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## A Need for Culture Change: GLBT Latinas/os and Immigration

Berta Esperanza Hernández-Truyol  
*University of Florida Fredric G. Levin College of Law*

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# A Need for Culture Change: GLBT Latinas/os and Immigration

Berta Esperanza Hernández-Truyol\*

## I. INTRODUCTION

In conversations about Latina/o immigration, such as the one that took place at *LLEADS #2: The U.S. Immigration Crises: Enemies at Our Gates or Lady Liberty's Huddled Masses?*, there is one issue that we tend not to address. There exists a Latina/o immigration *cuento normativo* (normative narrative) that obscures and denies an entire group of Latinas/os. This *cuento normativo* is not only insufficiently attentive to, but is downright erasing of GLBT Latinas/os. In this Article, I want to urge participation in a movement for cultural change within the various and varied *comunidades Latinas* (Latina/o communities) to embrace a new, inclusive *cuento normativo* about Latina/o immigration that eschews the erasures and exclusions effected by the existing *cuento normativo*.

The embrace of a new, inclusive narrative is not an easy task, particularly in light of the *cultura Latina's* (Latina/o culture's) rather negative views of, even derision towards, GLBT identities and people. In this work, I will reveal what I hope is compelling information that will take us in the direction of a new *cuento normativo*, and I will do this in three parts. First, I will provide a glance into the condition of life in law and society for GLBT persons around the world, with a special emphasis on the Latina/o experience, which I will contextualize in the culture. Next, I will present the two primary contexts in which the issue of immigration arises for GLBT Latinas/os: bi-national couples and persecutions in their home country. In this part, I will briefly consider the U.S. historical exclusion of GLBT persons in the immigration

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\* Levin, Mable & Levin Professor of Law at the University of Florida Fredric G. Levin College of Law. The author thanks Vivian Gutierrez, Shani King, Rachel Rebouche, Ediberto Roman, Hannibal Travis, and Darren Rosenblum for their comments on earlier drafts. Thanks also to Professor Roman and the other organizers of *LLEADS #2: The U.S. Immigration Crises: Enemies at Our Gates or Lady Liberty's Huddled Masses?* where the paper was first presented, to the editors of the *FIU Law Review* who worked on this piece, and to Karen Kays for magnificent work on all aspects of getting the essay completed.

context and the possibilities presented by the Uniting American Families Act (UAFAs). Finally, I will share some positive trends that are evident in the regional and international contexts that can provide the framework for the creation of our *nuevo cuento normativo*.

## II. GLBT STATUS AROUND THE WORLD

In order to demonstrate why it is of such urgent importance to articulate and develop a *nuevo cuento normativo* that includes the social and legal position of GLBT Latinas/os in the immigration context, this section provides a glimpse into the legal and social status of GLBT persons around the world. It follows with a brief overview of the location of homosexuality and lesbianism in the *comunidad Latina*.

### A. Laws

An overview of GLBT rights worldwide presents a rather depressing and daunting state of affairs. Over eighty countries have so-called “sodomy laws” that penalize male homosexual conduct; half of these nations also have statutes that criminalize lesbianism.<sup>1</sup> Some of these states even have laws that prohibit people from “imitating the

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<sup>1</sup> THE INT’L GAY AND LESBIAN HUMAN RIGHTS COMM’N, EQUAL AND INDIVISIBLE: CRAFTING INCLUSIVE SHADOW REPORTS FOR CEDAW 17 (2009), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/287-1.pdf>. The International Gay and Lesbian Human Rights Commission (IGLHRC) suggests that sexual rights are not “new rights”, but have long been established in international human rights law and are necessary for the enjoyment of “other rights, including the rights to bodily integrity, health and family.” *Id.* at 36. Moreover, the IGLHRC recommends that discriminatory laws affecting lesbians be brought to the attention of the Committee on the Elimination of Discrimination against Women (CEDAW) Committee to review for potential violations of the treaty. *Id.* It is noteworthy that on June 17, 2011, the United Nations Human Rights Council passed the “Human rights, sexual orientation and gender identity” resolution with a vote of 23 in favor, 19 against, and 3 countries abstaining. Julia Zebley, *UN Rights Council Passes First Gay Rights Resolution*, JURIST (June 17, 2011, 10:08 AM), <http://jurist.org/paperchase/2011/06/un-rights-council-passes-first-gay-rights-resolution.php>. This is the first resolution that calls for the end to discrimination based on sexuality. *Id.* There were intense disagreements, mostly drawn along cultural lines, about the propriety of such a measure. *Id.* Although South Africa introduced the resolution, it was the only African country that voted in its favor. *Id.* In fact, African and Middle Eastern states leveled accusations on South Africa that it was becoming westernized. *Id.* Significantly, on December 6, 2011, U.S. Secretary of State Hillary Clinton made a public statement that the U.S. will be utilizing foreign financial assistance, “international diplomacy and political asylum to promote gay rights.” John Paul Putney, *US to Use Foreign Aid, Diplomacy to Advance LGBT Rights Globally*, JURIST (Dec. 8, 2011, 8:34 AM), <http://jurist.org/paperchase/2011/12/us-to-use-foreign-aid-diplomacy-to-advance-lgbt-rights-globally.php>. This public statement followed a presidential executive memorandum that instructed the federal government to analyze ways to challenge the criminalization of sexuality and to utilize sexuality as a consideration in asylum decisions. *Id.* Following these developments, and arguably as a response thereto, Malawi has decided to review its law that prohibits homosexual acts. Michael Haggerson, *Malawi to Review Controversial Anti-homosexuality Law*, JURIST (Dec 8, 2011, 2:49 PM), <http://jurist.org/paperchase/2011/12/malawi-to-review-controversial-anti-homosexuality-law.php>.

