IMMIGRATION SPONSORSHIP RIGHTS FOR GAY AND LESBIAN COUPLES: DEFINING PARTNERSHIPS

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I. INTRODUCTION[1]

The United States federal government confers certain benefits on married couples, such as social security benefits,[2] property rights,[3] and inheritance benefits,[4] as well as immigration benefits.[5] In 1996, Congress enacted legislation that defined "marriage" under the Defense of Marriage Act ("DOMA").[6] DOMA narrows the federal definition of marriage, defining it as a union between "one man and one woman," thereby excluding lesbian and gay marital recognition. Thus, only heterosexual couples may enjoy the federal benefits conferred on married couples.

Within the context of immigration, one federally conferred benefit that U.S. citizens enjoy is sponsorship of their foreign spouses, which is specially designed to reduce prolonged separation of families and to promote reunification.[7] Since immigration

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1 The author of this Note views homosexuality as a form of sexual identification, neither morally inferior nor superior to any other form of identification.

2 42 U.S.C.A § 45(g) (West 2001). The U.S. General Accounting Office concluded that 1,049 federal laws provide benefits dependant on marital status—benefits like favorable tax treatment, enforcement of child support payments, and Social Security, Medicare, Medicaid, housing, veteran's, and federal employment benefits. UNITED STATES GENERAL ACCOUNTING OFFICE, 104TH CONG., REPORT TO THE HONORABLE HENRY J. HYDE, CHAIRMAN, COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES 2 (Fed. Doc. Clearing House 1996), *cited in* Terry S. Kogan, *Competing Approaches To Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 B.Y.U. L. REV. 1023, 1026 n.7 (2001).

3 11 U.S.C.A. §§ 541-560 (West 2001).

4 *Id.*

5 Immigration and Nationality Act §§ 101-507, 8 U.S.C. §§ 1101-1537 (2001).

6 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (1997)); 28 U.S.C. § 1738C (1997) (providing that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife").

7 8 U.S.C. § 1153(a) (2001).

> (a) Preference allocation for family-sponsored immigrants. . . . [Visas shall be allotted to the following types of aliens:]
> (1) Unmarried sons and daughters of citizens. . . .
> (2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens.

is under the control of the federal government,[8] the DOMA definition of "spouse" applies,[9] thereby restricting immigration sponsorship rights only to heterosexual couples. As a result, gay and lesbian U.S. citizens may not sponsor their spouses or partners for immigration purposes.

To cure this injustice, Congressman Jerrold Nadler introduced the Permanent Partners Immigration Act ("PPIA"),[10] drafted to amend the Immigration and Nationality Act ("INA").[11] Congressman Nadler stated:

> If an American citizen falls in love with a foreigner and gets married, he or she can sponsor the spouse - but, if a gay person falls in love and makes a lifelong commitment to that person, he or she cannot sponsor the partner to come to this country, which means they have to go live in another country, or it may mean there's no way they can live in the same country.[12]

If enacted, the PPIA would give monogamous same-sex partners the immigration sponsorship rights that married heterosexual partners enjoy.

The PPIA aims to cure injustices caused by DOMA by distinguishing "marriage" from "permanent partner" and by creating a parallel benefit system. The PPIA would add three words, "and permanent partner,"[13] where spousal benefits apply. The PPIA

> Qualified immigrants –
> (A) who are the spouses or children of an alien lawfully admitted for permanent residence, or
> (B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence . . . .
> (3) Married sons and married daughters of citizens. . . .
> (4) Brothers and sisters of citizens. . . .

Id.

[8] *Id. See also* DeCanas v. Bica, 424 U.S. 351 (1976). Even when the Constitution does not itself commit exclusive power on the federal government to regulate a particular field, federal preemption is required either when the nature of the subject matter permits no other conclusion or where Congress has unmistakably mandated preemption. Faustino v. INS, 432 F.2d 429 (S.D.N.Y. 1969), *cert. denied*, 401 U.S. 921 (1971) (Congress's authority to prescribe the conditions and terms by which aliens may come into the U.S. as immigrants is plenary and unfettered.).

[9] *See generally* Julie L. B. Johnson, Comment, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997).

[10] H.R. 690, 107th Cong. (2001); *H.R. 690, Bill Summary & Status for the 107th Congress*, Library of Congress, Thomas Legislative Information on the Internet, http://thomas.loc.gov/cgi-bin/query (last visited March 25, 2002). As of Feb. 27, 2002, there were ninety-two congressional co-sponsors for this bill. *Id.* The Permanent Partners Immigration Act ("PPIA") was originally introduced in 2000. H.R. 3650, 106th Cong. (2000).

[11] H.R. 690, 107th Cong. § 1 (2001).

[12] Missy Ryan, *Gay Partners in Search of Green Cards*, 32 NAT'L J. 804 (2000).

[13] H.R. 690, 107th Cong. §§ 1-21 (2001).

would also provide a comprehensive definition of "permanent partner" and restrict its application to immigration.[14]

Proponents of the PPIA contend that this parallel structure should not directly conflict with DOMA.[15] However, opponents of the PPIA raise the same arguments that are made against same-sex marriage.[16] Opponents contend that "partnerships," as defined under the PPIA, are synonymous with marriage, and are thus illegal in light of DOMA.[17] Other opponents state that partnership benefits under the PPIA will eventually affect all realms of federal government spending including spousal benefits such as Social Security, tax, bankruptcy, and insurance benefits.[18]

This Note will examine U.S. immigration policy from three perspectives. First, it will review U.S. immigration policy and its impact on gays and lesbians. Second, it will analyze the PPIA and its parallel partnership recognition approach. Third, this Note will address opposing policy arguments that may arise against the PPIA.

II. Effects of Disparate Treatment of Immigration Policy Towards Homosexuals

> Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door.[19]

There are three principal ways that a foreign citizen may legally enter the U.S.: (1) with a non-immigrant visa,[20] (2) as an immigrant,[21] and (3) through asylum.[22] Under the first category, non-immigrant visas are given for various reasons including vacations,[23] entrance before a scheduled marriage to a U.S. citizen,[24] or academic study.[25] Non-immigrant visas are given to eligible foreign nationals or "aliens" who intend to stay in the U.S. for a limited

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14 *Id.*

15 *See* discussion *infra* Parts II.B., II.B.1-7, II.C.

16 *See* discussion *infra* Parts III.A-C.

17 Ryan, *supra* note 12.

18 *See generally* Christine Hall, *Gore Says "Married" Homosexuals Should Get Fast-Track Immigration Status*, CNS News, *at* http://freerepublic.com/forum/a39e4a0d7258a.html (last visited Jan. 25, 2002).

19 Emma Lazarus, *The New Colossus* (1883), State Department Basic Reading in U.S. Democracy, *at* http://usinfo.state.gov/usa/infousa/facts/democrac/63.htm (last visited Jan. 23, 2002).

20 8 U.S.C. § 1184 (2001).

21 8 U.S.C. § 1151 (2001).

22 8 U.S.C. § 1157 (2001).

23 8 U.S.C. § 1184(c) (2001).

24 8 U.S.C. § 1184(d) (2001).

