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"I Do" But I Can't: Immigration Policy and Gay Domestic Relationships

Sandra E. Lundy

In early 1975, when Richard Frank Adams, a United States citizen, and Anthony Corbett Sullivan, an Australian citizen, obtained a marriage license from the Boulder, Colorado county clerk, they thought their immigration worries were over. Four days after they were married by a minister, Adams petitioned the Immigration and Naturalization Service (INS) for adjustment of Sullivan's status from that of a non-immigrant visitor to that of a permanent resident alien "immediate relative."1 The INS, and subsequently the Bureau of Immigration Appeals, rejected the petition, holding that the relevant portions of the Immigration and Nationality Act (INA or the Act) did not apply to gay persons.2 The federal courts affirmed,3 and Sullivan was ordered deported.

I will argue here that the INS should accord preference status to approve and expedite immigration not only for heterosexual aliens married to American citizens but also for gay aliens in domestic relationships with American citizens.4 It is true that gay marriage per se

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1. Section 204 of the Immigration and Nationality Act (INA) of 1952, as amended, 8 U.S.C. § 1154, establishes procedures for granting "immediate relative" status. This section has recently been supplemented by the Immigration Marriage Fraud Amendments of 1986, infra note 7, which probably will affect many couples applying for preference status after 1986. "Immediate relatives" are defined as: "children, spouses, and parents of a citizen of the United States . . . [who are] otherwise qualified for admission as immigrants." INA, 8 U.S.C. § 1151(b). The term "spouse," which is generally used throughout the the INA, is not specifically defined, see 8 U.S.C. § 1101(a)(35).


4. Throughout this paper, I use the term "gay" rather than "homosexual." I avoid the word "homosexual" because many gay and lesbian persons are offended by its clinical and historical overtones. "Gay and lesbian" would be the preferable phrase were it not so cumbersome to repeat in a lengthy paper. Unless stated otherwise, "gay"
is not recognized as valid anywhere in the United States, and the number of gay persons affected by this more general denial surpasses that of those affected by the immigration laws. However, "thousands, if not hundreds of thousands" of gay couples are, like Adams and Sullivan, adversely affected by the immigration laws. These couples often live in the shadow of a prospect unknown to their heterosexual married counterparts or even to gay citizen couples: the possibility of forced separation through exclusion or deportation. For these reasons, the immigration dilemma of these couples deserves careful and separate attention.

The INS's traditional justifications for establishing a preference for family relationships — the preservation of family unity and the prevention of the hardship of separation — are just as compelling for gay persons as they are for heterosexual persons. Gay domestic relationships are receiving greater recognition from courts and other institutions in our society today. Moreover, the INS has always exercised considerable flexibility in molding its immigration policies on personal and domestic matters to fit changing societal realities. I will here explore the policy and legal questions raised by the INS' failure to recognize gay domestic relationships for immigration purposes, and propose a sensible, effective policy that the INS should adopt to remedy this failure.

I. The Web and the Isolate: The Double Vision of the INA

Central to any understanding of United States immigration policy is an acknowledgment of the INA's orientation toward the concept of "relationship." With an almost tedious uniformity, the statute treats individuals not as isolated nodes but as matter embedded in a web of significant relationships. Family unity (or reunification), especially, is an overriding theme of our immigration laws. This refers to both gay men and lesbians. "Gay," however, is always used adjectively, as are "heterosexual" and other such terms, in recognition that a person is much more than her or his sexual orientation.

By "domestic relationship" I mean a de facto marriage between persons of the same sex. The existence of such a relationship is a matter of the subjective perception of the couple, but it can also be objectively verified. See infra notes 131-33 and accompanying text.

5. Telephone interview with Urvashi Vaid, Information Officer, National Gay Task Force, Washington, D.C. (Oct. 31, 1986) [hereinafter Vaid Interview]. Ms. Vaid notes that while exact figures are extremely difficult to gather, the INS' refusal to recognize gay domestic relationships as valid for immigration purposes potentially affects every alien entering the country, those who consider themselves to be gay persons as well as those who might discover that they are; that is, theoretically at least, any alien, while in the United States, may meet someone of the same sex with whom the alien wishes to establish a long-lasting domestic relationship.
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theme surely reflects a deep-seated belief in the centrality of stable, primary relationships to both the individual and the state.\(^6\)

The most highly privileged family relationship of immigration law is marriage to a United States citizen. Indeed, the law accords an alien spouse of a United States citizen or legal permanent resident alien substantial and unique protections.\(^7\) For example, an alien spouse of a United States citizen is not subject to the quota and labor certification requirements of the INA, 8 U.S.C § 1153.\(^8\) In addition, the alien spouse of a legal permanent resident is placed in the second of six preference categories for immigrant admission,\(^9\) in which chances of gaining entry are considerably higher than in the four remaining categories.\(^10\) Similarly, spouses of refugees\(^11\) and asylees\(^12\) are automatically accorded the immigration status of their wives or husbands. Alien spouses of United States citizens or legal


\(^7\) In general, the U.S. citizen or legal permanent resident alien relative of the alien applies for these benefits by petition. See, e.g., U.S. Dep’t of Justice, INS Form I-130, Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa. The latest amendments to the INA, passed at the end of the 99th Congress, do not disturb the relationship preferences and in fact make it easier for World Bank employees, fathers of illegitimate children, and others to establish relative status for family members. 44 CONG. Q., Oct. 18, 1986, at 2597-98. See generally IMMIGRATION REFORM AND CONTROL ACT OF 1986, reprinted in C. GORDON & H. ROSENFIELD, 1 IMMIGRATION LAW AND PROCEDURE §§ 1-55 [hereinafter GORDON & ROSENFIELD]. However, the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.), will make obtaining informative preference benefits more difficult in many other cases. For instance, § 2 of the Amendments imposes a new two-year “conditional” legal permanent resident status on alien sons and daughters who obtain that status by virtue of a marriage that is less than 24 months old. Conditional status may be terminated by the Attorney General on an initial or subsequent finding of fraud or marital termination, or for lateness in filing an application for change of status, refusal to be interviewed at the end of the conditional period, or an adverse determination based on the interview. A hardship waiver is available, but only for circumstances “occurring... during the period that the alien was admitted for permanent residence on a conditional basis” (including termination of the marriage by the alien spouse “for good cause”). Section 3 of the Amendments makes it more difficult for persons engaged to be married to obtain adjustment of their status from nonimmigrants to legal permanent resident aliens, and § 2 also makes it more difficult for aliens who obtained legal permanent resident status through marriage to obtain a second preference petition for a subsequent spouse. Nor can aliens in deportation or exclusion proceedings any longer receive special consideration simply by marrying a citizen, under § 5 of the Amendments.

\(^8\) 8 U.S.C. §§ 1151(a), 1151(b).


\(^10\) Danilov & Nerheim, The Status of Aliens Married to, or Divorced from, American Citizens, 30 FRAC. LAW., June 1, 1984, at 54.


\(^12\) 8 U.S.C. § 1158(c).
permanent residents who willfully or otherwise violate our immigration laws may receive special favorable consideration in exclusion or deportation proceedings. Moreover, alien spouses can be naturalized more quickly than other immigrants and may use their marital status to bring other family members into the country.

