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## Asians, Gay Marriage, and Immigration: Family Unification at a Crossroads

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# ASIANS, GAY MARRIAGE, AND IMMIGRATION: FAMILY UNIFICATION AT A CROSSROADS

Victor C. Romero\*

## I. INTRODUCTION: ASIANS, GAYS, AND FAMILY UNIFICATION

Family unification has long been a significant component of U.S. immigration policy,<sup>1</sup> and the Asian Pacific American (APA) community has long been a champion of laws that strengthen America's commitment to this goal.<sup>2</sup> The recent emergence of same-gender marriages among state and local governments has caused society to consider more closely its definition of the family, challenging the traditional notion that only civil unions between heterosexuals should be celebrated. But because U.S. immigration law does not include a gay or lesbian partner within its statutory definition of "spouse,"<sup>3</sup> binational same-gender couples may not legally remain in the country together, even if they have been married under favorable domestic or foreign law.

Aside from burdening close to 36,000 binational same-gender couples in the nation today,<sup>4</sup> restrictive U.S. immigration policies pose a particular

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\* Professor of Law, Penn State University. E-mail: vcr1@psu.edu. I thank Maria Pabon-Lopez and the journal staff for their invitation to publish this essay, which is part of a larger project on coalition building and social justice; Stephanie Farrior and workshop participants at the Second National People of Color Legal Scholarship Conference held at the GWU Law School in October 2004 and at a faculty colloquium at the UNLV Boyd School of Law in January 2005 for their comments and advice; Kristi Johnson for her excellent research assistance; and, most importantly, my family in the Philippines, my wife, Corie, and my children, Ryan and Julia, for their constant love and support. All errors that remain are mine.

1. The current family-preference categories enshrined in the Immigration and Nationality Act (INA) have been a fixture of immigration law since at least the passage of the McCarran-Walter Act of 1952. *See* Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 1952 (codified as amended at 8 U.S.C. §§ 1101-1537 (2000)).

2. *See, e.g.*, U.C. Berkeley Center for Labor Research and Education - Institute of Industrial Relations, *Advancing an Asian Agenda for Immigration Reform: Conference Summary and Recommendations*, Foreword (2002), at <http://laborcenter.berkeley.edu/immigrantworkers/asianagenda.pdf> (last visited Aug. 5, 2004) (noting that although family reunification is one of the "most critical issues" for the Asian community, it has not been a national priority).

3. *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982) (limiting the definition of "spouse" to those involved in a heterosexual marriage only). Moreover, the Defense of Marriage Act of 1996 deprives same-gender partners from receiving federal benefits. *Defense of Marriage Act of 1996*, 1 U.S.C. § 7 (1996).

4. E-mail from Adam Francoeur, Staff Member, Immigration Equality, to Victor C. Romero, Professor of Law, Penn State-Dickinson School of Law (June 18, 2004, 12:39 PM EDT) (on file with author) (reporting 35,820 binational same-gender couples in the U.S. today, based on preliminary findings of Urban Institute study of 2000 Census data) [hereinafter Francoeur E-mail].

dilemma to APAs who otherwise advocate family unity, yet embrace more traditional notions of the family. This is because traditional conceptions of marriage and the family may wreak havoc on the approximately 16,000 binational couples in which the foreign partner is Asian.<sup>5</sup> APAs who clamor for family-friendly immigration policies but temper their advocacy with tradition create a risk of deportation for thousands of gay and lesbian Asian immigrants with whom they should seek to build coalitions. Advocating a traditional view of family unity thus endangers the immigration status of thousands of Asian gays and lesbians, undermining claims to family unification the APA community has long valued.

## II. FAMILY UNIFICATION AS AN APA VALUE

### *A. Nisbett's Research Supports Common Belief that APAs Value Family in Ways Different from European Americans*

In his book *Geography of Thought*, social psychologist Richard Nisbett argues that, contrary to conventional wisdom, Westerners and East Asians differ in the way they view the world.<sup>6</sup> Although he is careful to point out that Asian Americans pose a peculiar problem, Nisbett supports his hypotheses about the differences between ancient Greek (Western) and Chinese (Asian) modes of thinking with numerous examples of experiments conducted on modern persons.