25 8 U.S.C. § 1184(e) (2001).

period of time.[26] Under the second category, a foreign citizen may obtain immigrant status through family sponsorship,[27] employer sponsorship,[28] or the Diversity Lottery System ("Lottery").[29] Under the final category, a refugee may be granted asylum "if the person is found to have been persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[30]

U.S. immigration is under the control of Congress, which sets the criteria for each method of entry. Regulation of immigration into the U.S. is shared between the Department of Justice ("DOJ") and the Department of State ("State Department").[31] Under the DOJ, discretionary authority over immigration is conferred upon the Secretary of State.[32] While this authority has been delegated to the Secretary of State, most of the authority over immigration is concurrently delegated to the Commissioner of the Immigration and Naturalization Service ("INS").[33] The INS works with the Department of Labor and the State Department's Foreign Consulate Offices to process immigration applications.[34] With such a bureaucratic machine in place, it is no surprise that the application process can be complicated, time consuming, and frustrating.

Since its inception, the INA has maintained a screening system—part of which includes a quota system—to determine entrance eligibility for immigrants and non-immigrants.[35] Congress has prescribed requirements for acceptable entry applications that emphasize the health, education, profession, beauty, accolades, wealth, family affiliation, and nationality of the prospective applicants.[36] The "open door policy" of receiving the tired, sick, and poor huddled masses is a fiction, not the current immigration policy. The reality is that the immigration process is replete with subjective standards of discrimination.[37]

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26 8 U.S.C. § 1184 (2001).
27 8 U.S.C. § 1151(c) (2001).
28 8 U.S.C. § 1151(d) (2001).
29 8 U.S.C. § 1151(e) (2001).
30 8 U.S.C. § 1101(a)(42)(A) (2001).
31 8 U.S.C. §§ 1102-1104 (2001).
32 1 IMMIGR. L. & PROC. (MB) § 1.02 (2000).
33 8 U.S.C. § 1104 (2001).
34 8 U.S.C. §§ 1102-1104 (2001).
35 8 U.S.C. §§ 1101, 1351 (2001).
36 *Id.*
37 *Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background Analysis Before the House Committee on the Judiciary*, 100th Cong. 113 (1988). *See also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6-7 (1998), *reprinted in* 19 IMMIGR. & NATIONALITY L. REV. 1 (1999).

A. Discrimination Against Homosexuals - A Perspective on U.S. Immigration

The history of U.S. immigration is riddled with unfair and arbitrary discrimination against homosexuals.[38] Beginning with the Immigration Act of 1917 ("1917 Act"), homosexuals were excluded from entry into the U.S.[39] In determining whether a non-citizen may enter the U.S., the 1917 Act set forth a list called "Grounds for Exclusion" which described the acceptable type of person who could enter the U.S.[40] While the 1917 Act did not specifically state that homosexuals should be excludable from entry, lesbians and gays were nonetheless categorized as excludable for medical reasons.[41] At that time, suspected homosexuals were considered medically unfit for entry because it was believed that they suffered from a mental disorder.[42] Homosexuals were categorized as "persons of constitutional psychopathic inferiority."[43]

In 1952, the 1917 Act was amended.[44] While there was no specific statutory language excluding homosexuals, the Act again implicitly excluded them for medical reasons.[45] This time, homosexuals were included in the category of persons "afflicted with psychopathic personality, epilepsy or a mental defect."[46] INS officers interpreted and systematically applied the amended 1917 Act to exclude homosexuals on the basis of mental illness.[47]

In 1963, the Supreme Court decided *Rosenberg v. Flueti*,[48] which addressed whether the language of the 1952 amendments to the 1917 Act applied to homosexuals.[49] The Court reviewed the statutory construction and interpretation of the 1917 Act, and found that "psychopathic personality" and "mental defect" were terms too vague to be applied to homosexuals.[50] As a result, immigration officials could no longer bar entry to homosexuals *per se* for medical reasons.

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38 Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 439 n.2 (1994).

39 *Id.* at 445-47.

40 *Id.* at 439, 439 n.2.

41 *Id.* at 446.

42 *Id.*

43 *Id.*

44 Christopher A. Duenas, Note, *Coming To America: The Immigration Obstacle Facing Bi-National Same-Sex Couples*, 73 S. CAL. L. REV. 811, 816 (2000).

45 *Id.*

46 *Id.*

47 *Id.* at 817.

48 374 U.S. 449 (1963).

49 Foss, *supra* note 38, at 454-56.

50 *Rosenberg*, 374 U.S. at 451.

However, this victory against discrimination was short lived. As a result of *Rosenberg v. Flueti*, Congress clarified the ambiguity by amending the 1917 Act to include "persons afflicted with sexual deviation" to the list of persons ineligible for entry.[51] In doing so, Congress clearly intended to categorize homosexuals as sexual deviants.[52]

More than fifteen years later, U.S. immigration policy towards homosexuals became unusually progressive.[53] This change in attitude was probably reflective of changing societal attitudes towards homosexuality. The first major hurdle in immigration policy was overcome by an announcement by the Surgeon General on August 2, 1979.[54] The Surgeon General stated that homosexuality was no longer considered a mental disorder.[55]

The Surgeon General's declaration was challenged in *Hill v. INS*.[56] The Ninth Circuit Court of Appeals reviewed and applied the Surgeon General's comment and held that "homosexuality *per se* is no longer considered to be a mental disorder," and that exclusion based solely on homosexuality was no longer permissible.[57] Thus, homosexuals could no longer be denied entry into the U.S. based on their "sexual deviancy."

Congress then repealed the homosexual exclusion provision entirely in 1990, during the course of revising the section of the INA pertaining to exclusions.[58] This was one of the many momentous reforms in immigration policy that has occurred over the past thirty years. However, there is still much more to be done. Discrimination continues to exist against homosexuals. In particular, the seemingly non-discriminatory, family-based immigration sponsorship program discriminates against U.S. citizens who are in binational relationships with same-sex partners.

B. Exclusion of Same-Sex Partners Is Against the Policy of Family Reunification

U.S. citizens who legally wed foreign nationals enjoy the benefit of sponsoring their spouses for immigration to the U.S.[59] "Fam-

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51 8 U.S.C. § 1182 (1917).
52 *Id.*
53 Foss, *supra* note 38, at 457-59.
54 Hill v. INS, 714 F.2d 1470, 1472 (9th Cir. 1983).
55 *Id.* at 1473.
56 *Id.*
57 *Id.*
58 Duenas, *supra* note 44, at 825.
59 8 U.S.C. § 201(b)-(c) (2001).

ily reunification"[60] is the policy that drives the preferential treatment for immigrants sponsored by spouses or immediate family members who claim U.S. citizenship.[61] Congress stated that the purpose of family sponsorship was to keep families together.[62]

In debating the 1990 INA amendments, several members of Congress voiced their support for strengthening the family reunification provisions.[63] "The National interest is served through the humanness of the policy, and the promotion of public order and well-being of the Nation."[64] Congress spoke out in favor of family reunification by stating that prolonged separation is "anti-family" and "counterproductive," and that restriction of entry is "inconsistent with the principles on which this Nation was founded."[65] Furthermore, "[p]sychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States .... In keeping with the tradition and humanitarian concerns, ... the admission of the immediate family members of U.S. citizens [should be] without numerical limits."[66] To bring families together more quickly, the foreign applicant is exempt from the quota system.[67] Usually, there are tremendous backlogs in processing applications subject to the quota system.[68] If those family members applied without the benefit of family sponsorship, it could take years to process their applications. Exemption from the quota system therefore means quick processing and reunification with the sponsor family.

