, 89th Congress, 1st Session 19 (1965).

¹⁶ See *Hill v. INS*, 714 F.2d 1470, 1472 (9th Cir. 1983).

¹⁷ Department of Justice, *Press Release: Guidelines and Procedures for the Inspection of Aliens Who are Suspected of Being Homosexual* (Sept. 9, 1980).

¹⁸ *Hill v. I.N.S.*, 714 F.2d 1470 (9th Cir. 1983).

¹⁹ However, a Fifth Circuit decision upheld the regulations, ruling that “psychopathic disorder” was a “term of art” in the INA and did not require a medical diagnosis. *In re Longstaff*, 716 F.2d 1439, 1447 (5th Cir. 1983). Homosexuals could therefore still be excluded at certain entry points (those within the Fifth Circuit’s jurisdiction) but could avoid problems by entering the country via a port in any other circuit’s jurisdiction (the Department of Justice having opted to apply to Ninth Circuit rule where no ruling had been made). See Golden, Dennis A., *The Policy Considerations Surrounding the United States’ Immigration Law as Applied to Binational Same-Sex Couples*, 18 Kan. J. L. Pub. Pol’y 301, 303 (discussing disparity created by *Hill* and *Longstaff*).

²⁰ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) *cert. denied*, 458 U.S. 111 (1982).

taken off the books in 1991,²¹ *Adams* remains good law – same-sex partners cannot be considered “spouses” for the purposes of the INA.

Around the same time that the ban on homosexual immigration was being officially lifted, the immigration courts were grappling with the issue of whether or not to grant asylum for aliens persecuted in other countries on the basis of their homosexuality. In *Matter of Toboso-Alfonso*,²² the Board of Immigration Appeals (BIA) considered the case of a Cuban ex-pat who claimed that he would face persecution on account of his sexuality if he were returned to Cuba. To qualify for asylum, an alien must demonstrate that he or she will face persecution on one of five enumerated grounds.²³ One of those grounds is “membership in a particular social group.” The INS argued that “socially deviated behaviour” such as homosexuality, should not qualify as membership in a particular social group.²⁴ Dismissing that argument, and noting that it considered homosexuality to be an “‘immutable’ characteristic,”²⁵ the BIA went on to establish that homosexuals were to be considered a “particular social group,” and that persecution could form the basis of a grant of asylum.²⁶ The Attorney General later confirmed that this precedent would be applied to all future cases.²⁷

So, the Board of Immigration Appeals, and later the Attorney General, declared that one’s sexual orientation to be an immutable characteristic, and therefore found

²¹ Immigration Act of 1990, Pub. L. No. 101-649, §601, 104 Stat. 4978, codified at 8 U.S.C. §1182 (1990).

²² 20 I. & N. Dec. 819, 820-23. (BIA 1990).

²³ Asylum requires that the claimant demonstrate a well-founded fear of future persecution if returned to his or her country of origin, on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42).

²⁴ “The Service argues that ‘socially deviated behaviour, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act’....”. *Toboso-Alfonso*, 20 I. & N. at 821.

²⁵ *Id.* at 822-23.

²⁶ *Id.* In this case, the claim being made was for “withholding of removal” rather than asylum, because the claimant’s criminal record disqualified him from an asylum claim. However, the standard for finding qualifying persecution is the same.

²⁷ See Att’y Gen. Ord. No. 1895-94 (June 19, 1994) (Declaring *Matter of Toboso-Alfonso* to be controlling precedent for all future decisions).

foreign homosexuals to be deserving of protection from persecution in other countries. Yet, homosexuals in the United States (who presumably have a similarly immutable character to their sexual orientations) are, on the basis of their sexual orientations, denied the right to sponsor their partners for immigration status. The question that arises, which I will address in the next section, is: what purposes might be served by these two contrasting policies?

II. Possible Explanation for a Conflicted Policy

A. Negative and Positive Rights

I have framed the right of asylum for persecuted homosexuals and the denial of immigration benefits for same-sex partners as contradictory stances. I do understand, however, that some would see an easy distinction between the two, on the basis of negative and positive rights. That is, the right not to be persecuted for homosexual activity in the private sphere is different from the granting of affirmative rights for homosexuals in the public sphere. This type of distinction is a common theme of tolerance discourse, and has been taken up by many politicians with regard to the rights of same-sex couples, particularly in the marriage debates.²⁸ This is also the stance that characterizes the larger government position on homosexuality in America – a willingness to be tolerant, by not actively interfering with the private lives of homosexuals, but not to grant those individuals full equality.