Furthermore, for immigration purposes, the INS has established a strong presumption in favor of the validity of a marriage for example, regulations prescribe that common law marriages are deemed valid for immigration purposes if such relationships are recognized in the couple's resident state. Our immigration law's emphasis on marital affiliation goes even further by recognizing tribal and other so-called customary marriages, as well as Unification Church ("Moonie") proxy marriages, although the INA maintains a strong presumption against the validity of proxy marriage. Of course, marriage undertaken solely for the purpose of circumventing the immigration laws will not be considered valid.


14. 8 U.S.C. §§ 1430(a) and 1430(b).


17. See 3 IMM. L. SERV. § 36.2 (1986); Danilov & Nerheim, supra note 10, at 55.

18. See, e.g., In re L., 7 Immigration and Nationalization Decisions 587 (BIA 1957) (customary Chinese marriage valid for immigration purposes); In re Agbulos, 13 Immigration and Nationalization Decisions 993 (Dist. Dir. 1969) (marriage by Philippine tribal custom valid for immigration purposes).


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The web of significant relationships which forms the context for evaluation of most aliens' entry applications is, however, swept away for gay aliens. Both the INA and the INS seem to envision gay persons a-contextually, as isolated "deviates" from whom the country must be protected. Two exclusion provisions, both based on pre-entry conduct, are generally relied on to deny entry to gay aliens. First, § 1182(a)(9) of the INA excludes aliens who were convicted of a crime involving "moral turpitude" or "who admit committing acts which constitute the essential elements of such a crime." Even though the presumptive act of moral turpitude might have been legal in the country in which it occurred, it is nonetheless judged by prevailing U.S. standards. The broad language of § 1182(a)(9) would seem to spell trouble for any entering homosexual alien. However, the provision apparently has never been read as a blanket ground for exclusion of all gay persons.

Far more significant is 8 U.S.C § 1182(a)(4), which excludes "[a]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect." This provision has its origins in the Immigration Act of 1917, which excluded all aliens "of constitutional psychopathic personality." This was a medically precise term of the

riage Fraud Amendments of 1986, supra note 7, § 2(d)(2) (criminal penalties, including fines and imprisonment, for immigration marriage fraud).

21. In Jordan v. De George, 341 U.S. 223 (1951) the Supreme Court rejected a challenge to the "moral turpitude" provision of the Immigration Act of 1917, essentially similar to the current provision, on the ground that it was "void for vagueness." The term first appeared in the Act of March 3, 1891, 26 Stat. 1084. 341 U.S. at 229 n.14. C. Gordon and E.G. Gordon note that "[a]tempts to arrive at a workable definition of moral turpitude never have yielded entire satisfaction," but that for immigration purposes "a conspiracy to commit a crime or an attempt to commit a crime or being accessory to a crime will involve moral turpitude only if the basic crime does." C. GORDON & E.G. GORDON, IMMIGRATION AND NATIONALITY LAW: STUDENT EDITION § 4.13 (1984).

22. 1 Gordon & Rosenfield, supra note 7, at § 2.43c.


24. Theoretically, 8 U.S.C § 1182(a)(13) is also available to exclude gay aliens, at least those entering in some states. That section excludes "[a]liens coming to the United States to engage in any immoral sexual act." In fact, this provision is targeted to the activities of prostitutes and pimps and "to activities similar to prostitution; moreover, it excludes only those whose primary reason for entry is the immoral purpose so defined. 1 Gordon & Rosenfield, supra note 7, at § 2.44b. This provision apparently has never been used to exclude gay aliens.

25. Pub. L. No. 64-301 § 3, 39 Stat. 874, 875 (1917). See also infra note 26, for medical definitions of "constitutional psychopathic personality." No one knows how many gay aliens may have entered before passage of this statute. Evidence suggests, though, that in the 18th and 19th centuries the United States was seen as a haven for gay persons seeking refuge from persecution or embarrassment in their native land. See J. Katz, GAY AMERICAN HISTORY at 37-39, 48; 645, n.12 (1979).

Because the history of the exclusion and expulsion of gay aliens has been exhaustively covered elsewhere, what follows is a broad overview. For comprehensive background
day that included, but was not limited to, gay persons. Subsequent changes in the language of the “gay exclusion” also tracked evolving medical terminology. The term “sexual deviation,” as used in the last amendment of the provision in 1965, reflects standard medical terminology of that date.

Nevertheless, in the 1967 case of Boutillier v. INS, the Supreme Court held the phrase “sexual deviation” to be a legal term of art that evinced Congress’ legitimate intent to exclude all gay aliens from entry into the country for any length of time. The case concerned the naturalization petition of, and subsequent deportation proceedings against, a Canadian alien who admitted to having “homosexual relations” both before and after entry. The Public Health


26. The Manual of the Medical Examination of Aliens issued by the United States Public Health Service in 1918 contains the following explanation under the heading Constitutional Psychopathic Inferiority:

But aside from those showing defective intelligence, there is an important group in the borderland between sanity and insanity who are “failures of mental adaptation” and have a tendency to become actively disordered. In this class are the constitutional psychopaths and inferiors, the moral imbeciles, the pathological liars and swindlers, the defective delinquents, many of the vagrants and cranks, and persons with abnormal sexual instincts.

The dividing line between these various types is not well defined, and for purposes of simplicity in classifying the mentally abnormal immigrant they may all be included in one general class and certified as cases of constitutional psychopathic inferiority.

Cited in Note, ‘Psychopathic Personality’ and ‘Sexual Deviation’, supra note 25, at 328-29. See also Note, The Immigration and Nationality Act and the Exclusion of Homosexuals, supra note 25, at 97:

“Constitutional psychopathic inferior” was a contemporary medical classification for individuals “who show a lifelong and constitutional tendency not to conform to the customs of the group.” They were persons who “habitually misbehave...have no sense of responsibility to their fellow-men or to society as a whole...succumb readily to the temptation of getting easy money through a life of crime...[and] fail to learn by experience.” Their condition was “constitutional” in that it was “inherent in their nervous structure” and was “present at birth.” [citations omitted]

27. See generally Note, ‘Psychopathic Personality’ and ‘Sexual Deviation,’ supra note 25.


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Service (PHS) had issued to Boutillier the requisite "Class A" certification of excludability on medical grounds.30

Since the case centered on the petitioner's challenge to the accuracy of his certification as a "sexual deviate,"31 the holding was broader than the facts required it to be. That is, the Court could simply have held that since Boutillier had received the relevant certification for exclusion in accordance with established procedures, he could be excluded. Moreover, the Court, in its apparent haste to confirm Congress' "plenary powers" over immigration, ignored a crucial fact: that in all of its debates over the wording of INA § 212(a)(4), Congress never moved the "gay exclusion" outside of the list of medical, as opposed to philosophical or criminal, exclusions.32 Congress' inaction strongly suggests that it meant the exclusion of gay persons to be governed by changing medical knowledge.33

Current INS Operations Instructions (operating rules for officers, examiners and administrators),34 while ostensibly implementing the

30. Whether the relevant provisions of the INA (principally, §§ 232-34) require the use of Class A certification to exclude homosexuality is a subject of dispute among the circuit courts. See Lesbian/Gay Freedom Day Comm. v. USINS, 541 F. Supp. 569 (N.D. Cal. 1982), aff'd in part and vacated in part, sub. nom. Hill v. INS, 714 F.2d 1470 (9th Cir. 1983) (INA requires PHS certification for exclusion); In re Longstaff, 716 F.2d 1439 (5th Cir. 1983), cert. denied 467 U.S. 1219 (1984) (PHS certification provision of INA discretionary). The issue is of more than technical interest, since PHS, in conformity with changing medical standards, has refused since 1979 to issue Class A certificates to homosexuals. (In 1973 the American Psychiatric Association removed homosexuality from its list of mental disorders, see Note, The Propriety of Denying Entry to Homosexual Aliens, supra note 25, at 331.) Recently, the U.S. Attorney General's office instructed the Department of Health and Human Services, PHS' parent agency, that it is required by the INA to issue Class A certificates to "self-proclaimed homosexual aliens" entering within the Ninth Circuit. Letter from Acting Attorney General D. Lowell Jensen to Dr. Edward N. Brandt, Jr., Assistant Secretary for Health, Dep't of Health and Human Services (Apr. 5, 1986), 61 INTERPRETER RELEASES 378 (1986) [hereinafter Jensen Letter].