The following is a brief overview of the mechanics of spousal sponsorship. A U.S. citizen may sponsor a foreign citizen for immigration if the foreign citizen is considered an immediate family member.[69] For example, a U.S. citizen may sponsor his or her spouse for an application for immigration because the spousal rela-

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60 U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES 288 (Michael Lemay & Elliott Robert Barkan, eds., 1999). This Act was enacted to support family reunification, and it claimed that it "set new ceilings or a worldwide level of Immigration, especially as related to the reunification of immediate family members." *Id.*

61 *Id.*

62 *Id.* at 63.

63 *Id.*

64 *Id.*

65 Duenas, *supra* note 44, at 815.

66 *Id.* at 814-15 (citing U.S. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMGR. POL'Y AND THE NAT'L INTEREST 112, 112-13 (1981).

67 8 U.S.C. § 201(b) (1917).

68 *Visa Bulletin, Immigrant Numbers for April 2002,* United States Department of State Bureau of Consumer Affairs (Mar. 8, 2002), *at* http://travel.State.gov/visa_bulletin.html (last modified March 8, 2002) [hereinafter *Visa Bulletin*] (providing priority dates for family-based immigrant visas, employment-based immigrant visas, and the lottery system).

69 *Id.*

tionship falls[70] under one of the five family-based sponsorship categories based on an "immediate family relationship."[71] To be considered a "spouse": (1) the foreign spouse must be of the opposite gender of the U.S. citizen spouse;[72] (2) the foreign spouse must be of good moral character;[73] (3) there must be a valid marriage;[74] and (4) the foreign spouse must be healthy.[75] Thus, a U.S. citizen who is legally married[76] to a healthy, same-sex Dutch citizen cannot sponsor his or her foreign partner for immigration. However, if the foreign partner was of the opposite sex, sponsorship benefits would apply.

DOMA prevents sponsorship rights from being conferred on same-sex couples.[77] DOMA describes marriage for federal purposes by stating that no State may recognize a "relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, . . . or a right or claim arising from such relationship."[78] Therefore, if any state legally recognizes same-sex marriages, no other state is required to recognize such unions. For example, if Vermont granted marriage rights to a same-sex couple, and if the couple then moved to another state, any rights afforded to the couple in Vermont would be disregarded in the other state.

DOMA states that in all other

> ruling[s], regulation[s], or interpretation[s] of administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between *one man* and *one woman* as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.[79]

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70 *Id.*; *see also* 8 U.S.C. § 1153(a), (d) (2001).

71 *Id.*

72 1 U.S.C. § 7 (1997); 28 U.S.C. § 1738C (1997).

73 8 U.S.C. § 1153(a), (d) (2001).

74 *Id.*

75 *Id.*

76 Press Release, Statistics Netherlands, In April Almost 400 Marriages Between Same-Sex Couples (July 25, 2001), *at* http://www.cbs.nl/en/services/press-releases/2001/pb01e164.pdf (last visited Jan. 24, 2002). On April 1, 2001, same-sex couples were permitted to obtain civil marriages in the Netherlands. At that time, eighty percent of the same-sex married couples were registered partners. Since same-sex marriage became available, the number of partnership registrations for same-sex couples has decreased. Partnership registration is also available to male-female couples, and the number of partnership registrations has remained stable. *Id.*

77 Johnson, *supra* note 9, at 1621.

78 28 U.S.C. §1738C (1997).

79 *Id.* (emphasis added). DOMA was passed in reaction to *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), a Hawaiian case in which a federal court declared that the state of Hawaii had failed in its attempt to demonstrate a compelling state interest for withholding the right to legal marriage for same-sex couples. Jon-Peter Kelly, Note, *Act of Infidelity: Why Defense of Marriage Act Is Unfaithful To the Constitution*, 7 CORNELL J. L. & PUB POL'Y 203 (1997).

This provision directly impacts the INA which governs the INS, the administrative agency charged with implementing the INA.[80] Thus, any ruling, regulation, or interpretation of the INA shall be subject to definitions provided by DOMA. Spousal benefits for immigration purposes, as well as any other federal benefits, only apply to married persons as defined by DOMA.

C. Alternative Approaches for Same-Sex Bi-National Couples

Since U.S. citizens are not able to sponsor their foreign same-sex partners, the foreign partners must qualify independently to enter the U.S. Same-sex bi-national couples are forced to explore alternative approaches to immigration if they decide to reside in the U.S. This result subjects foreign partners to the quota system, and separation may be indefinite.

Some couples seek alternative approaches to immigration through the lottery[81] and employer sponsored immigration.[82] However, these approaches are not guaranteed. The lottery is restricted to certain countries and is subject to the quota system.[83] Since the lottery application process is simple[84] and since there is no fee attached,[85] the odds of winning the lottery are also very low. Employer sponsored immigration is extremely difficult for a variety of reasons. It involves risks and costs for the employer and the foreign partner.

Employer sponsored immigration operates as follows. First, the foreign partner must possess a marketable skill that would be attractive to a U.S. employer.[86] Then, the foreign partner must find an employer who is willing to hire and sponsor him or her for

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80 8 U.S.C. § 103 (2001).

81 8 U.S.C. §1153(c) (2001).

82 8 U.S.C. § 1153(b) (2001).

83 *Id.*; *see also Visa Bulletin*, *supra* note 68.

84 *How Do I Participate in the Diversity Visa Lottery Program?*, Immigration & Naturalization Service, *at* http://www.ins.gov/graphics/howdoi/divlott.html (last modified Nov. 13, 2001). The State Department determines the forms used, and instructions are printed in the federal register; but, the form is generally intended to remain simple. For example, in 2000 the requirements were on one single-sided page, which essentially asks for the applicant's name, address, and country of origin. *Id.*

85 *Id.* Any fees associated with the lottery shall be paid only if the application is accepted; there is no processing fee required at the time of submission. *Id.*

86 *Immigration Through Employment*, Immigration & Naturalization Service, *at* http://www.ins.gov/graphics/services/residency/employment.htm (last modified Jan. 15, 2002) [hereinafter *Immigration Through Employment*] (providing information for aliens who desire to become immigrants based on the fact that they are retained by permanent employers). To be eligible for immigration through employment, most employment categories require U.S. employers to complete labor certifications. In the labor certification, the employer must prove that he completed a sufficient search for a U.S. citizen employee and that his alien employee is not taking an employment opportunity away from a U.S. citizen. The employer then submits the certification with the appropriate fees. *Id.*

immigration, which may be difficult because there are risks for the employer who sponsors a non-citizen employee.[87] The employer must submit a labor certification to the Department of Labor, attesting that there are no other U.S. citizens capable of working for the job[88] and that the employer is capable of paying the employee at the prevailing wage.[89] If the labor certification is approved, then the immigration application is sent to the INS for further scrutiny.[90] Again, this is all subject to the quota system.[91] Even if the foreign partner possesses the marketable skills required by employers, this process is more costly[92] and time consuming[93] than the family-sponsored immigration application.

To stay with his or her U.S. partner, the foreign partner may then have to proceed with a non-immigrant type entry.[94] Non-immigrant visas are granted for a limited stay or visit. In addition, this alternative requires access to a certain amount of funds,[95] a certain level of education,[96] or a particular profession,[97] and, yet again, it is subject to the quota system.