²⁸ For instance, George Bush said during the presidential debates in 2000: “I’ve been a tolerant person all my life. I just happen to believe strongly that marriage is between a man and a woman,” implying, as I understand it, that he would not seek to interfere with private-sphere activity by same-sex couples, as long as those couples did not seek public recognition of their union. Commission on Presidential Debates, *The Second Gore-Bush Presidential Debates*, October 11, 2000, available at <http://www.debates.org/index.php?page=october-11-2000-debate-transcript>. Similarly, Barack Obama opposes gay marriage, though he maintains that he believes in equal rights for same-sex couples. Bacon Jr., Perry, “Democratic Candidates Address Gay Rights,” *Wash. Post*, Aug. 9, 2007, at A7.

However, this distinction is at least somewhat collapsed in the immigration field. Can we really say that a U.S. citizen who must leave the country in order to live with her life partner is not having her rights infringed upon? In a comparable situation dealing with the right of a U.S. citizen man to sponsor his illegitimate child for immigration, Justice Marshall took the position that withholding this benefit was tantamount to infringing on the fundamental right to “freedom of personal choice in matters of marriage and family life.”²⁹ Conversely, is the granting of asylum not the affirmative grant of a public benefit? In any case, regardless of whether or not one sees an easy distinction between the two policies, it is interesting to consider the purposes that might be served by each one, and by the two in conjunction with one another.

B. Defining America Against the Other

In *Phenomenology of Spirit*, Hegel introduces the idea of the necessity of an individual consciousness having another consciousness through which to understand itself: “the lord achieves his recognition through another consciousness.”³⁰ The idea of defining oneself through and against an Other is frequently invoked in political theory. In her book *Regulating Aversion: Tolerance in the Age of Identity and Empire*, Wendy Brown invokes this notion in putting forth the idea of tolerance can serve the purpose of distinguishing the United States (and other Western democracies, and their allies) from their enemies (who are the enemies of tolerance). She posits that Western democracies legitimate themselves through “a constructed opposition between a cosmopolitan West and its putatively fundamentalist Other.”³¹ One purpose that U.S. asylum law might serve, then, is to allow the United States to define itself against other countries according

²⁹ *Fiallo v. Bell*, 430 U.S. 787, 810 (1977) (Marshall, J. dissenting).

³⁰ G.W.F. Hegel, *Phenomenology of Spirit* 116, A.V. Miller, translator (1998).

³¹ Wendy Brown, *Regulating Aversion Tolerance in the Age of Identity and Empire* 6 (2006).

to its tolerance (and their lack of tolerance) for homosexuals. There is support for this in asylum jurisprudence.

First, it is not a coincidence that the first alien to be granted asylum on sexual orientation grounds was from Cuba. While there is no doubt that Cuba persecuted homosexuals,³² by 1990 attitudes were softening.³³ Certainly, other countries had comparable or worse track records regarding the treatment of homosexuals (and it is of course useful to recall that, at this time, sodomy laws were still on the books in some parts of the United States). However, the United States has always had a particularly strong interest in casting itself in a favourable light as compared to Cuba, and part of that strategy has been an extremely favourable immigration policy towards any Cubans who sought refuge in the United States.³⁴ Cubans fleeing their homeland for the United States serves as a powerful form of anti-communist propaganda that the United States sought to encourage.³⁵ In fact, Fidel Toboso-Alfonso had arrived in the United States as part of the “Mariel Boatlift” of 1980,³⁶ an instance of the United States employing an extremely favourable policy towards Cubans – only his subsequent criminal convictions put him at

³² See, e.g., Susanna Peña, “*Obvious Gays*” and the State Gaze: Cuban Gay Visibility and U.S. Immigration Policy during the 1980 Mariel Boatlift. *Journal of the History of Sexuality*, 16(3), 482-514, 518 (2007) (“Between 1959 and 1980 male homosexuals suffered a range of consequences from limited career options to detention in street sweeps to incarceration in labor camps.”).