33. See Note, The Propriety of Denying Entry to Homosexual Aliens, supra note 25, at 351.

34. See INS Operations Instructions 235.8, App. OI, reprinted in 4 GORDON & ROSENFELD, supra note 7, at 23-466.9. See also Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to David L. Crossland, Acting Commissioner, Immigration and Naturalization Service, Dec. 10, 1979, reprinted in 56 INTERPRETER RELEASES 569, 572 (1979) (continued enforcement of § 212(a)(4) despite PHS refusal to certify) [hereinafter Harmon Memorandum]; Memorandum from Andrew J. Carmichael, Jr., Associate Commissioner, Examinations, Immigration and Naturalization Service, to Regional Commissioners, Feb. 7, 1985 (confirms this policy) [hereinafter Carmichael Memorandum]; Jensen Letter, supra note 30.

However, Scott Blackman, Deputy Director for Deportation of the INS' New York City regional office, acknowledged that the policy is "toothless." Interview with Scott Blackman, in New York City, (May 5, 1986). Recently, though, the INS began exclusion
broad mandate of Boutillier, in fact underscore its lack of viability. An alien is excluded from entry as a gay person only if, at the port of entry, he or she makes a "voluntary, unsolicited and unambiguous" admission of homosexuality and repeats that statement to a second inspecting officer. In other words, "in order to gain admission to the country homosexuals must deny their orientation and thereby collude in a farcical transaction." Exact figures are hard to obtain, but this policy ensures the entry into the country of many thousands of gay aliens every year.

Thus, not only are the current procedures demeaning to both INS officers and gay aliens, but they are also ineffective. Privacy concerns, a tight budget and more pressing enforcement priorities such as border control make it unlikely that the INS would be willing to, or could, successfully pursue a more vigorous program. However, the INS appears unlikely to scrap the policy entirely.

Although unsatisfactory, the regulations relating to gay aliens illustrate an important, often overlooked point concerning Congress' broad powers over immigration: the INS has considerable flexibility in the quotidian implementation of INA provisions, and particularly in the definition of the Act's more subjective terms. In response to changing social mores, for example, the INS has abandoned its policy of treating cohabitation without marriage as a per se instance of "bad moral character" that will defeat a naturalization petition.

proceedings under § 212(a)(4) against a number of Cuban "Marielitos" who admitted to having been jailed in Cuba for homosexual activity. Lesbian/Gay Law Notes, Oct. 1986, at 59.

35. See Carmichael Memorandum, supra note 34.


37. According to the Kinsey Institute, 9.3% of Americans have had significant homosexual experiences. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799, 800 n.4 (1979). A more recent study puts the figure at between 8-15%, see Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 n.7 (1985) (Brennan, J., dissenting from denial of petition for certiorari), citing Homosexual Behavior: A Modern Reappraisal (J. Marmor ed. 1980). In 1983 alone, 9,849,485 nonimmigrants were admitted into the country. U.S. Dep't of Justice, 1983 Statistical Yearbook for the INS, Table NIM 2.1, at 125. Immigrants aside, and assuming that only a mere 3% of entering nonimmigrant aliens are gay persons, approximately 206,000 gay persons can be assumed to have entered the United States in 1983 alone. Cf. infra note 112 and accompanying text.

38. E. Hull, supra note 36, at 65.

39. See Carmichael Memorandum, supra note 34; Jensen Letter, supra note 30.

40. See generally Roberts, Sex and the Immigration Laws, 14 San Diego L. Rev. 9 (1976). Roberts notes correctly that the INS' attitude toward fornication as an index of bad moral character has undergone some liberalization. Id. at 35-37. While the INS' attitude regarding homosexuality remains relatively unchanged, the courts have held that homosexuality is not a per se index of "bad moral character" for purposes of obtaining citizenship. See Nemetz v. INS, 647 F.2d 432 (4th Cir. 1980); In re Brodie, 394 F. Supp. 1208 (D. Or. 1975); In re Labady, 1326 F. Supp. 924 (S.D.N.Y. 1971).
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has also allowed certain non-conventional marriages, such as some proxy marriages, to stand as valid for immigration purposes.41 Moreover, the INS has even evolved a policy allowing for the temporary admission of certain openly gay aliens.42 In short, the INS has exercised considerable adaptability in the past and could therefore, absent express statutory prohibition, legally recognize gay domestic relationships as valid for immigration purposes if it determined that doing so would not violate current social mores.43

II. Marriage and Homosexuality

Gay people are commonly stereotyped as being “anti-marriage” and “anti-family.”44 In fact, while some gay persons have abjured marriage as an institution of patriarchal privilege,45 many others have sought the right to marry.46 The reasons are not difficult to understand. Beyond its many material advantages, “[m]arriage is generally viewed as strengthening the stability, emotional health, and social respectability of a relationship between two people.”47 Additionally, marriage and family relationships are widely assumed to foster the “ability independently to define one’s identity that is central to any concept of liberty.”48

41. See supra notes 18-19 and accompanying text.
42. “[I]n the case of a nonimmigrant ["sexual deviant"], a medical examination should not be required if, in spite of the alien’s admission [of "sexual deviancy"], the facts of the case would support a recommendation that the alien’s temporary admission be authorized under the provisions of INA § 212 (d)(3)(A) [8 U.S.C. § 1182(d)(3)(A)] [admission of otherwise excludable consular officers].” 1 IMMIGRATION L. SERV. § 4:16.
43. “It may reasonably be inferred that Congress intended homosexuality to be defined in light of current knowledge and social mores.” Harmon Memorandum, supra note 34, at 581.
44. A common charge in this regard is that gay persons, particularly gay men, are child molesters or otherwise “prey on youth.” See, e.g., J. Katz, supra note 25, at 124, 393; cf. Note, The Exclusion and Expulsion of Homosexual Aliens, supra note 25, at 328 and nn.249-51. As one commentator has remarked, “It is a bizarre underestimation of the attractions of family life to suppose that the legitimacy of homosexuality as a way of life would have any effect on it at all.” Id. at 329, quoting Baker v. Wade, 553 F. Supp. 1121, 1131 (N.D. Tex. 1982). For a list of authorities who maintain that gay relationships are inherently “corrupt,” see Delgado, Fact, Norm, and Standard of Review — The Case of Homosexuality, 10 U. DAYTON L. REV. 575, 586 n.90 (1985).
46. See generally J. Katz, supra note 25, at 53-58, 225-26, passim.
The courts have found no "fundamental" right to marry for gay persons, as they have for heterosexual persons.49 Nevertheless, gay people have always entered into marital-type domestic relationships, and appear to be doing so in growing numbers.50 Such relationships have been shown to be virtually identical in their psychology to heterosexual marriages.51 Moreover, gay domestic relationships are beginning to resemble heterosexual arrangements in other ways as well. Although a traditional justification for confining marriage to heterosexual persons has been the belief that marriage is designed primarily for procreative purposes,52 new reproductive technology challenges this notion.53 Thus, in the near future many gay relationships may also revolve around begetting and raising children.