Another approach to remaining with a U.S. partner is through asylum, which involves risks as well.[98] This process is also subject to quotas.[99] The asylum application is very complicated; it requires the expense of hiring an attorney. However, there may be a chance for pro bono representation.[100]

"Many gay and lesbian immigrants are really refugees, fleeing persecution on the basis of sexual orientation in their country of

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87 *Id.*

88 8 U.S.C. § 1153(b) (2001). *See also Immigration Through Employment, supra* note 86.

89 *Immigration Through Employment, supra* note 86.

90 8 U.S.C. § 1182(n) (2001).

91 *Visa Bulletin, supra* note 68.

92 *Forms and Fees,* Immigration and Naturalization Service, *at* http://www.ins.gov/graphics/formsfee/forms/index.htm (last visited Jan. 25, 2002). The transactional costs are higher because the application process is more complicated. *Id.*

93 The labor certification must first be approved by the Department of Labor before an applicant can apply for immigration with the INS.

94 8 U.S.C. § 1184 (2001).

95 *Id.*

96 *Id.*

97 *Id.*

98 Sexual orientation-based asylum claims have been relatively successful, but they depend on certain conditions within the country. For example, some countries have laws that make sodomy punishable by death (Muslim countries), while other countries do not stop gang violence against gays and lesbians (Brazil).

99 Exec. Order No. 99-45, 64 Fed. Reg. 54505 (Sept. 30, 1999). This determination set the quotas for the admittance of refugees during the year 2000. *Id. See also Visa Bulletin, supra* note 68.

100 Organizations like the Lesbian & Gay Immigration Rights Task Force provide assistance by finding pro-bono representation for asylum applicants who could not otherwise afford representation. The Lesbian and Gay Immigration Rights Task Force, *at* http://www.lgirtf.org (last modified Jan. 2, 2002).

origin."[101] During the interview procedure, an asylum applicant must prove that he or she has been persecuted in the past, or that he or she is fearful of future persecution.[102] To prove credibility, it is often necessary to repeatedly recant stories of incidents of sexual, physical, and emotional abuse that occurred in his or her home state.[103] A foreign partner may not be ready to relive the abuse by telling the story; and he or she may not wish to have his or her story scrutinized and criticized and his or her credibility questioned.

Often, the foreign partner "cannot even obtain a visa to travel to the U.S. for a temporary visit."[104] Some couples undergo desperate measures to stay in the U.S. and engage in illegal behavior to remain together. While some decide to enter and stay in the U.S. without authorization ("illegal immigrants" or "illegal aliens"),[105] others enter into "sham" marriages.[106] The INS's definition of a sham marriage is "any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws."[107] For many bi-national same-sex couples, arranging mutually beneficial "sham" marriages is a last, desperate attempt to make a life together in the U.S., even though the consequences can be severe.[108] Many bi-national same-sex couples take this route because they feel there are no other options.

Despite the recognition of the social benefits of family reunification, Congress will not recognize the benefits and existence of gay and lesbian marriages. The disparate treatment of bi-national heterosexual couples, compared with same-sex couples, is immense. The PPIA intends to cure this disparity by providing equal benefits to U.S. citizens who are in committed relationships with foreign citizens.

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101 Lavi S. Soloway, Esq., *Challenging Discrimination Against Gays and Lesbians in U.S. Immigration Law*, Partners Task Force for Gay & Lesbian Couples, *at* http://www.eskimo.com/~demian/lgirtf-1.html (last visited Jan. 25, 2002).

102 8 U.S.C. § 1158(a)-(d) (2001). For a comprehensive definition of "persecution," see 8 U.S.C. § 1101(A)(42)(a).

103 *See, e.g.*, Hernandez-Montiel v. Immigration and Naturalization Serv., 225 F.3d 1084 (9th Cir. 2000). The Board of Immigration Appeals of the INS was ordered to review a sexual orientation-based claim for asylum. During the investigation and administrative hearings, Geovanni Hernandez-Montiel had to recount in detail the series of rapes that he endured by the hands of the Mexican police to substantiate his credibility. *Id.*

104 Soloway, *supra* note 101.

105 8 U.S.C. § 1325 (2001).

106 *Id.*; *see also* Duenas, *supra* note 44, at 811-12.

107 8 U.S.C § 1325(c).

108 Duenas, *supra* note 44, at 811-12.

III. Partnership Benefits for Same-Sex Couples

There are two ways in which immigration benefits may be extended to same-sex bi-national couples: (1) by the recognition of same-sex marriages; and (2) through the creation of a parallel benefits system by providing "partnership" recognition. The PPIA has proposed the implementation of the parallel system of "partnership" recognition, rather than taking the former route.

A. Repeal or Amendment of DOMA

In addressing the inequities of the U.S. immigration policy towards same-sex partners, proponents of the PPIA chose not to follow the first route, i.e. the recognition of same-sex marriages.[109] Since DOMA still applies, it must either be repealed or amended to include the recognition of same-sex marriages. This route, however, is highly improbable since attempts at federal recognition of same-sex marriages prior to the enactment of DOMA have been consistently obstructed.[110] DOMA was enacted to thwart the advancement of civil unions or same-sex marriages.

The PPIA is different from DOMA because of its intended extent and scope. In comparison to DOMA, the PPIA is narrowly tailored to apply only to immigration;[111] DOMA's broad scope extends to all federal regulations.[112] This narrow approach to the implementation of a parallel "partnership" structure is favorable considering that the PPIA would be the first introduction of "partnerships" to federal law.

Furthermore, the PPIA would likely be welcomed by the INS. This assertion stems from the exception to the same-sex spouse inadmissibility rule under non-immigrant classification, in which a same-sex spouse or partner is permitted to accompany the non-immigrant to the U.S.[113] "Such a provision is important because it is a strong example of the INS's attempt to incorporate alternative

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109 H.R. 690, 107th Cong. §§ 1-21 (2001) (addressing only partnerships and not marriage).

110 Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982) (concluding that Congress did not indicate an intention to enlarge the "ordinary meaning" of the word "spouse" and that without such indication the Court would not extend immigration benefits to same-sex couples). *But see In re* Allen, 186 B.R. 769 (Bankr. N.D. Ga. 1995) (construing 11 U.S.C. § 302(a) (1978), a provision of the Bankruptcy Code relating to debtor-spouse, the court declared that if a state recognized a legal marriage between a same-sex couple, the couple would qualify for relief under § 302).

111 H.R. 690, 107th Cong. §§ 1-21 (2001).

112 1 U.S.C. § 7 (1997); 28 U.S.C. § 1738C (1997).

113 Brian McGloin, Comment, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 Cal. W. Int'l L.J. 159, 167-68 (1999) (citing B-2 Visa Available for Non-Spouse, Same-Sex Partner of L-1, INS Says, Interpreter Release, at 441 (March 29, 1993)).

relationships and families into its policies."[114] The INS Deputy Assistant Commissioner of Adjudication issued a letter, explaining that non-spouse partners of certain classes of non-immigrants may be issued visitor for pleasure visas for as long as the non-spouse partner is a resident.[115] "The visa may only be issued when a spouse or partner will be accompanying the principal alien, indicating a derivative relationship between the [visitor for pleasure] non-immigrant and [his or her] partner."[116] While this exception is a benefit, which may only be received by foreign citizens, it is also important to note that the fundamental policy behind this exception is the recognition of same-sex relationships. This exception indicates that INS officials would welcome the recognition of same-sex partnerships.