³³ See Marquis, Christopher, “Homosexuals in Cuba finding greater acceptance from society, government,” *Knight-Ridder Newspapers*, April 12 1995 (noting that in the late 1980s and early 1990s, the Castro government became more accepting of homosexuality sought to project a more liberal image to avoid deterring other countries from allying with Cuba). See also International Gay and Lesbian Association. “Description of Discriminatory Sexual Offenses and Their Application,” *World Legal Survey: Cuba* (1999) (noting that the provisions of the Cuban Penal Code dealing with homosexuality were softened in 1988).

³⁴ Cubans are automatically accorded refugee status, and may adjust to LPR status after two years. See *Cuban Adjustment Act*, Pub. L. No. 89-732, § 1, 80 Stat. 1161, 1161 (1966).

³⁵ See Alberto J. Perez, Note, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 *Nova L. Rev.* 437, 445 (2004) (discussing the American government’s interest in encouraging Cubans to flee to the U.S.).

³⁶ The Mariel Boatlift refers to Fidel Castro’s opening up of the Port of El Mariel to various Cuban citizens, a large percentage of whom were prisoners, and allowing them to escape to the United States. Alberto J. Perez, Note, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 *Nova L. Rev.* 437, 445 (2004).

risk of being returned to Cuba.³⁷ The application of the sexual orientation asylum policy to Cuba, a country that was already the subject of a heavily politicized policy, provides clues as to the political character of the law.

As well, some of the strongest language I found in homosexual asylum cases was directed at members and followers of Hizbollah. In a case dealing with persecution of homosexuals in Lebanon, the Ninth Circuit referred to Hizbollah followers as “primitively and abhorrently” believing that the brutalisation of homosexuals was justified,³⁸ and noted that “[a]gainst this backdrop of systemic intolerance...Karouni fears persecution if removed to Lebanon.”³⁹ While the behavior at issue was indeed terrible persecution, it is interesting that the court took the opportunity to identify the intolerant and primitive nature of Hizbollah, a designated terrorist organization and a clear enemy in the United States’ war on terror.

The United States is sometimes singled out among Western democracies for lagging on equal rights for homosexuals.⁴⁰ By creating a right of asylum for homosexuals persecuted in other countries, the United States simultaneously diverts attention from its own discriminatory policies by calling attention to (admittedly far greater) abuses elsewhere in the world, and justifies imperialist policies by casting itself as a champion of other countries’ oppressed citizens.⁴¹ Similar to the ways in which other countries might seek to draw attention to their liberal positions on certain human rights issues, in order to

³⁷ Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990).

³⁸ Karouni v. Gonzalez, 399 F.3d 1163, 1174 (9th Cir. 2005).

³⁹ *Id.* at 1167.

⁴⁰ See Aaron Xavier Fellemeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 Wm. & Mary L. Rev. 797, 822 (“The United States is a relatively late bloomer. Until 1961, every U.S. state outlawed homosexual conduct between consenting adults....”). See also *supra* note 2 and accompanying text.

⁴¹ See Brown, *supra* note 31, at 6 (“Tolerance thus emerges as part of a civilization discourse that identifies both tolerance and the tolerable with the West, marking nonliberal societies and practices as candidates for an intolerable barbarism....”).

distract from and/or downplay human rights abuses in other areas,⁴² by granting asylum to persecuted homosexuals, the United States can cast itself as humane and respectful of human rights (as compared to the countries-of-origin of the homosexual refugees), while distracting from domestic discrimination.

C. Maintaining the Kinship Grid

One of the discriminatory policies that is shielded by the homosexual asylum policy is, of course, the policy of exclusion towards the foreign partners of homosexual Americans. The purpose served by this policy presumably falls in line with the purpose behind the rest of the U.S. policies discriminating against homosexuals, that is, “actively shoring up the family values and marriage form that its own secularization has weakened.”⁴³ That is, the state continues to discriminate in an attempt to preserve the fundamentalist values that are eroded by its liberalism.

Sealing Cheng notes a policy in South Korea of encouraging Korean men to marry foreign women, partly in response to a shortage of Korean women available to marry Korean men (in particular, men in rural communities).⁴⁴ The government subsidizes and supports these relationships, but only insofar as the women involved assimilate into Korean culture and produce Korean children⁴⁵ – insofar as they fit themselves into the desired “kinship grid.”⁴⁶ The United States arguably engages in

⁴² For other examples of these diversionary tactics, see Katherine Franke, *Ahmadinejad Comes to Columbia: Sexuality, Nationalism and Global Governance*, Unpublished Manuscript (2009) available at www2.law.columbia.edu/faculty_franke/FTW2009.html.