50. Interview with Judith Turkel, Board Member of Lambda Legal Defense and Education Fund and Bar Association for Human Rights (New York City), in New York City (Mar. 15, 1986) [hereinafter Turkel Interview]. The number of publications of mainstream presses that include sections offering advice on gay marital arrangements is another indication of their growing popularity. See, e.g., P. ASHLEY, OH PROMISE ME, BUT PUT IT IN WRITING: LIVING-TOGETHER ARRANGEMENTS BEFORE, DURING, AND AFTER MARRIAGE 72-78 & passim (1978); L. WEITZMAN, THE MARRIAGE CONTRACT: A GUIDE TO LIVING WITH LOVERS AND SPOUSES (1981); N.O.W./LEGAL DEFENSE AND EDUCATION FUND & R. CHEROW-O'LEARY, THE STATE-BY-STATE GUIDE TO WOMEN'S LEGAL RIGHTS (1987). See also H. CURRY & C. DENIS, A LEGAL GUIDE FOR GAY AND LESBIAN COUPLES (1980).


One gay rights lawyer estimated that she has met one lesbian or gay couple a month who wished to establish legal protections for a child to be born by donor insemination or other nontraditional means. She asserts that other lawyers dealing with same-sex couples have also reported an increasing number of requests for domestic relations legal services related to children born by nontraditional means. Turkel Interview, supra note 51. An early study estimates that "there are well over 1.5 million lesbian mothers in this country." Hunter & Polkoff, Custody Rights of Lesbian Mothers: Legal Theories and Litigation Strategy, 25 BUFFALO L. REV. 691, 191 (1976). See also Herman, Lesbians & Kids: Community We Create, Gay Community News, May 24, 1986, at 6, cols. 1-5 ("lesbian baby boom"); C. PIES, CHOOSING PARENTHOOD: A WORKBOOK FOR LESBIANS (1985); and infra note 59.

Almost all of the scholarly literature on homosexuals' right to marry ignores this trend. See, e.g., Karst, supra note 47, at 684; Note, Homosexuals' Right to Marry, supra note 47, at 201; Note, Legality of Homosexual Marriage, supra note 47, at 578.
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Discrimination against gay persons may still be widespread and often virulent. Courts following traditional precedents have been hostile to the notion of same-sex marriage, and have even disparaged the worth of same-sex relationships. In *Baker v. Nelson*, for example, the Supreme Court dismissed for want of a substantial federal question a suit over whether a gay couple could be denied a marriage license. Similarly, the district court in *Adams* dismissed the plaintiff's due process claim by noting approvingly that "there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable and, by definition, impossible." Moreover, state legislatures and courts have been uniformly resistant to the notion of state-sanctioned gay marriage.

Inroads into anti-gay prejudice that were unthinkable ten or even five years ago, however, are appearing with some frequency. Commentators continue to be critical of court decisions such as *Baker* and *Adams*, questioning their constitutionality and their durability as sound precedent. Moreover, some state courts have shown a remarkable willingness to reject the traditional hostility toward gay persons. While they have stopped short of finding a fundamental right to marry for gay persons, they have expressed their willingness to concede not only the existence of gay long-term primary commitments but also the intrinsic value of such commitments. For example, a California court recently allowed a lesbian couple of seven years' standing to adopt a child. A gay man in New York whose

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56. 486 F. Supp. at 1123.


58. See generally Rivera, *Recent Developments*, supra note 54, at 324-36 for an account of developing law regarding gay domestic relationships in such areas as child custody, wills, and property settlements. The examples that follow in the text primarily are those that have occurred subsequent to the publication of this article by Rivera.


To deem . . . collateral relatives, some of whom have no blood relationship to each other, family members and to deprive the instant defendant, who has provided care
domestic partner had recently died was awarded the highly coveted "relative" status for purposes of retaining their apartment.\textsuperscript{60} In addition, "[t]he D[istrict of] C[olumbia] City Council Judiciary Committee has given approval to a 'durable power of attorney' law, which has been hailed by local gay activists as a valuable tool to allow gay significant others to play the role of family members in medical emergencies."\textsuperscript{61} Gay people have received worker's compensation benefits to tend partners who are ill,\textsuperscript{62} and wills by gay people leaving estates to partners are no longer routinely disregarded.\textsuperscript{63} Indeed, through contractual arrangements involving property rights, power of attorney, domestic partnership agreements, and the like, gay couples can secure a kind of quasi-common law marital status and thereby obtain many of the legal protections accorded by right to heterosexual couples.\textsuperscript{64}

Largely through the efforts of gay rights lawyers and activists, these advances have not stopped at the courtroom. A few municipalities have extended insurance and other city benefits to "domestic partners."\textsuperscript{65} Insurance companies and automobile clubs voluntarily are extending marital benefits privileges to same-sex

and love through both a serious illness and death, of family member status would indeed be an arbitrary way to define family . . . there is no rational reason for separate classification . . . there is no rational reason to exclude persons in [the defendant's] situation from being classified as a family member, when in fact, the relationship was much closer than that of many family members.

\textit{See also In re Adult Anonymous II,} 452 N.Y.S. 2d 198, 200 (1982) (adoption of adult male by his homosexual partner promotes the "moral and temporal interests" of both). In California, a gay man recently was awarded custody of his 15-year-old son by the San Diego Superior Court, and the Washington State Court of Appeals recently struck a trial court order prohibiting a child from visiting his father in the father's gay lover's presence. \textit{LESBIAN/GAY LAW NOTES,} Summer 1986, at 43. Most recently, the Massachusetts Superior Court, in a strongly-worded rebuke to Gov. Michael Dukakis' administration, permitted two gay men to challenge as "irrational" and "arbitrary" a Department of Social Services regulation categorizing foster parents by sexual orientation and giving preference to heterosexual persons. 15 Mass. L.W. 17 (1986).


\textsuperscript{61.} \textit{LESBIAN/GAY LAW NOTES,} Summer 1986, at 43.

\textsuperscript{62.} \textit{A Success Story: Obtaining 'Domestic-Partner Benefits,'} Wall St. J., Mar. 12, 1986, at 37, col. 3.

\textsuperscript{63.} \textit{See Rivera, Recent Developments, supra} note 54, at 325-26.