B. Parallel Partnership Benefits

The PPIA re-defines "partnerships" for immigration purposes and proposes to extend immigration benefits to same-sex bi-national couples through a parallel benefits system.[117] The PPIA defines "permanent partner" as:

> an individual over 18 years of age who is in a committed, intimate relationship with another individual over 18 years of age in which both parties intend a lifelong commitment; is financially interdependent with that other individual; is not married to or in a permanent partnership with anyone other than that other individual; is unable to contract with that other individual a marriage cognizable under [the Immigration and Naturalization] Act; and is not a first, second, or third degree blood relation of that other individual . . . . The term "permanent partner" means the relationship that exists between two permanent partners.[118]

If the PPIA were passed, then the "partnership" definition would be the first of its kind in the U.S. Note, however, that other countries have grappled with the "partnership" debate and do recognize same-sex partnerships. Currently, fifteen other nations, all industrialized, have adopted same-sex partnership legislation for immigration.[119] These countries, like the U.S., do not recognize

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114 *Id.* at 168.
115 *Id.*
116 *Id.*
117 H.R. 690, 107th Cong. §§ 1-21 (2001).
118 *Id.*
119 Those countries with formal policies include Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, the Netherlands, New Zealand, Norway, South Africa, Sweden, and the United Kingdom. Namibia, Portugal, and Spain have allowed same-sex

"marriage" for same-sex couples, nor do they have national partnership laws.[120] Instead, they choose to limit the scope of the benefit, which is similar to the PPIA.[121] Also, while some of these countries follow the civil law approach, others share the common law approach like the U.S.[122]

Prior to exploring the possible adoption of limited partnership benefits in the U.S., it is helpful to review the similar actions other industrialized countries have taken regarding this issue. They extend partnership benefits on a limited basis. Utilizing a parallel benefit structure similar to the PPIA, these countries have enacted legislation that is narrow in scope. The following is a brief overview of the policies that have been adopted in Canada, the United Kingdom, Australia, South Africa, New Zealand, and Finland.

1. Canada

In Canada, the department in charge of immigration is the Canadian National Department of Citizenship and Immigration.[123] Although Canada does not recognize same-sex marriages, same-sex partners may obtain spousal benefits.[124] For example, Canada recognizes same-sex relationships for purposes of sponsorship of a foreign partner for residency on humanitarian and compassionate grounds.[125]

Under humanitarian and compassionate grounds, common-law relationships as well as same-sex relationships are eligible for spousal benefits as long as the couples "reside together [in] a genuine conjugal-like relationship."[126] The relationship is scrutinized to determine whether there is a bona fide relationship, i.e. one that is at "the level of interdependency between the partners."[127] Factors that are examined include stability and duration of the relationship, current marital status, evidence of past immigration abuse, joint finances, joint responsibilities, and the sponsor's will-

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partners to remain on a discretionary basis. THE LESBIAN & GAY IMMIGRATION RIGHTS TASK FORCE, BRIEFING BOOK ON IMMIGRATION 15 (Pradeep Singla ed., 2000).

120 *Id.*

121 *See* discussion *infra* Parts II.B.1-6.

122 *Id.*

123 *The Department*, Citizenship and Canada Immigration, *at* http://www.cicnet.ci.gc.ca/english/about/index.html (last visited Jan. 25, 2002).

124 *Id.*

125 *World Legal Survey – Canada*, The International Lesbian and Gay Association, *at* http://www.ilga.org/Information/legal_survey/americas/canada.htm (last modified June 23, 2000).

126 *Id.*

127 *Id.*

ingness to pledge support to his or her partner.[128] Canadian marital sponsorship goes through a review process similar to the process that the U.S. employs. In both countries, evidence of a bona fide relationship is a consideration in family sponsorship cases. Under the PPIA, the validity of same-sex partners' relationships would be tested the same way that heterosexual, married couples are tested.[129]

In Canada, the humanitarian and compassionate determination is a subjective process. The power to scrutinize eligibility is vested in Canadian immigration agents.[130] Furthermore, a determination on humanitarian and compassionate grounds is not subject to appeal.[131] Thus, if a couple is unhappy with the determination, there is no process available to review whether the determination was arbitrary or capricious.

2. The United Kingdom

In the United Kingdom, immigration is regulated under the Immigration and Nationality Directorate.[132] On October 13, 1997, the United Kingdom established the "Concession for Unmarried Partners" which was subsequently amended on June 16, 1999.[133] This rule permits unmarried couples, including same-sex couples, to obtain sponsorship benefits.[134]

More specifically, the rule requires certain evidence of a bona fide relationship.[135] These include: (1) the relationship must be akin to marriage; (2) the relationship must last for a period of at least two years; (3) any previous relationship by either partner must not currently exist; (4) the couple must intend to live together permanently; and (5) the sponsor must be willing to support the foreign partner.[136] As evidenced above, this rule examines all relationships similar to the way in which the U.S. examines bona fide marriages.

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128 *Id.*

129 *Id.*

130 *Id.*

131 *Citizenship and Immigration To Canada*, Citizen and Canada Immigration, *at* http://cicnet.ci.gc.ca/english/press/99/9902-pre.html (last visited Jan. 10, 2001).

132 *Immigration Directorates' Instructions*, Common-Law and Same Sex Relationships (Unmarried Partners), Immigration & Nationality Directorate, *at* http://www.ind.homeoffice.ogv.uk/default.asp?PageId=1023 (last visited Jan. 23, 2001).

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

3. Australia

In Australia, the Department of Immigration and Multicultural Affairs controls immigration.[137] On November 1, 1999, a "partner class" was created for family-based (or "family stream") immigration.[138] Under this "partner class," there are subclasses categorized as "spouse" and "interdependency."[139] Australian citizens, permanent residents, and eligible New Zealand citizens may sponsor close family members.[140]

Same-sex couples may also qualify for the partner class of the family stream. To qualify for the partner class of the family stream, these couples must establish bona fide relationships.[141] In establishing a bona fide relationship, the relationship at issue and the availability of financial support are examined.[142] In addition, the same-sex couple must show that: (1) they are in a committed relationship; (2) there are no other concurrent relationships; (3) their relationship is genuine and the couple plans to have a continued relationship; (4) financial support is available; and (5) the relationship will continue for at least twelve months subsequent to the submission of the application.[143]

4. South Africa

In South Africa, the Department of Home Affairs controls immigration under the Aliens Control Act.[144] The issue of same-sex immigration benefits was raised before South Africa's highest court (the Cape High Court) in 1999 after South Africa incorporated lesbian and gay rights into its constitution.[145] The Cape High Court ruled that same-sex couples should enjoy the same right that

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137 *The Department*, Department of Immigration & Multicultural & Indigenous Affairs, *at* http://www.immi.gov.au/department/dept.htm (last visited Jan. 23, 2002).

138 *Family Migration – Introduction*, Migrating to Australia, Department of Immigration & Multicultural & Indigenous Affairs, *at* http://www.immi.gov.au/allforms/family.htm (last visited Jan. 23, 2002).

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Interdependent Partner*, Migrating to Australia, Department of Immigration & Multicultural & Indigenous Affairs, *at* http://www.immi.gov.au/allforms/f-inter.htm (last visited Jan. 23, 2002).

144 *World Legal Survey - South Africa*, The International Lesbian and Gay Association, *at* http://www.ilga.org/Information/legal_survey/africa/southafrica.htm (last modified Feb. 5, 2001).