⁴³ Brown, *supra* note 31 at 98.

⁴⁴ Sealing Cheng, *Sexual Victimhood, Citizenship and Nationhood in South Korea*, Unpublished Manuscript (2009), available at www2.law.columbia.edu/faculty_franke/FTW2009.html.

⁴⁵ *Id.* at 19-27.

⁴⁶ The issue of whether the government should *allow* same-sex couples to take a place in the kinship grid is separate from the issue of whether homosexuals actually want (or should want) to be incorporated into the that grid. To me, the answer to the first question is an easy one (yes), while the answer to the second is much more complicated (and beyond the scope of this paper). For a discussion of that issue, see Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 Colum. J. Gender & L. 236 (2006) (questioning the benefit of the gay movement’s focus on recognition from the government, and noting the shift in the rights-

similar behaviour – immigration laws that discriminate against homosexuals also serve the purpose of maintaining and encouraging the desired kinship grid. The “family-based” immigration laws are not applicable to just any type of family – they seek to encourage the formation and preservation of a specific type of family structure: the traditional nuclear family.⁴⁷ By allowing immigration benefits for the heterosexual spouses of American citizens and LPRs, the state is encouraging (some might even say coercing) the preservation and formation of married heterosexual couples and nuclear families based around that unit.⁴⁸

By disallowing the immigration for the same-sex partners of American citizens and LPRs, the government discourages these relationships – as discussed earlier in the paper, many couples break up, or are forced to live their lives elsewhere in order to stay together.⁴⁹ Those couples that do stay in the United States often do so in violation of immigration laws – they are forced to become outlaws. The government will support and embrace the opposite-sex partners of American citizens and LPRs, because they fit easily into the kinship grid and can help maintain the American ideal of nuclear families; the government will reject and banish same-sex partners, because they cannot. Such a policy sends a powerful message about what kind of relationships and families are desirable from the point of view of the U.S. government.

bearing subject from a gay individual to a “domesticated” same-sex couple). As with heterosexual couples, however, lifestyle choices for same-sex individuals and couples are more restricted when immigration status is an issue (see *infra* note 48 and accompanying text).

⁴⁷ A U.S. citizen may sponsor (in order of preference) a husband, wife, child under the age of 21, or a parent (provided the U.S. citizen sponsor is at least 21 years of age); an unmarried son or daughter over the age of 21; a married son or daughter of any age; or a brother or sister (provided the U.S. citizen sponsor is at least 21 years of age). An LPR may only sponsor a husband or wife, or a child under the age of 21. See United States Citizen and Immigration Services, *Immigration Through a Family Member*, www.uscis.gov.

⁴⁸ See Leigh Kamping-Carder, “Canadians Among Us!” *N.Y. Observer* (July 31, 2008) (describing one woman who married her long-time boyfriend so that she could stay legally in the United States) *available at* <http://www.observer.com/2008/real-estate/canadians-among-us>.

⁴⁹ See *supra* notes 5-6 and accompanying text.

D. Tolerance and Discrimination

There is a mutual dependence between these two policies. An immigration policy allowing for homosexual refugee claims serves to define America as a tolerant nation (against the intolerance of other nations); this, in turn, serves to distract from America's discrimination against homosexuals in other areas, including the refusal to allow the same-sex partners of American citizens and LPRs to immigrate on that basis. Conversely, liberal policies such as the asylum law in question threaten America's imagined community built on nuclear families, and so the government feels the need to "shor[e] up"⁵⁰ the traditional structure by discriminating against individuals who do not conform to it.

The distinction the government seeks to draw between negative and positive of course cannot justify discrimination. But beyond that, as discussed above, it is also at least partly a false distinction as applied to immigration laws.⁵¹ What I will discuss now is the UAFA as a response to the falsity of that distinction, and the discussion surrounding it as an illustration of the problems with lawmaking based on an ideal of tolerance rather than equality.

III. The Uniting American Families Act (UAFA)

The express purpose of the UAFA 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.⁵²

⁵⁰ See Brown, *supra* note 31, at 98.

⁵¹ See *supra* note 29 and accompanying text.

⁵² Uniting American Families Act, H.R. 1024, 111th Cong. (2009); S. Res. 424, 111th Cong. (2009).