\textsuperscript{64.} \textit{See P. Ashley, L. Weitzman, H. Curry & C. Denis, and N.O.W. & Cherow-O'Leary, all cited supra note 50.}

\textsuperscript{65.} Currently, Berkeley, California and West Hollywood, California have such laws. Vaid Interview, supra note 5. Significantly, "for the first time, the national board of the [American Civil Liberties Union] has adopted a formal policy statement endorsing gay and lesbian marriage and the provision of spouse benefits to gay couples. . . . [T]he ACLU is probably the first mainstream civil rights group to take such a position." \textit{LESBIAN/GAY LAW NOTES,} Nov. 1986, at 66.
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couples. Some real estate agencies and banks are willing to provide their services to the same-sex couple as a unit. Religious organizations — such as the Catholic "Dignity" group, the Metropolitan Community Church (Protestant), and gay-oriented synagogues — help to provide committed same-sex couples with acceptance and a sense of place within the religious community. In sum, to many gay persons, the concept of marriage is as important as it is for heterosexual persons, for both the personal and societal benefits it can bestow. Courts and other social institutions are slowly beginning to accord legitimacy to same-sex marital-type arrangements, and are likely to continue to do so.

III. The Problem with Current INS Policy

Denying preference status to gay aliens violates basic principles of justice and fairness. It also violates the constitutional requirement of equal protection, which provides that similarly situated groups may not be arbitrarily distinguished in law. The individual liberty interests of gay persons seeking immigration preference status for domestic partners is in many ways substantially similar, if not identical, to that of heterosexual persons seeking a marital preference. First, once they have entered the country, all aliens have a substantial "liberty interest" in remaining here. This interest encompasses both the right "to stay and live and work in this land of freedom" and the right to continue with one's family. Loss of

67. Id.
68. But see Bowers v. Hardwick, 54 U.S.L.W. 4919, reh'g denied, 55 U.S.L.W. 3228 (1986) (states may proscribe private, consensual homosexual sodomy). The full effect of Bowers is difficult to foresee. While progress toward gay rights may be slowed on the federal level, see, e.g., Walsh v. Missouri, 713 S.W.2d 508 (1986) (proscription of homosexual sodomy does not abridge fourteenth amendment rights), it is still likely to go forward on state and local levels, see, e.g., Commonwealth v. Wasson, No. 86M859, Fayette County Dist. Ct., Ky, reported in LESBIAN/GAY LAW NOTES, Dec. 1986, at 71 (consensual sodomy statute unconstitutional on state constitutional grounds).

70. See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (legal aliens have a liberty interest in civil service employment); Landon v. Plasencia, 459 U.S. at 34 (excludable aliens have an interest in remaining with their families in the U.S.); Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985), aff'd as modified, 781 F.2d 1450 (11th Cir. 1985) (Mariel boatlift parolees have a liberty interest in immigration parole); Perez-Funez v. District Dir., INS, 619 F. Supp. 656 (C.D. Cal. 1985) (illegal alien minors have a substantial liberty interest in being accorded various procedural rights guaranteed in deportation hearings).
72. 459 U.S. at 34.
this interest may lead to the loss of “all that makes life worth living.” The marital preferences embedded in the INA are in a sense constructed to minimize the possibility of such losses, and in recognition of the weighty personal interests at stake for the individual and the couple. Indeed, a marital preference often spells the difference between deportation or years of waiting in a foreign land and the more immediate unification of the family. Moreover, gay domestic relationships as well as heterosexual marriages can meet the same core individual needs for companionship and stability. Not one iota of evidence suggests that an INS-forced disruption of a gay domestic relationship would cause any less suffering and deprivation to the individuals involved than would similar interference with a heterosexual marriage. In both cases, the integrity of the couple as well as the welfare of the individuals — and perhaps their children — is at stake.

In addition, gay domestic relationships are substantially more like the conventional heterosexual marriage than are the non-conventional heterosexual marriages recognized by the INS. Unlike the couples in many heterosexual proxy or customary marriages, for example, gay domestic partners cohabit and share in the management of a single household, activities traditionally associated with the term “marriage.” It is illogical to deny this viable domestic unit a chance to continue to function while recognizing unions in which the two individuals may live apart for many years.

If gay and heterosexual persons are similarly situated with regard to their interest in immigration preference status, then a policy of unequal treatment can only be justified if the government’s interest outweighs the interest of the adversely affected individuals. In determining what level of judicial scrutiny to apply in balancing these competing interests, the courts choose among three tests: strict scrutiny, rational basis, and intermediate scrutiny. The latter is the most appropriate for determining the validity of discrimination against gay domestic relationships for immigration purposes.


74. One likely rationale for the validation of customary and tribal marriages is that they receive religious, if not state, sanction. However, some denominations, such as the Metropolitan Community Church, and some individual ministers and rabbis also perform gay marriage ceremonies.

75. See Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978) (INS not permitted to consider separate living arrangement of couple as per se proof of a “dead” marriage) and cases cited supra note 18.
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Strict scrutiny, the most exacting standard, requires the government to prove a "compelling" interest for enacting legislation that either disables a "suspect class" or burdens the exercise of a fundamental right. Indicia of suspectness include "immutable" characteristics such as race and national origin. Suspect status will also be accorded to groups "saddled with such disabilities, or subject to such a history of purposefully unequal treatment, or relegated to such a position of political powerlessness as to command . . . protection from the majoritarian political process." Legislation subject to this exacting standard almost always falls. However, for purposes of federal equal protection analysis, and despite considerable criticism, the courts have held that neither gay persons nor aliens constitute a suspect class.

If strict scrutiny is not appropriate in this instance, however, neither is its opposite, the not "wholly irrational" or "rational basis" test. Under these rubrics, almost any explanation that is not totally bizarre will serve to justify upholding government actions against individual or group interests. Courts have often applied this standard to immigration cases, reasoning that immigration policy raises purely political questions (that is, issues properly left to a

76. See generally L. Tribe, supra note 73, at 1000-1003.
77. Id. at 1000-1002.
83. Fiallo v. Bell, 430 U.S. 787 (1977) (INA provision preventing fathers of illegitimate alien children from claiming relative preference for them not unconstitutional). The INA was recently amended to eliminate this provision, see supra note 7.
84. Cf. Johnson v. Robison, 415 U.S. 361 (1973) (no rational basis for statutory restriction on Veterans Administration educational benefits discriminating between conscientious objectors who performed required alternative civil service and veterans who had been on active duty).
coordinate branch of government), or correlativey that such policies are a necessary adjunct of Congress' largely unreviewable power to shape foreign policy. However, where no clearly identifiable foreign policy issues are at stake, as in the case of validating gay domestic relationships for immigration purposes, the latter argument loses its force. The “political question” rationale is also problematic, for since gay persons and aliens have been and continue to be systematically barred from participation in the majoritarian political process, decisions by the judiciary to leave the legal fate of such groups almost entirely in the hands of the “coordinate branches” itself seems an abdication of responsibility.

The appropriate level ofjudicial scrutiny to apply to the INS' current policy is intermediate scrutiny. As its name implies, intermediate scrutiny is neither as demanding on the government as strict scrutiny, nor as obsequious as the rational basis standard. It requires that classification “may fairly be viewed as furthering a substantial interest of the State,” and that it “rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced be treated


Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.


A. Aleinikoff and D.A. Martin enumerate the many constitutional clauses that have been held to justify federal preemptive power over immigration. These include the Commerce Power, the War Power, the Migration and Importation Clause, and the Foreign Affairs Power. Another often-repeated rationale concerns inherent sovereign power. A. ALEINIKOFF & D.A. MARTIN, IMMIGRATION: PROCESS AND POLICY 14-16 (1985). The Supremacy Clause also has been cited to justify federal preemptive power over immigration. see De Canas v. Bica, 424 U.S. 350 (1975).