145 *Id.* Clause 9.(3) of the South African Constitution reads: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth." *Id.*

married couples enjoy.[146] Thereafter, the South African Constitutional Court affirmed the ruling, holding that "[g]ays and lesbians in same-sex life partnerships are as capable as heterosexual couples of expressing and sharing love in its manifold forms . . . . [T]hey are capable of constituting a family including affection."[147]

In South Africa, partnership benefits are expansive because of their constitutional support. Partnership benefits have received such support because the South African government has sought to abolish all kinds of discrimination and has endeavored to correct injustices by creating constitutional grounds for protection.

5. New Zealand

In New Zealand, immigration is controlled by the New Zealand Immigration Service.[148] The New Zealand Bill of Rights Act of 1990 provides protection against discrimination based on sexual orientation.[149] This act eventually led to a statement in December 1998 by Mr. Delamere, the New Zealand Minister of Immigration, extending partnership benefits to same-sex couples.[150] He stated: "There are further areas of discrimination. Because a partner in a same-sex relationship is not recognized as a non-principal applicant (unlike a heterosexual partner), a same-sex couple cannot qualify for residence through a single application in the same way that a heterosexual couple can."[151] Mr. Delamere understood the restrictions on and the disparate treatment applied to same-sex couples by the immigration process, and he took corrective action.

As a result of Mr. Delamere's statement, in New Zealand, a same-sex relationship is considered a "de facto partnership."[152] The relationship between sponsor and foreign nationals is scrutinized in a manner similar to married couples. These same-sex couples must prove that they have shared a genuine and stable relationship for at least two years.[153]

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146 *Id.*

147 *Id.*

148 *Family Category*, New Zealand Immigration Service, *at* http://www.immigration.govt.nz/migration/family.html (last modified Sept. 10, 2001).

149 *World Legal Survey – New Zealand*, The International Lesbian and Gay Association, *at* http://www.ilga.org/Information/legal_survey/asia_pacific/new_zealand.htm (last modified June 23, 2000).

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

6. Finland

In Finland, immigration is controlled by the Directorate of Immigration, an agency of the Ministry of the Interior.[154] Sponsorship for immigration is extended to immediate family members, which include same-sex couples known as "cohabitants."[155] The establishment of a bona fide relationship is required through proof of cohabitation for at least two years, with no other concurrent relationships.[156]

7. Summary

The common thread amongst all of these countries is the recognition that same-sex partnerships are viable and valid. Moreover, each of these countries has sought corrective action to end discriminatory practices. Each of these countries has struggled with the issue of partnership recognition and has come to the conclusion that immigration policy can include benefits for same-sex couples without disturbing the definition of marriage.

C. Family - The Heart of the Debate

In the U.S., partnership recognition first developed in the workplace.[157] There, married couples were automatically eligible for benefits such as medical insurance while same-sex partners were not.[158] Employers became attuned to the needs of employees, and they extended workplace benefits to same-sex partners to attract and retain valuable employees.[159] These benefits were termed "domestic partnerships" by employers who recognized the need to support all of their employees equally.[160]

The term "partnerships" stands for federal recognition of a family model that is not restricted to the traditional nuclear family. "Partnerships" are a type of family model that encompasses the diverse definition of today's family; one that focuses on function rather than form.[161] "Partnerships" include "[t]hose who are not

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154 *Functions,* The Directorate of Immigration, *at* http://www.uvi.fi/englanti/doc/ulkovi2.html (last visited Jan. 23, 2002).

155 *Residence Permit for Finland on the Basis of Family Ties,* The Directorate of Immigration, *at* http://www.uvi.fi/pdf/oleskelulupa_perhside_englanti.pdf (last visited Jan. 23, 2002).

156 *Id.*

157 Demian, *Legal Marriage Primer: Read This If You Don't Read Another Thing About Legal Marriage,* Partners Task Force for Gay & Lesbian Couples (2002), *at* http://www.buddybuddy.com/toc.html (last visited January 25, 2002).

158 *Id.*

159 *Id.*

160 *Id.*

161 Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition,* 5 J.L. & POL'Y 107, 156 (1996).

married but function as family by caring for and supporting one another on a daily basis [and by] receiv[ing] no support for the essential role they play."[162]

The traditional nuclear family model is one of form rather than function.[163] The model centers on a married heterosexual couple, joined for the purpose of procreation.[164] DOMA, which requires one man and one woman per marriage,[165] follows the traditional nuclear family model. Thus, DOMA confers benefits only on the traditional nuclear family.

However, the traditional nuclear family model is an inadequate representation of American families. This model does not encompass all other situations that exist in our society. "Views of marriage, sexuality and reproduction have . . . undergone shifts in moral tolerance for many different kinds of families."[166] Divorce, remarriage, same-sex couples, straight, non-marital relationships, single parenthood, and blended families are not reflected in the traditional nuclear family model.[167] The family model that should be adopted is one that is defined by function, where relationships exist and where members love and care for one another.

In *Brashi v. Stahl Associates*,[168] the New York Court of Appeals defined family from a cultural and functional perspective, rejecting the rigid nuclear family model.[169] The court found two gay men to be a "family" by examining their emotional and financial interdependence. The Court stated that a family does not "rest[ ] on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."[170] The court concluded that for the purposes of New York landlord-tenant law, a family can exist without the formalization of a marriage certificate or an adoption order.[171]

Same-sex couples can be interdependent emotionally and financially without the existence of a marriage certificate.[172] In the

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162 *Id.* at 122.
163 *Id.*
164 *Id.*
165 28 U.S.C. § 1738C (2000).
166 Ettelbrick, *supra* note 161, at 155. *See also* Heidi Eischen, Survey, *For Better or Worse: An Analysis of Recent Challenges To Domestic Partner Benefits Legislation*, 31 U. TOL. L. REV. 527, 539-43 (2000) (reviewing domestic partnership laws and recent challenges to them).
167 Ettelbrick, *supra* note 161, at 157.
168 74 N.Y.2d 201 (N.Y. 1989).
169 *Id.*
170 *Id.* at 211.
171 *Id.*
172 Ettelbrick, *supra* note 161, at 138 ("Family definition advocates have successfully shifted society's view of lesbians and gay men from an emphasis solely on the sexual aspects of their relationships to an acceptance of their familial bonds.").

U.S., same-sex couples engage in committed monogamous relationships, share household expenses and property, and raise children.[173] These partnerships are a type of family that should be legally recognized. Same-sex couples do not need marriage certificates to bear children, raise children, or assume the responsibilities of a family.[174] However, they do not receive the benefits that are conferred on other families because the federal government, according to DOMA, will not confer benefits unless the union is legally recognized.

Same-sex families should not be denied benefits based strictly upon a lack of a marriage certificate. "As the . . . vision of family incorporates those who love and care for one another, strict adherence to formal definition will . . . obstruct the broader social policy of supporting family nurturance, caretaking and commitment."[175] The PPIA could provide same-sex families with immigration privileges and obligations of spouses by recognizing them as "partnerships." The term "partnerships" attempts to correct this inequity so that these types of families can obtain the same benefits that other families enjoy, without offending those who oppose extending "marriage" to same-sex couples.