In one study by social psychologists Sheena Iyengar and Mark Lepper, for example, children were asked to work on anagrams, such as "What word can you make from GREIT?" Some children were told that they must work on a particular set of anagrams, others were given a choice, and still others were told that their mothers had selected a set for them to work on. The American children were most motivated when they were allowed to choose the set themselves, and least motivated when they were told their mothers had chosen the set for them. In contrast, the Japanese and Chinese children were most motivated when told that their mother had chosen the set, indicating the value they placed on the family relationship over the individualism valued by the American children.<sup>7</sup> The study concludes that because Westerners have long valued individualism while Easterners have long valued family, Easterners are less open to claims of individual rights than their Western counterparts.

Gay and lesbian activism is therefore less likely to be prevalent in Eastern than in Western societies because gay individuals are less likely to be understood or supported by Eastern families who might view "coming out" as

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5. *Id.* (reporting the following breakdown by national origin of Asian partner: Philippines – 2,009; China – 1,295; India – 1,225; Japan – 984; Vietnam – 809; and Thailand – 765; another 9,062 are from other Asian countries).

6. See generally RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT* (2003).

7. *Id.* at 58-59.

disruptive of family peace. While there are certainly many conservative Western families that might also suppress individual expression, European Americans are more likely to understand the source of their kin's individualism even if they might not appreciate this particular manifestation of it. Put differently, the typical modern Westerner subscribes to a variant of John Stuart Mill's "harm principle"<sup>8</sup>—that an individual is free to do as she pleases as long as she does no harm to anyone else. Asians, according to Nisbett, do not begin with the same premise. Instead, they seek harmony in human interaction, just as they seek harmony between humans and nature. The individual is therefore subordinate to the family, and unlike in Western culture, will not seek to please herself first, but will rather seek to understand and fulfill her role within the existing social structure.<sup>9</sup>

The Nisbett paradigm of East-West differences reflects the lived experiences of many APAs. APA Presbyterian minister Cal Chin, though sympathetic to the gay rights movement, explains the opposition of many in the Chinese American community thusly: "I wouldn't use 'conservative' to describe Chinese American views . . . I would say that Chinese Americans are more corporate in their thinking; they think about how an individual and an individual's actions impact the community. You can't act in isolation."<sup>10</sup> Chin notes that Chinese Americans "tend to place family and community over individual preferences and lifestyle."<sup>11</sup> This emphasis on family and community has led some APA community leaders to draw distinctions between minority statuses, distinguishing between being Asian (and thus part of the family) and being gay (and therefore not). The Reverend Raymond Kwong, who like Chin, is a minister of APA descent, explains: "We are sympathetic to true minorities. Gays and lesbians are not a genuine minority. The Supreme Court laid down qualifications of a minority and one is immutable characteristic – skin color. Have you ever met an ex-Asian? However, there are thousands of ex-gays."<sup>12</sup>

This tension among APAs over individual rights versus family cultural traditions was recently tested when *Details* magazine's April 2004 edition carried a photo-spread entitled "Gay or Asian?" in which the author, Whitney McNally, enumerated perceived similarities between gays and Asian males,

8. See generally John Stuart Mill, *On Liberty*, in 43 GREAT BOOKS OF THE WESTERN WORLD 312 (Robert Maynard Hutchins ed., 1952) (stating "that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subject to either social or legal punishment, if society is of the opinion that one or the other is requisite for its protection").

9. NISBETT, *supra* note 6, at 53 ("When describing themselves, Asians make reference to social roles ('I am Joan's friend') to a much greater extent than Americans do.").