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This “middle-tier” approach permits the court “to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles.”

Intermediate scrutiny is proper where legislation, though not necessarily of itself invidious, “nonetheless give[s] rise to recurring constitutional difficulties.” This level of scrutiny will be triggered for legislation that burdens important, though not fundamental rights and/or a “sensitive” group, that is, a group that, while not necessarily “discrete and insular,” is nevertheless quite likely to be “injured by law.” As may be obvious, intermediate scrutiny is a fluid, if not porous, concept. To date it has been applied to group classifications as diverse as gender, age, illegitimacy and alienage, both legal and illegal, and to such important interests as employment, education and family unity. Predicting which laws or regulations will trigger intermediate scrutiny is thus difficult. However, the jurisprudence on intermediate scrutiny of gender classifications provides the most fully developed articulation of the issue and serves as an important guideline.

In Craig v. Boren, the Supreme Court explained that gender-based legislation is apt to be motivated by “archaic and overbroad” generalizations, thus making heightened judicial scrutiny necessary. The case involved an Oklahoma law, purportedly en-

92. Plyler v. Doe, 457 U.S. at 218 n.16.
93. 457 U.S. at 217.
94. L. Tribe, supra note 73, at 1090.
95. See, e.g., Kirchberg v. Feenstra, 450 U.S. 455 (1981); Califano v. Webster, 430 U.S. 313 (1977); Reed v. Reed, 404 U.S. 71 (1971).
103. 429 U.S. 190 (1976).
acted to reduce the number of accidents caused by teen drunk driv-
ing, that established gender-based differentials for the minimum
drinking age. Despite the impressive array of statistics marshalled
by the State, the justices were simply unwilling, absent some clearly
remedial purpose,\textsuperscript{105} to sanction "the use of sex as a decisionmaking
factor."\textsuperscript{106} Indeed, they opined that the empirical research itself
probably reflected the researchers' own gender biases and that of
the society at large.\textsuperscript{107} In other words, the Court was unwilling to
validate regulations that further entrenched majoritarian prejudices
by singling out a group for disadvantageous treatment in a way that
did little or nothing to advance legitimate government interests.
Had the Court been applying rational basis scrutiny, it would have
accepted the government's explanation and statistics at face value as
rationally justifying the law as it stood. Had the Court been apply-
ing strict scrutiny, it would have rejected the government's ration-
ale, even if that rationale were backed by more solid evidence, as
insufficiently compelling.

Given the constitutional principles enunciated in \textit{Craig}, an INS
policy denying spousal benefits to gay domestic partners also man-
dates intermediate scrutiny. Just as Oklahoma's drinking law had its
true foundation in the stereotyping assumption that teen-aged boys
were inherently incapable of exercising the same good judgment as
teen-aged girls, the INS' position on gay domestic relationships im-
plicitly adopts and legitimates the stereotype that gay persons are
inherently emotionally incapable of entering into genuine domestic
relationships, perhaps because they are inherently "sick" or "im-
moral."\textsuperscript{108} Both forms of discrimination are "based on archaic
and overbroad assumptions about . . . relative needs and capacities" and
each "deprives persons of their individual dignity" and thereby vio-
lates principles of equal protection.\textsuperscript{109} For both, some form of

\begin{itemize}
  \item \textsuperscript{105} 429 U.S. at 190.
  \item \textsuperscript{106} 429 U.S. at 202.
  \item \textsuperscript{107} 429 U.S. at 201-03 and nn.14, 16.
  \item \textsuperscript{108} \textit{See} Adams v. Howerton, 486 F. Supp. at 1123; \textit{see also} Hardwick v. Bowers, 54
U.S.L.W. at 4922 (Burger, J., concurring).
  \item \textsuperscript{109} Roberts v. United States Jaycees, 468 U.S. at 625. Denying the validity of gay
domestic relationships for immigration purposes may well be devastating to the per-
sonal integrity of the individuals involved and to the integrity of the couple. For
instance, such a policy might force the couple to make the agonizing choice between
maintaining their emotionally central relationship by forced relocation (which in any
event may not be possible) or by circumvention of the immigration laws, or dissolving
the relationship. Application of this choice to heterosexual married couples would be
unthinkable. Yet it seems equally unconscionable when applied to gay couples who are
functionally and emotionally married. Stigmatizing the gay individuals concerned and

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heightened scrutiny is therefore appropriate to ensure that the target groups are not subject to the whims of legislators’ prejudices.

This is especially true for gay citizens seeking relationship preference for alien domestic partners. These persons are victims of multi-layered discrimination. They suffer discrimination under the immigration laws, which stigmatize all gay persons as diseased and unworthy, and under domestic social and legislative assumptions that they are incapable of forming close familial relationships — the very thing the law refuses to recognize. Surely gay persons handicapped by the immigration laws are denied “their individual dignity” in a way that merits not merely cursory judicial attention but intermediate scrutiny.\(^\text{110}\)

In defending a policy that refuses to recognize gay domestic relationships as valid for immigration purposes, the government — in this case, the INS — might assert the following closely interrelated interests: (1) the importance of preventing a large influx of gay aliens into the country, (2) the need to prevent sham marriages, (3) the need to protect family life, and (4) the need to protect the nation’s morals.

The government would probably claim that refusing to validate gay domestic relationships is a way to enforce INA § 212(a)(4), now 8 U.S.C. 1182(a)(4), which, following Boutillier, excludes all gay aliens from the country. This reasoning has several flaws. First, there are more direct ways to accomplish this end, namely better border enforcement. As Justice Brennan noted in Plyler v. Doe, a case involving intermediate scrutiny, the INS cannot use its own failures of enforcement to justify unlawful discrimination against those who thereby enter the country.\(^\text{111}\) Moreover, despite the INS’ protestations to the contrary, evidence suggests that the agency is not committed to effecting a meaningful gay exclusion. In the period 1971-83, the last date for which figures are available, only forty-
four of the tens of millions of persons who entered the country were excluded for being "immoral," and these figures do not indicate how many such persons were so excluded for being gay.\textsuperscript{112}

Second, the government may assert that validating gay domestic relationships for immigration purposes would encourage large numbers of aliens to attempt to circumvent the immigration laws by entering into sham domestic arrangements in the hopes of obtaining easy access to citizenship or legal permanent resident status. Since relative preference status confers so many benefits for immigration purposes, the potential for sham arrangements undertaken solely for purposes of circumventing the INA is enormous. Sham marriages, however, are expressly prohibited by the INA under 8 U.S.C. 1251(c) and by the Immigration Marriage Fraud Amendments of 1986, and the INS tries vigorously to detect such fraud. Even under the recent Immigration Marriage Fraud Amendments, a policy recognizing gay domestic relationships for immigration purposes would not be substantially more difficult to enforce against sham marriages than is the policy recognizing traditional heterosexual marriages.\textsuperscript{113} Moreover, the proposed policy change might actually reduce the number of sham marriages. Under the current regime, gay nonimmigrant aliens who wish to remain in this country sometimes enter into sham marriages with a gay or heterosexual person of the opposite sex.\textsuperscript{114} A policy validating gay marriages for immigration purposes would certainly reduce the number of these sham marriages by permitting gay aliens to immigrate legitimately through their own domestic relationships.