Despite this lack of legal recognition, same-sex partnerships currently coexist with marriages in the U.S. The U.S. notion of family was once centered around a two-person union based on procreation and the traditional nuclear family.[176] DOMA represents this model well. However, as social values have changed, the idea of family should also change and be based on interdependence and responsibility. The proponents of the PPIA recognize the changing family model. Couples who have entered into "partnerships" have already assumed the obligations and responsibilities of a family. Therefore, they should be afforded the rights and benefits that go along with these obligations and responsibilities. It is recognized that the separation of persons in a committed relationship is cruel.[177] The federal government's resistance in validating these relationships is equally as cruel.

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173 Michael S. Wald, *Same-Sex Couples: Marriage, Families, and Children: An Analysis of Proposition 22 – The "Knight" Initiative*, Partners Task Force for Gay & Lesbian Couples (Dec. 1999), *at* http://www.buddybuddy.com/wald-1.html (last visited Feb. 28, 2002).

174 *Id.*

175 Ettelbrick, *supra* note 161, at 152.

176 *Id.* at 155.

177 Duenas, *supra* note 44, at 815.

IV. Potential Effects of Federal Recognition

To understand the opposition to the introduction of "partnerships" into federal law, the public policy arguments against same-sex partnerships should be outlined. There are three main arguments that have been raised against "partnerships," which are substantially similar to the arguments that have been raised against same-sex marriages and civil unions. Those policy arguments are: the procreation argument, the fear of validation argument, and the slippery slope argument.[178]

A. Procreation Argument

The procreation argument stands for the proposition that the only morally acceptable sexual relations are those aimed at procreation.[179] In opposition to the PPIA, Congressman Steve Largent[180] has focused upon the extension of benefits to non-traditional couples. He stated: "Common sense and science tell us that the best way to propagate a society is through the traditional family, not through people living together."[181] Congressman Bob Barr,[182] has joined Congressman Largent's opposition, stating that "[s]pousal benefits have always been intended for spouses, not homosexual partnerships."[183] Congressman Barr has also argued that the enactment of the PPIA would facilitate fraud and would deny married couples immigration privileges.[184] The opponents of the PPIA believe that since same-sex couples cannot procreate, they are not families, therefore they should not be able to have the same rights as married couples.[185] These opponents show no regard for any other form of family that may exist. The only type of family they find acceptable is the kind described by DOMA.

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178 Johnson, *supra* note 9, at 1631.

179 Wald, *supra* note 173.

180 *Vacancies and Successors - 107th Congress, 2nd Session*, Members and Committees, Office of the Clerk, U.S. House of Representatives, *at* http://clerkweb.house.gov/mbrcmtee/vacantoffice/index.htm (last modified Feb. 27, 2002) (providing February 15, 2002 as the resignation date of Rep. Largent, U.S. Representative of the First District of Oklahoma). Rep. Largent resigned due to his desire to run for governor. *Representative (R-OK) Steve Largent*, Opensecrets.org, The Center for Responsive Politics, *at* http://www.opensecrets.org/politicians/summary.asp?cid=no0005597&cycle=2002 (last visited March 1, 2002).

181 Ryan, *supra* note 12, at 804.

182 *About Bob Barr*, Congressman Bob Barr, Georgia's 7th Congressional District, GOP.gov, *at* http://hillsource.house.gov/barr/document.asp?doc=bio (last visited March 1, 2002). Rep. Barr serves as Georgia's Seventh District Congressional Representative. *Id.*

183 Ryan, *supra* note 12, at 804.

184 *Id.*

185 Wald *supra* note 173.

Supporters of the procreation argument believe that opportunities and benefits should never be provided to same-sex couples because homosexuality is morally wrong.[186] Peter LaBarbera, commenting on a "former" gay male's marriage to a woman, stated:

> [The couple] walked down the aisle and were united before God in true marriage, . . . follow[ing] in the tradition of millions of couples before them. Homosexual so-called "marriages," . . . are a perversion of the real thing. Romantic love was never intended to be between members of the same sex — a truth that politics and propaganda cannot alter.[187]

However, according to the First Amendment of the U.S. Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[188] Separation of church and state is fundamental to the Constitution. The civil, legal recognition of partnerships should be separate from religious definitions of "morality" and "marriage."

Certain acts may be legally permissible even though they are considered morally wrong by certain religions.[189] For example, there are religious moral arguments against divorce.[190] However, the federal government has found that while religious moral arguments exist against divorce, it still is legally permitted.[191] Thus, the PPIA should not be considered or reviewed under moral arguments based on religion.

The procreation argument also assumes that homosexuals cannot maintain loving and committed relationships.[192] This as-

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186 Kogan, *supra* note 2, at 1040.

> At the same time, the Moralistic Position distorts the truth about gay and lesbian people by demonizing and dehumanizing virtually every aspect of their lives. Gays and lesbians are portrayed as dangerous, unstable, promiscuous, disease-spreading socio-paths, unable to sustain lasting meaningful relationships and therefore unworthy of marriage rights. A clear example is, again, set forth in the work of Lynn Wardle. In an effort to portray gay and lesbian people as psychologically flawed, Wardle attributes a root cause of homosexuality in modern society to the rise in divorce rates and general decline in our society's respect for marriage.

Id. *See also* Press Release, Americans for Truth Pressroom, Something Truly To Be "Proud" of: Former Homosexual Jim Hanes Takes a Bride (June 23, 1999), *at* http://www.americansfortruth.com/Marriage.html (last visited Jan. 25, 2002) [hereinafter Americans for Truth Pressroom].

187 Americans for Truth Pressroom, *supra* note 186.

188 U.S. CONST. amend. I. The entire amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

189 Wald, *supra* note 173.

190 *Id.*

191 *Id.*

192 *Id.*

sumption is based on the premise that long-lasting, committed relationships revolve around having and raising children.[193] According to procreation argument advocates, same-sex couples are so dissimilar from heterosexual couples that standard family policies should not apply.[194]

Research on the relationships of same-sex couples proves otherwise.[195] There have been three studies surveying relationships in gay and lesbian communities.[196] In these studies, many same-sex couples indicated that they had made long-term (i.e. more than ten years) commitments to their relationship.[197] The studies therefore concluded that the same-sex couples resembled the heterosexual, cohabitating couples that had also participated in the study.[198]

However, these conclusions were based on surveys. There have not been studies of stability based on randomly selected same-sex couples over a period of time.[199] There has, however, been a large, non-random study on same-sex couples.[200] This study examined relationships in America, including 3,500 gay and lesbian couples and 650 heterosexual cohabitating couples.[201] This study found that most of the cohabitating couples lived together for an average of less than four years, while married couples were together for almost ten years.[202] However, the average length of part-

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> Even if you concede that gay men - being men - are, in the aggregate, less likely to live up to the standards of monogamy and commitment that marriage demands, this still suggests a further question: Are they less likely than, say, an insane person? A straight man with multiple divorces behind him? A murderer on death row? A president of the United States? The truth is, these judgments simply cannot be fairly made against a whole group of people. We do not look at, say the higher divorce and illegitimacy rates among African Americans and conclude that they should have the right to marry taken away from them. In fact, we conclude the opposite: It's precisely because of the high divorce and illegitimacy rates that the institution of marriage is so critical for black America. So why is that argument not applied to homosexuals?

Kogan, *supra* note 2, at 1041 (citation omitted).