10. Julie D. Soo, *We Asked, They Told: Chinese Americans Unsettled on Same-Sex Marriage*, ASIAN WEEK, May 21, 2004, available at [http://news.asianweek.com/news/view\\_article.html?article\\_id=b0b5a28f6cabaea5fc76d4584301d61e](http://news.asianweek.com/news/view_article.html?article_id=b0b5a28f6cabaea5fc76d4584301d61e) (last visited Feb. 9, 2004).

11. *Id.*

12. *Id.*

based on crude stereotypes. It reads, for instance: "Ladyboy Fingers: Soft and long. Perfect for both waxing on and off, plucking the koto, or gripping the Kendo stick."<sup>13</sup> How would Reverend Kwong and his ilk have responded to this piece? Would they have been inclined to claim that it discriminated against Asians but not gays, thereby protecting the Asian "family" and its male members from slanderous comparisons to "sexual deviants"? Claiming discrimination against Asians but not gays would be a difficult trick, especially considering the large number of Asian males that are gay. Some communities even have their own gay APA associations. The Gay Asian and Pacific Islander Men of New York issued a nuanced response that carefully identified the nature and extent of the offense: "[The *Details* piece] 'was an absurd and tasteless play on worn out stereotypes of both the LGBT'<sup>14</sup> community and East Asian cultures. It demeaned all gay men as sexaholics, Asians as exotic chattels from far off lands, and Asian men as passive and effeminate."<sup>15</sup>

Gay rights issues become particularly difficult for APAs within the context of immigration law. While APAs have historically supported legislation that unites and keeps families together, that advocacy has been limited to traditional depictions of the family. The argument goes something like this: If Europeans are able to immigrate fairly quickly so they can be with their stateside families, so should Asians, because Asians value families just as much as Europeans do. Asians are not asking for special consideration for non-traditional families; they simply want what Europeans already enjoy—routine, predictable, and timely family-based immigration.

Such an approach is safe and may be politically expedient, but it contains within it a contradiction—it assumes that the only binational families that exist are heterosexual ones. A forthcoming Urban Institute study reveals that this is not true. Preliminary data culled from the 2000 Census reveals that not only are there at least 35,820 binational same-gender couples present in the United States, but in forty-five percent of the cases, the foreign partner is Asian.<sup>16</sup> This means that by limiting their immigration law reform advocacy to traditional, heterosexual marriages and families, APAs put at risk approximately 16,000 Asian nationals because their U.S.-citizen partners are not permitted to petition for them to remain in the country as their "spouse."<sup>17</sup>

Thus, two problems arise out of excluding gay and lesbian APAs from the discussion and advocacy. First, not including gay and lesbian APAs undercuts the family unification argument. If families are formed by gays and

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13. Whitney McNally, *Gay or Asian?*, DETAILS, April 2004, at 52, available at <http://www.asianmediawatchdog.com/detail/detailpic.html> (last visited on Dec. 27, 2004).

14. "LGBT" stands for Lesbian, Gay, Bisexual and Transgender.

15. Phil Tajitsu Nash, *Washington Journal: Gays: The New 'Heathen Chinese,'* ASIAN WEEK, Apr. 9, 2004, available at [http://news.asianweek.com/news/view\\_article.html?article\\_id=6fe0596a85a6a9f9fe0e3fa647418753](http://news.asianweek.com/news/view_article.html?article_id=6fe0596a85a6a9f9fe0e3fa647418753). (last visited Jan. 27, 2004).

16. Francoeur E-mail, *supra* note 4.

17. See *supra* note 3 and accompanying text.

lesbians whether *de jure* or *de facto*, then they deserve to receive the same family-reunification benefits afforded straight European and Asian families. Moreover, to draw the line at “Asians” neglects the reality that a large number of Asian noncitizens living in this country are gay. Second, such a limited perspective is particularly short-sighted when viewed through the lens of U.S. immigration history, whose foundations can be traced to the anti-Chinese movement of the late nineteenth century.