Third, the government might well argue that the relational benefits conferred by the statute were clearly meant only for heterosexual couples, and that to accord such benefits to gay couples would destroy or at least weaken the strong pro-family orientation of the INA. Certainly, the government might well be able to articulate a strong interest in preserving family life. However, disadvantaging gay persons is not the least restrictive route to that objective.\textsuperscript{115} Research has shown that laws suppressing gay activity do not propel many gay people into heterosexual marriage, and that marriages

\textsuperscript{112} 1983 \textit{Statistical Yearbook for the Immigration and Naturalization Service}, \textit{supra} note 37, Table ENF 2.1 at 193.

\textsuperscript{113} \textit{See also infra} notes 129-33 and accompanying text.

\textsuperscript{114} Vaid Interview, \textit{supra} note 5; telephone interview with Paula Ettelbrick, Staff Attorney, Lambda Legal Defense and Education Foundation, New York, New York (Nov. 6, 1986). No INS official with whom I spoke would venture a guess as to whether enforcement would be more difficult with gay persons.

\textsuperscript{115} \textit{See} Craig \textit{v. Boren}, 429 U.S. at 200.
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that gay persons undertake hoping to be “cured” of their homosexuality almost always fail, causing a great deal of pain to both marriage partners.\textsuperscript{116} Conversely, since homosexuality is not contagious, a tolerance of gay committed relationships for immigration purposes would hardly send heterosexual innocents running from the altar. States and municipalities that have strong gay rights bills have reported no such flight. Perhaps most importantly, as one commentator notes, “homosexuality poses a threat only to the formal definitions of marriage and the family, not necessarily to the values of caring and responsibility that lie behind them. Perhaps a broader conception of family is necessary to preserve the intimacy and sharing that are the central objects of the state’s concern.”\textsuperscript{117}

Indeed, using the “family unity” rationale, it might be difficult for the government to justify granting immigration spousal benefits to heterosexual couples who do not plan to have children while denying them to gay couples who already have children.

The Congress that passed the 1952 Act of course was not thinking in such expansive terms. It operated in an era when society knew much less about homosexuality, and relied on professional assessments that have been widely repudiated in subsequent years.\textsuperscript{118} Since the INA allows, and the INS has shown, flexibility in meeting the requirements of changing social standards, the issue that remains is why the INS has been so inflexible with respect to gay persons. Does the government’s interest in privileging only heterosexual couples create community benefits that outweigh the harm done to the affected gay couples? Hard facts rather than hardened prejudices will have to be advanced to make that case. It seems unlikely that the government could successfully advance such a claim.

Finally, the federal government might assert that it has a compelling interest in protecting the nation’s morals that any concession to gay persons would thwart. Even allowing that the federal government has a right to determine the moral as well as the social and economic policies of the nation, it is still questionable whether the INS’ current, very selective policy of morality will effectuate such a goal. It is difficult to articulate cogent reasons, for example, for allowing the family ties of a heterosexual alien smuggler or drug

\textsuperscript{116} See C.A. Tripp, \textit{The Homosexual Matrix} 249-50 (1975).
\textsuperscript{117} Note, \textit{ supra} note 79, at 1307.
dealer to be given great weight in immigration proceedings\textsuperscript{119} while those of a noncriminal gay alien who only wishes to establish a stable home with a legal resident or citizen are given no weight whatsoever. Again, if homosexual activity is not always treated as per se "bad" moral character for purposes of obtaining citizenship,\textsuperscript{120} why is it treated as a per se instance of unacceptable morality in the context of gay domestic relationships for immigration purposes?

In short, no substantial government interest seems strong enough to outweigh the real and often compelling interests gay persons have in obtaining a preference status for domestic partners. In the context of the INS' support of heterosexual marriages, its refusal to recognize gay domestic relationships for immigration purposes fails to survive the intermediate level of scrutiny that should be required for such discriminatory classification.

IV. Proposal: A Gay Domestic Relationship Status for Immigration Purposes

For immigration purposes only, the INS should establish a quasi-marital preference status for gay persons in domestic relationships. INS regulations can be amended to achieve this goal while remaining within the framework of current immigration laws.

INS regulations now require that a marriage valid for immigration purposes must (1) be valid in the state (or country) in which it was celebrated and (2) not have been undertaken merely to circumvent the immigration laws.\textsuperscript{121} The proposed change in INS regulations ensures the validity of domestic relationships for immigration purposes while remaining substantially within the boundaries of the present test. The INS should leave the test unaltered for cases involving male-female arrangements. For gay persons, the first prong of the test could be met by filing a Statement of Relationship Form with the INS (or a Dissolution form, where appropriate). Such a form, modeled on the domestic partnership agreements in effect in some municipalities,\textsuperscript{122} would establish a quasi-marital domestic re-

\textsuperscript{120} See cases cited supra note 40.
\textsuperscript{121} Adams v. Howerton, 673 F.2d at 1038. The Immigration Marriage Fraud Amendments of 1986, supra note 7, § 2, add the following third criterion as INA § 216(d)(1)(A)(II): "[the marriage] has not been judicially annulled or terminated, other than through the death of a spouse" during the two-year conditional period.
\textsuperscript{122} See supra note 65.
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relationship status for immigration purposes.\textsuperscript{123} As in domestic relationship documents recognized elsewhere, the form would have to be sworn to and notarized. In order to prevent fraud, persons filing such documents could be subjected to the same two-year conditional period and to the same waiting period following dissolution before claiming preference status for a second alien domestic partner as those to which heterosexual persons are now subject. The second prong of the test would not have to be changed. A gay couple claiming the domestic relationship status would bear substantially the same burden of proving the genuineness of the relationship as that borne by heterosexual couples claiming the marital preference.\textsuperscript{124}

Four practical and political effects of the proposed policy change seem the most problematic: enforcement, fraud detection, privacy and federalism. The proposal could be implemented in ways that effectively address each of these concerns.

The INS employee most responsible for determining the validity of a gay domestic relationship would be the Examiner. The Examiners have the task of subjectively assessing the genuineness of the relationship. Enforcement of this task might prove especially difficult for gay domestic relationships because Examiners may not be aware of how to assess these relationships properly. Moreover, INS Examiners are not renowned for their sensitivity to other cultures and lifestyles.\textsuperscript{125} To a large extent, recruitment and training policies within the INS account for this phenomenon.\textsuperscript{126} Examiners are generally recruited from within the Service. Many begin as clerks (with or without college degrees) and receive promotions through the ranks based on length of service and performance reviews of prior assignments that may not have involved skills needed by an effective Examiner. Examiners receive two weeks of basic training at the INS school in Florida. Thereafter, on-the-job continuing education sem-

\textsuperscript{123} The concept of a quasi-marital status for gay persons is presented in Note, Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution, supra note 47, at 213-15. But see Note, The Legality of Homosexual Marriage, supra note 47, at 588-89 (quasi-marital status is less-than-equal to marital status). For an example of domestic partnership legislation allowing gay persons certain spousal privileges, see City of Berkeley, California, Domestic Partnership Policy, Statement of General Policy, Dec. 4, 1984.

\textsuperscript{124} See infra notes 131-33 and accompanying text.