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at 24 n.39 (citing Janet Lever, *Lesbian Sex Survey*, ADVOC., August 22, 1995, at 29; Janet Lever, *The 1994 Advocate Survey of Sexuality and Relationships: The Men*, ADVOC., August 23, 1994, at 23; Bryant & Demian, *Partners National Survey of Lesbian and Gay Couples*, 1 J. GAY AND LESBIAN SOC. SERV. 101, 101-17 (1994); Larry D. Hatfield, *New Poll: How U.S. Views Gays*, SAN FRANCISCO EXAMINER, June 6, 1989, at A-19).

197 Wald, *supra* note 173.

198 *Id.*

199 *Id.* at 34.

200 *Id.* at 34 n.42 (citing PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 324 (1983)).

201 Wald, *supra* note 173.

202 *Id.*

nerships for both same-sex couples and heterosexual couples was the same.[203]

It should be noted that this study was conducted in the 1970's,[204] whereas the surveys were done almost twenty years afterwards.[205] A more recent survey on randomly selected same-sex couples may resolve the differences between the results of these two studies on same-sex couples.

B. Fear of Validation Argument

The fear of validation argument stands for the proposition that if same-sex marriages, unions, or partnerships are recognized, the basic fabric of society will dissolve because the traditional notion of marriage is the cornerstone of society.[206] "Allowing same-sex couples to marry will undermine the institution of marriage as a whole, since people will lose respect for it and for the law."[207] The argument assumes that once same-sex relationships are legally recognized, polygamous or incestuous unions will be next.[208]

> In debates about the family, there is a long history of strong resistance to any change. Change can be quite threatening; this is especially the case when the change is related to sexual identity. It is natural, and easy, for opponents of change to argue that society should stick to "tradition." Since significant changes usually cannot be tried as an experiment, proponents of change cannot prove that it will not cause the predicted harm.[209]

The fear of validation argument is not new. Similar predictions of the fall of society were made in challenges against the marriage of white men and African American women in the case of *Loving v. Virginia*.[210] In *Loving*, the Supreme Court analyzed and

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203 *Id.*

204 Kogan, *supra* note 2, at 1040.

> Today's marriage law is utterly uninterested in character. There are no legal requirements that a married couple learn from each other, grow together spiritually, or even live together. A random woman can marry a multimillionaire on a Fox TV special and the law will accord that marriage no less validity than a lifelong commitment between Billy Graham and his wife. The courts have upheld an absolutely unrestricted right to marry for deadbeat dads, men with countless divorces behind them, prisoners on death row, even the insane.

Id. (internal citations omitted).

205 Wald, *supra* note 173.

206 *Id.*

207 *Id.* at 6.

208 Kogan, *supra* note 2, at 1039. "Because history and definition alone cannot do the trick, the second and more insidious strategy employed by the Moralistic Position to justify denying marriage rights to same-sex couples is a strategy of overstatement and distortion." *Id.*

209 Wald, *supra* note 173.

210 388 U.S. 1 (1967).

rejected this type of fear-based argument that was raised in support of anti-miscegenation statutes. Supporters of those racially driven statutes claimed that society would dissolve with the advent of interracial marriage.[211] The Court found that race-based restrictions are illegal and that the fears that promoted such restrictions are without merit.[212]

The *Loving* decision clearly set a precedent against racial classification. However, for the proponents of same-sex partnership rights, it is difficult to see how *Loving* can promote the same-sex partnership argument, as the gender analogy does not easily translate.[213] While the utility may be lost for a legal argument, *Loving* is a classic example of the existence of fear-based arguments.[214]

Today, there is much less debate over whether an interracial couple should be permitted to enter into a committed relationship. However, *Loving* was decided less than forty years ago. For same-sex couples, *Loving* is an inspiration in their quest for equal treatment. It is an example of how compassion and equity can overcome baseless fear and arbitrary discrimination.

C. Slippery Slope Argument

While both the procreation and the fear of validation arguments seem more designed to play on emotion rather than on reasoned discussion, the slippery slope argument focuses on the potential legal and economic impacts of the introduction of the partnership model.[215] The application, scope, and precedential value of the PPIA are points of concern.

The slippery slope argument questions the precedential value of the introduction of partnership benefits.[216] The inherent danger is that federal recognition will affect all realms of our society, such as Social Security, tax, bankruptcy, and insurance benefits.[217] Michael Greve of the American Enterprise Institute shares this concern and has stated: "Could these people stroll in and say, 'you've

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211 Wald, *supra* note 173.

212 Kelly, *supra* note 79, at 241.

213 *Id.* at 243-44.

214 *See generally* Eischen, *supra* note 166, at 543-46 (reviewing equal protection arguments relating to recent cases involving domestic partnership laws).

215 David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 633 (2001) ("There will be serious consequences if America legalizes same-sex 'marriage' or civil unions. In the short run, we are likely to see enormous legal and political turmoil nationwide.").

216 Coolidge, *supra* note 215, at 638 ("Whatever happens, two outcomes seem likely: there will eventually be litigation in other states based on Vermont's civil union law, and if another state recognizes a Vermont civil union, all of the Vermont law's effects may potentially carry over to the other state.").

217 Hall, *supra* note 18.

already recognized this in granting us immigration status. You cannot now turn around and say it doesn't count for, let's say, federal Medicare?'"[218] Unintended benefits are the main concern because of their potential ability to "create an upheaval in current federal and state law."[219] This slippery slope argument against partnerships does not focus on whether the partnership is "fair" or "morally correct." Instead, it addresses the issue from a purely logistical vantage point. The size and scope of government is at the root of the homosexual marriage, union, and partnership controversy.[220] As Greve stated:

> If we lived in a society where people go about their contracts and that's the end of it, and weren't constantly hanging on the state, that would be one thing. What makes it hard is that just about everything people do is subsidized, or in one way or another shaped by the government.[221]

If the PPIA is enacted, its definition of "partnerships" would remain a definition for immigration purposes. Should it? While partnerships will stand parallel to marriages, "[n]o parallel structure to marriage law could possibly duplicate the more than 1,040 Federal laws . . . which apply to anyone with a marriage license. To try to do so would be a legal, financial and logistical nightmare."[222] Any possible expansion of partnership benefits would be a slow process either through the courts or the legislature, the appropriate forums for the discussion of the extension of any kind of benefit.

Moreover, the argument that benefits on same-sex couples may have an impact on another administrative agency or on other benefits conferred is one that can be made of any new legislation. Unforeseen consequences do arise. However, it is within the realm of the administrative agencies, the courts, and the legislature to decide whether to accept the extension of domestic partnership rights. Partnership benefits for immigration should not be prevented merely because providing them may be an argument for providing other partnership benefits in the future.

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218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

222 Bryant, *supra* note 196.

V. CONCLUSION

Partnership recognition under the Permanent Partners Immigration Act has a great emotional as well as practical meaning. This Note has sought to provide a general understanding of the issues that may arise with the recognition of "partnerships," and it has sought to create more understanding of and sensitivity towards Americans who are denied the right to be with the persons of their choice.

Although there are other opportunities available for foreign partners to gain immigrant status independently, the legal benefit denied to the partner of a U.S. citizen is an inequity that should be corrected. There is no reason to believe that partnerships will function differently from marriages in terms of commitment and stability, or that the recognition of partnerships will have negative effects on society in general. However, if the PPIA is not passed, the non-recognition of same-sex partnerships will continue to undermine the policy of family unification by keeping committed, loving families apart.

Ultimately, acceptance of the PPIA and the partnership model hinges on the legal recognition of same-sex relationships. Since this decision will have a great impact on our society, it should be made by the people through the legislature.