### *B. The Anti-Asian Legacy of Immigration Law*

Immigration law governs when noncitizens of the United States are permitted to enter and required to leave the country. While the first hundred years of our nation’s history saw immigration virtually unregulated by the federal government,<sup>18</sup> events of the mid to late nineteenth century saw the United States tighten its borders, following what was perceived to be the arrival of large numbers of Chinese laborers, particularly on the economically-depressed West Coast.<sup>19</sup> Growing anxiety among policymakers culminated in the adoption of the Chinese Exclusion Act of 1882,<sup>20</sup> the most significant restriction on immigration since the nation’s founding.<sup>21</sup> The Act not only suspended further immigration of Chinese nationals, but it also required those in the United States to procure re-entry certificates before leaving the country, and authorized the deportation of Chinese individuals who violated the Act.<sup>22</sup>

The severity of the Act prompted litigation, leading to the U.S. Supreme Court’s landmark opinions in two immigration law cases: *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.<sup>23</sup> In *Chae Chan Ping*, the Court held that Congress has exclusive authority over immigration law and can therefore decide to prevent a returning Chinese laborer from re-entering the country.<sup>24</sup> Petitioner Chae Chan Ping had procured the requisite re-entry certificates prior to leaving the United States to visit China. Between then and when he returned, however, Congress decided to revoke all certificates, including Chae Chan Ping’s. For the Court to curb Congress’s power would

18. *E.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19 (1996) (During the first century of the Republic, “[r]egulation of transborder movement of persons existed, primarily at the state level but also supplemented by federal legislation.”).

19. *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995).

20. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

21. *E.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 13 (2002) (describing the Chinese Exclusion laws as “the first significant federal immigration legislation enacted since the adoption of the Constitution”).

22. *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

23. *See generally* Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting*, in IMMIGRATION STORIES (Peter H. Schuck & David A. Martin, eds. forthcoming 2005).

24. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

have been tantamount to restricting the federal government's autonomy; Congress's decision was therefore "conclusive upon the judiciary."<sup>25</sup> A product of the larger racism that was infecting the country at the time,<sup>26</sup> Justice Field's opinion upholding Congress's policies is laced with anti-Chinese rhetoric, describing their presence in the country as "an Oriental invasion"<sup>27</sup> and characterizing the immigrants as "foreigners of a different race . . . who will not assimilate with us."<sup>28</sup> Bob Chang argues that this rhetoric contributes to the perception of APAs as "perpetual internal foreigners,"<sup>29</sup> those that the law allows into the country but marks as different from the norm.

The Court extended Congress's plenary power over excluding noncitizens to deporting them in *Fong Yue Ting v. United States*. Aside from holding that Fong Yue Ting and his two copetitioners could be deported for failing to comply with the Act, the Court specifically endorsed a provision requiring applicants for residence certificates to produce "a credible white witness" who could vouch for the Chinese.<sup>30</sup> Even if one were to assume that the Chinese at the time were notoriously untrustworthy so as to justify a general rule requiring a "credible witness," Congress should have drafted the provision to make credibility, and not race, the sticking point. While such an overtly racist law finds little resonance today due to its over- and under-inclusiveness,<sup>31</sup> one can still find contemporary examples of race being used as a proxy for disloyalty and distrust, especially in the targeting of the Arab and Muslim communities after 9/11.<sup>32</sup>

In sum, *Chae Chan Ping* and *Fong Yue Ting* teach that the APA community should think carefully about the policy positions it chooses to

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25. *Id.* at 606.

26. See generally BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (2004) (Mapping Racism Series); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A 'Magic Mirror' Into the Heart of Darkness*, 73 *IND. L.J.* 1111 (1998); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. REV.* 1 (1998); ANGELO H. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* (1998).

27. *Chae Chan Ping*, 130 U.S. at 595.

28. *Id.* at 606.

29. ROBERT S. CHANG, *DISORIENTED* 38 (1999).

30. *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (1893) (upholding "white witness" provision).

31. See Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 *CAL. L. REV.* 341, 348-53 (1949) (defining over- and under-inclusiveness in equal protection analysis of government action).