A permanent partner is defined as an individual 18 years or older who is:

- (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 individual;
- (D) is unable to contract with that individual a marriage cognizable under this Act;
- (E) is not a first, second, or third degree blood relation of that other individual

This bill reflects a desire to correct a clear instance of discrimination against homosexuals in the law. This indicates an understanding that a tolerant stance is more difficult to take in the immigration context – here, the end result looks more like the active *denial* of a right than the passive non-granting of a benefit. In other words, the consequences of refraining from extending U.S. citizens and LPRs the ability to sponsor same-sex partners are the denial of that person’s right to have a committed relationship with the person of their choice in this country – that person is, in many cases, effectively exiled.⁵³ Thus, the government has difficulty falling back on a negative/positive rights distinction in justifying this inequity.

However, the problems with the bill illustrate the difficulties of legislating while walking the tightrope between tolerance and equal rights. Of course, there are some members of Congress who simply will not vote for a bill that strengthens gay rights. But among those that will, the biggest complaint about the bill is the potential for fraud.⁵⁴ The difference, of course, between the verification processes for a permanent partnership and a marriage is that no marriage certificate is required for permanent partners. Instead, there is a requirement of “financial interdependence.” While the requirement of a

⁵³ See supra note 29 and accompanying text.

⁵⁴ 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, 373 (2007) (stating that in his years lobbying Congress to pass the Act, the most cited reason for non-support is a concern about fraud); see also supra note 10 and accompanying text.

marriage might be a fairly low bar, it is still a bar, and its removal is problematic insofar as it makes immigration fraud slightly easier.

Since this type of lawmaking is on a background of tolerance towards homosexuality, rather than full acceptance, asking for a marriage certificate is not an option. The Defense of Marriage Act (DOMA)⁵⁵ would preclude the federal government from recognizing same-sex marriages for the purposes of immigration benefits, and even if it did, it would create a strange legal situation if those marriages were recognized. Thus, since the government is unwilling to recognize the marriages of same-sex couples, a fraud problem is created.

The financial interdependence requirement seems to be the chosen substitute for a marriage certificate. Yet, the fact that the bill is dealing with binational couples makes this a somewhat irrational requirement. While financial interdependence could be a completely reasonable proxy for commitment in the context of a couple living together in the same country, binational couples are often forced to live in separate countries due to one lacking immigration status in the United States. Sharing bank accounts and expenses might be impractical or even impossible.

Commentators have advanced suggestions to substitute a different proxy for commitment, but there is no easy solution for this problem.⁵⁶ Furthermore, advocates for the bill are afraid to introduce anything that makes “permanent partnership” look like marriage by another name, because they do not want to take on anti-same-sex marriage lobby.⁵⁷ Legislators are thereby put in the extremely difficult position of attempting to

⁵⁵ Defense of Marriage Act, Public Law No. 104-199, 110 Stat. 2419.

⁵⁶ See, e.g., Dueñas, *supra* note 6, at 813 (proposing a national registry for same sex couples), Carraher, *supra* note 9, at *51 (proposing minimum relationship length requirement).

⁵⁷ Carraher, *supra* note 9, at *41 (“A final major argument that will be advanced against the bill is that gay rights advocates are just using immigration rights in the UAFAs to stealthily advance their goal of same-sex marriage.”).

find a proxy for marriage that looks enough like marriage to alleviate fraud concerns, but not so much like marriage as to upset the traditional definition of marriage. Thus UAFA illustrates the problems inherent in attempting to legislate a position of tolerance towards homosexuality that seeks to avoid infringing on rights while simultaneously refraining from granting full equality.

IV. Conclusion

Tolerance, as Wendy Brown points out, is not the same as equality, or even acceptance.⁵⁸ Tolerating homosexuality in this country means allowing private homosexual behaviour, but denying any demands by homosexuals for political recognition. Yet these things are not necessarily easy to separate, particularly in the immigration context – thus we see contradictory policies, like the granting of asylum for persecuted homosexuals coupled with the denial of immigration rights to the partners of gay Americans. When the government attempts to expand the behaviour it will tolerate, as it is attempting to do with the UAFA, it must walk a political tightrope. Until a shift in the political climate moves homosexuals from the objects of tolerance to political equals, expanding gay rights will always involve an uncomfortable push and pull between allowing private behaviour and denying public benefits.

⁵⁸ Brown, *supra* note 31.