\textsuperscript{125} The need for additional “training in human relations” for INS officers has been recognized in U.S. Comm'n on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration, Findings and Recommendations 3.2, at 43 (1980); see also id. at 39 (INS decisions often based on racial and ethnic prejudices).

\textsuperscript{126} The following information on sham marriages was obtained in interviews in New York City with Jill Dufresne, INS Assistant District Counsel, New York, in New York City (May 5, 1986), and Peterson Interview, supra note 19.
inars are optional, although Supervising Examiners may strongly advise an Examiner to attend a seminar in an area in which she or he is weak. Nevertheless, Examiners are not trained to be sensitive to cultural or other differences regarding marital arrangements.127

Clearly, then, any formal INS procedure for examining the validity of gay domestic relationship claims might well meet with Examiners' confusion, uncertainty, or even hostility. Some supplemental training of Examiners and Supervisory Examiners will undoubtedly be necessary to address homophobia among investigators and to alert them to any special issues regarding gay domestic relationships of which they might need to be aware in order to make fair and accurate determinations. Such training need not entail an undue financial burden on the INS, since it probably could be provided free of charge and on an as-needed basis. For example, training could be offered either within the INS school or in local offices by gay rights educational groups skilled in conducting such sessions in governmental and institutional contexts.128 Nothing suggests that these changes will be easy to effect. Yet the magnitude of the individual interests involved justifies the degree of administrative inconvenience.129 Significantly, the courts on other occasions have ordered the INS to undertake additional administrative work to safeguard individual rights and interests.130

The proposed policy change also would not hamper investigation and detection of sham marital arrangements. Under current policy, a citizen or legal permanent resident alien seeking a change in immigration status for his or her spouse first fills out and files Form I-130, Petition to Classify Status of Alien Relative for Issuance of Visa. This form must be accompanied by relevant documents, including birth certificates, photographs, and marriage certificates — or, if documentation is not available, sworn affidavits by two persons

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127. For instance, I was informed by the Supervisory Immigration Examiner of the New York City office of the INS that among the nonverbal cues that Examiners are trained to look for are whether the couple touch or look at each other during the interview. When I pointed out to her that in some cultures a couple would never do either in the presence of strangers, the Supervisory Examiner acknowledged that the Examiners were not trained to account for such variations. Peterson Interview, supra note 19.


130. See, e.g., cases cited supra note 70.
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"who were living at the time and who have personal knowledge of the event."\textsuperscript{131}

Once the petition is approved, the couple is scheduled for an interview with an INS Examiner. The interviewer, during a session lasting from twenty to thirty minutes, seeks to uncover any evidence of sham marriage — that is, tries to determine whether the marriage would have existed but for the immigration laws. Petitioners must bring to the examination any documents to support their claim, including personal letters, photographs, insurance policies, leases, phone bills, and bank statements. In addition, the Examiner usually asks the couple questions about their life together. While these questions today rarely entail probing into the details of the couple's sex life, they might include such queries as: "What color is your spouse's toothbrush?" "What did your spouse eat for breakfast today?" Vast differences in age, cultural background, or education between the marriage partners make Examiners particularly suspicious. Couples are generally questioned together, but if the Examiner is especially doubtful of the marriage's genuineness, he or she might question each member of the couple individually. (A lawyer may be present throughout the proceedings, but may not coach her or his client).\textsuperscript{132}

To trained Examiners, some marriages seem blatantly sham. In these cases, spouses might even be given separate tape-recorded interviews. In addition, a separate investigation of the marriage claim may be conducted by the investigative office of the INS, which functions independently of other offices. Investigations by this office are usually triggered by anonymous tips and may involve interviews with employers, neighbors, and other knowledgeable people.

This brief outline of the INS's investigative techniques for sham marriage demonstrates that, provided some formal procedure exists

\textsuperscript{131} U.S. Dep't of Justice, INS, Form 1-130, Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa, Instructions 3(c)(4). The Immigration Marriage Fraud Amendments of 1986, \textit{supra} note 7, alter this procedure for couples claiming preference status within 24 months of marriage by requiring an interview after a two-year conditional period as a prerequisite for obtaining full legal permanent resident alien status. Regulations and operating instructions for these interviews have yet to be promulgated. The language of the Amendments suggests that considerable documentary evidence of the marriage's ongoing viability will be required, and production of residence and employment records is specifically mandated. However, the structure, and certainly the function, of the two-year interview is unlikely to be markedly different from the current initial interview.

\textsuperscript{132} The grapevine among aspiring immigrants and immigration lawyers is apparently quite efficient, and a good deal of pre-examination coaching occurs. For this reason, the INS Examiners try never to ask stock questions, and to change frequently the questions they ask. Peterson Interview, \textit{supra} note 19.
to validate gay domestic relationships for immigration purposes, sham gay domestic relationships should not be substantially more difficult to detect than sham heterosexual marriages. Presumably the gay couple will be able to produce ample documentary evidence of functioning as a couple and to answer questions about each other’s personal habits and tastes.

One must also consider the impact of the proposed policy change on gay people's right to privacy. “Right to privacy” here means not simply the right to same-sex intimate associations but the vaunted “right to be let alone.” Because gay people still face widespread discrimination — in courts, in the workplace, and in society at large — many more choose to remain “in the closet” than to “come out.” For those who wish to keep their sexual orientation a purely private matter, any procedure entailing public acknowledgment of their gay identity might seem particularly threatening. Indeed, in the case of validating gay domestic relationships for immigration purposes, many gay couples may see the choice between suffering the hardship of separation and suffering through an investigative interview (and perhaps a court proceeding) as nearly equivalent, or as no real choice at all. Yet the INS clearly has a right to adequate disclosure from the couple.

No easy solution to this dilemma is possible. However, by working with liaisons from the gay communities, the INS might develop guidelines for a “least intrusive” method of investigating the validity of gay domestic relationships for immigration purposes. Many state and local governments currently maintain liaisons with gay rights advocacy groups, as they do with other interest groups. The INS itself maintains liaisons with special advocacy groups representing a variety of religious, ethnic, and government interests. Together the INS and representatives of the gay communities could devise an effective plan that would enable the maximum number of gay couples who qualified for the domestic relationship benefit to obtain it while preserving the efficiency of the INS' procedures for investigating sham marriages and keeping accurate records.

Traditionally, the regulation of marriage and morals has rested squarely within the ambit of the state’s police power. The above proposal would not disturb this balance. No state would be compelled to recognize “gay marriage.” States proscribing homosexual

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sodomy would still be free to enforce that proscription against any alien-citizen gay couple that should choose to reside there. The proposal would simply allow the federal government to exercise its acknowledged prerogative to formulate uniform immigration policies and regulations, even in the area of domestic relations and morals. It would therefore affirm this prerogative without impermissibly disregarding the principles of comity and federalism.

Conclusion

Gay “married” couples require the same protection from immigration laws that heterosexual married couples require and obtain. By refusing to recognize any form of gay domestic relationship as valid for immigration purposes, the INS violates the gay couple’s rights to equal protection. As the number of openly gay couples and families increases, and as these arrangements receive growing societal acceptance, the inequity of the INS policy will become ever more pronounced. Validating gay domestic relationships for immigration purposes would entail no undue burden for the INS. Refusal to validate, on the other hand, places intolerable burdens on gay couples.