32. See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Muslims and Arabs*, 58 *N.Y.U. ANN. SURV. AM. L.* 295 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 *CONN. L. REV.* 1185 (2002); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 *DEPAUL L. REV.* 871 (2003).

advocate in the immigration debate. Arguing for family unity for one group while forgetting the needs of another neglects the anti-Chinese legacy of our immigration law, and perhaps inadvertently, replaces one stereotype—the historically “unassimilable Asian”—with another—the currently “unassimilable gay or lesbian.” As Phil Tajitsu Nash correctly notes:

LGBT people should have the same rights as the rest of us to share the government-sanctioned rights and responsibilities of marriage, as well as all of the other guarantees of life, liberty and the pursuit of happiness. And, based on our community’s history, we APAs should be among their strongest supporters.<sup>33</sup>

Like the Chinese before them, gays and lesbians suffer discrimination under our immigration law. In order to fully understand the ramifications of a pro-family reunification agenda that includes advocating for binational same-gender partners, it is important to review briefly the status of gays and lesbians within our immigration law, past and present.<sup>34</sup>

### C. *The Anti-Gay Reality of Immigration Law*

As mentioned earlier, same-gender partners are not considered “spouses” under federal law, generally, and immigration law, in particular. There have been, however, other cases in which gay men have been the subject of discrimination under U.S. immigration law. Two in particular stand out: *Rosenberg v. Fleuti*<sup>35</sup> and *Boutilier v. INS*.<sup>36</sup> In both, the Immigration and Naturalization Service (INS)<sup>37</sup> sought to deport admitted gay men George Fleuti and Michael Boutilier because they suffered from a “psychopathic personality,” which the INS contended included homosexuality.<sup>38</sup> Neither Fleuti nor Boutilier were evaluated to be “psychopathic,” although both admitted to being gay.

33. Nash, *supra* note 15.

34. See generally JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN & LESBIANS V. THE SUPREME COURT* (2001) (providing journalists’ accounts of the human face of the gay rights movement, including interviews with immigration litigants before the Court). On gay rights and the law generally, see WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

35. 374 U.S. 449 (1963).

36. 387 U.S. 118 (1967).

37. Since March 1, 2003, the enforcement functions of the INS have been transferred to U.S. Immigration and Customs Enforcement (ICE). Dept. of Homeland Security, Immigration & Borders, at [http://www.dhs.gov/dhspublic/theme\\_home4.jsp](http://www.dhs.gov/dhspublic/theme_home4.jsp) (last visited on Feb. 9, 2005).

38. For a detailed account of the personal stories of Fleuti and Boutilier, see MURDOCH & PRICE, *supra* note 34, at 89-134.

In *Fleuti*, the Court did not reach the underlying issue, relying instead on a technicality. The INS's theory was that because Fleuti had left the United States for a day trip to Ensenada, Mexico, in August 1956, he was mistakenly allowed to re-enter despite his "psychopathic personality." The Court did not decide whether homosexuality was a psychopathic disorder under the immigration code; instead, it ruled that Fleuti's Mexican trip was both brief and innocent, and that therefore he could not be deported unless the INS could show otherwise.<sup>39</sup>

While a victory for Fleuti, the Court's decision to dodge the substantive issue came back to haunt another gay man four years later. In *Boutilier v. INS*, the Court ruled that the deportation provision regarding "psychopathic personality" was broad enough to include "homosexuality" and that it gave adequate notice to Boutilier that he might be deported for engaging in sex with persons of the same gender.<sup>40</sup> Ironically, the deportable Boutilier had more substantial connections with the United States than did Fleuti, whom the Court allowed to remain: Boutilier had resided in the United States many years longer than Fleuti, had lived with family in New York, and had enjoyed a seven-year relationship with an American man.<sup>41</sup>

Although homosexuality is no longer viewed as a "psychopathic personality," and indeed, individuals who are persecuted on the basis of their homosexual status may come to the United States as refugees,<sup>42</sup> foreign gay and lesbian partners of U.S. citizens may not immigrate as family members. That means that Michael Boutilier, even if he had not been deported, would still have had to find some way to remain here permanently<sup>43</sup> (through his employer, for instance) other than through his long-term relationship with his U.S. citizen partner.

Asians no longer have to worry about being excluded from immigrating because of their race, nor are they barred under state laws from marrying outside their race.<sup>44</sup> In contrast, foreign same-gender partners of U.S. citizens still face the prospect of deportation because the federal government and its immigration laws do not recognize same-gender marriages.<sup>45</sup> In May of 2004,

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39. *Fleuti*, 374 U.S. at 462-63.

40. *Boutilier*, 387 U.S. at 118-19.

41. MURDOCH & PRICE, *supra* note 34, at 103.

42. See *Matter of Toboso-Alfonso*, 20 IMMIGR. & NAT'LITY DECISIONS 819 (Att'y Gen. June 12, 1994).

43. Apparently, American consulates abroad are permitted to allow non-marital partners (gay or straight) the ability to visit the U.S. as tourists when their partners apply for temporary work visas. See Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 493 (2002). While a welcome development, this does not entitle a gay couple to reside in the United States *permanently*.

44. See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking Virginia anti-miscegenation law as unconstitutional promulgation of white supremacy).

45. See, e.g., Victor C. Romero, *The Selective Deportation of Same-Gender Partners: In Search of the "Rara Avis"*, 56 U. MIAMI L. REV. 537 (2002).

many gay and lesbian couples flocked to Massachusetts courts to marry, celebrating that state's monumental move to become the first in the nation to recognize same-gender marriages.<sup>46</sup> At least one couple was left to watch from the sidelines: American Austin Naughton and his partner of five years, a Spanish national here on a non-immigrant visa, decided not to wed that day. As Naughton put it, "If we marry, he could be deported."<sup>47</sup> Naughton's unnamed Spanish partner could just as well have been Asian. As two recent studies show, there is much to be learned about the Asian gay and lesbian community that should be considered in formulating an immigration platform that is pro-family, pro-Asian, and pro-gay rights.

### III. RECENT EMPIRICAL RESEARCH ON APA AND ASIAN IMMIGRANT GAYS AND LESBIANS

#### A. *The 2004 Asian American Federation of New York's Report on Asian Pacific American Same-Gender Households in New York, San Francisco, and Los Angeles*

In a path-breaking report on three of the largest Asian gay communities in the United States, the Asian American Federation of New York utilized year 2000 Census data to study same-gender households in New York City, San Francisco, and Los Angeles.<sup>48</sup> The study reveals that a great majority of gay and lesbian partners were immigrants,<sup>49</sup> most of whom entered the United States in 1980 or later—81% in New York City, 73% in San Francisco, and 83% in Los Angeles—far higher than their non-Asian counterparts, the great majority of whom were U.S. citizens by birth.<sup>50</sup> Interestingly, most of the Asian respondents were U.S. citizens either by birth or naturalization—57% in New York City, 70% in San Francisco, and 72% in Los Angeles—although this was lower than comparable data for non-Asians.<sup>51</sup> Nonetheless, significant numbers of Asian gays and lesbians reported noncitizenship, close to a third on average—42% in New York, 29% in San Francisco, and 28% in Los Angeles.

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46. Elizabeth Mehren, *Massachusetts Begins Allowing Gays to Wed*, L.A. TIMES, May 17, 2004, at A10.

47. *Id.*

48. Asian American Federation of New York, *Asian Pacific American Same-Sex Households: A Census Report On New York, San Francisco, And Los Angeles* (Mar. 22, 2004), <http://www.aafny.org/cic/report/GLReport.pdf> (last visited Jan. 17, 2005).

49. While one might be foreign-born and still be a citizen at birth if one's parent is a citizen, this study used the foreign-born population to represent the immigrant population. *Id.* at 13 n.9.

50. *Id.* at 13-14.

51. *Id.* at 13.

Because current immigration and nationality law does not recognize same-gender relations, these APA gay and lesbian noncitizens—approximately a third of the population of same-gender APA households surveyed—will need to seek naturalization through a means other than marriage.

*B. The Urban Institute's Forthcoming Report on Binational Same-Gender Couples in the United States*

Preliminary figures out of the Urban Institute's report, commissioned by the group Immigration Equality, also raise concern.<sup>52</sup> Like the tri-city report, these preliminary findings are based on the year 2000 Census. They reveal a substantial number of same-gender binational couples, 16,000, in which the foreign partner is Asian. Indeed, this number may be lower than it actually is because of underreporting and undercounting.<sup>53</sup>

Taking the data from both of these surveys, educated guesses can be made as to the likely impact of current immigration law on Asian gays in binational same-gender partnerships. Assuming a little less than a third of Asian gays and lesbians around the country are noncitizens, and that there are 16,000 such persons currently involved in binational relationships, then a conservative estimate yields about 5,000 Asian gays and lesbians who may not adjust their status based on their current relationships with U.S. citizens. Even assuming that some are in the process of adjusting their papers through their employers or some other legitimate means—and that some may not want to get married—this still leaves a sizeable number of APA members who are without any means to remain legitimately in the United States. Had they been straight, they could marry their partners; being gay, that option is unavailable to them.

Some in the APA community have begun to embrace the fight for gay marriage as their fight. The Gay Asian Pacific Support Network sponsored an "Asian and Allies Rally for Marriage Equality" in August 2004 in Los Angeles.<sup>54</sup> Their website invited supporters to bring along "family, friends, and loved ones as we take a stand for fairness, justice, and equality. Make a statement. Make a difference. Make marriage happen."<sup>55</sup> For the many APA members who are foreign same-gender partners of U.S. citizens, the stakes are even higher since they risk deportation (and if they are abroad, exclusion). A family unification immigration policy for Asians should include unification for those Asians whose choice to create a family involves a partnership with someone of the same gender.

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52. See Francoeur E-mail, *supra* note 4.

53. *Id.*

54. Gay Asian Pacific Support Network, GAPSIN Events: Asians and Allies Rally for Marriage Equality, (on file with author).

55. *Id.*

## IV. CONCLUSION

Asian Pacific Americans have long valued family. They have also long valued tradition, embracing values imported from ancestral lands and cultures. In the context of U.S. immigration policy, APAs have combined these two points to support legislation that promotes family unification. They contend that because family unification has been a mainstay of immigration policy for many years, it should be applied fairly to all immigrants and their families, including Asians, who, because of U.S. Citizenship and Immigration Services (USCIS) backlogs inherited from the INS, have to wait for interminably long periods of time. Because of the recent movement toward greater recognition for same-gender marriages and gay and lesbian families, APAs should consider carefully whether they should continue on the traditional path they have chosen—that is, to argue for the guarantee of equal treatment of traditional immigrant families—or to expand their argument to advocate for the protection of non-traditional, but just as loving and legitimate, same-gender marriages and families. Aside from being a logical extension of the basic APA position on family unity, fighting for the protection of same-gender binational marriages simultaneously benefits the thousands of Asian same-gender partners who risk deportation unless the law is changed. Hopefully, upon further reflection, APAs, the gay and lesbian community, and the gay and lesbian APA community together will support a broader definition of family reunification than that which currently exists under immigration law.

Hiram Kwan, immigration counsel to George Fleuti, the gay man the INS sought to deport in the early 1960s, once admitted that although he originally did not see Fleuti's battle as a struggle for civil rights, "[N]ow, I see it from the bigger picture . . . . He was discriminated against as much as the blacks and the yellows and the Indians and the Jews. . . . I would say the homosexual is the yellow person of today."<sup>56</sup> Kwan's point may be taken one step further: Sometimes the homosexual *is* a yellow person.

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56. MURDOCH & PRICE, *supra* note 34, at 98-99.