appearance of the opposite sex.”<sup>2</sup> Moreover, there are seventy-six countries in the world where homosexual acts are illegal; in five of these nations, homosexual acts are punishable by death.<sup>3</sup>

While none of the Latin American and Caribbean states surveyed impose the death penalty for intimate conduct between persons of the same sex, such acts are illegal in much of the Caribbean.<sup>4</sup> Moreover, while not making same-sex intimate conduct illegal, three countries in Latin America and the Caribbean have an *unequal* age of consent for homosexual and heterosexual acts: the Bahamas, Chile and Paraguay.<sup>5</sup> Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela have an *equal* age of consent for homosexual and heterosexual acts.<sup>6</sup>

On the flip side, forty-nine countries worldwide and some municipalities, including the Latin American states of Colombia, Costa Rica, Mexico, Nicaragua, Venezuela, as well as the City of Rosario in Argentina, and some parts of Brazil, prohibit employment discrimination based on sexual orientation.<sup>7</sup> Of the Latin American locations, only the City of Rosario prohibits discrimination on the basis of gender identity.<sup>8</sup> To be sure, there are nine countries worldwide that have constitutional prohibitions against discrimination based on sexual orientation, including the states of Bolivia, Colombia, Ecuador, and parts of Argentina and Brazil.<sup>9</sup>

Colombia, Nicaragua, and Uruguay are among the seventeen countries around the world that consider the carrying out of hate crimes based on *sexual orientation* an aggravating circumstance.<sup>10</sup> Uruguay is one of only three countries that consider the carrying out of hate crimes based on *gender identity* an aggravating circumstance.<sup>11</sup>

<sup>2</sup> Kuwait’s Penal Code was amended in December 2007 with this provision. *Kuwait: Halt Dress-Code Crackdown: Authorities Should Repeal Repressive Law, Free Detainees*, HUMAN RIGHTS WATCH (Mar. 30, 2008), <http://www.hrw.org/en/news/2008/03/30/kuwait-halt-dress-code-crackdown>.

<sup>3</sup> See DANIEL OTTOSSON, THE INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 9-43 (2010), *available at* [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_homophobia\\_2010.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_homophobia_2010.pdf).

<sup>4</sup> Homosexual acts are illegal in Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & the Grenadines, Trinidad & Tobago. *See id.* at 45.

<sup>5</sup> *See id.* at 46.

<sup>6</sup> *See id.*

<sup>7</sup> *See id.* at 47.

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.* at 48.

<sup>11</sup> *See id.*

Twenty countries prohibit incitement to hatred based on sexual orientation, with Uruguay being the only Latin American state that does so.<sup>12</sup>

Around the world, merely nine countries and various municipalities grant same-sex couples the right to marry.<sup>13</sup> In the United States, only Connecticut, Iowa, Maryland, Massachusetts, New Hampshire, Vermont, Washington State, Washington, D.C., and New York allow same-sex couples to marry.<sup>14</sup> In addition, Delaware, Hawaii, Illinois, New Jersey, and Rhode Island allow civil unions between same-sex

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<sup>12</sup> See *id.* Incitement to hatred generally refers to provoking hatred based upon a particular social status, or distributing hateful materials, delivering public speeches that are inflammatory, or generating inflammatory rumors.

<sup>13</sup> *Id.* at 49; Alexei Barrionuevo, *Argentina Approves Gay Marriage, in a First for Region*, N.Y. TIMES (July 15, 2010), <http://www.nytimes.com/2010/07/16/world/americas/16argentina.html>; Ashley Hileman, *Brazil Court Recognizes Same-Sex Marriage*, JURIST (Oct. 26, 2011, 10:47 AM), <http://jurist.org/paperchase/2011/10/brazil-high-court-recognizes-same-sex-marriage.php> (noting that on Tuesday, October 25, 2011, Brazil's High Court of Justice upheld the same-sex marriage of two women). However, at the other end of the spectrum, on November 29, 2011, the senate in Nigeria criminalized the marriage of couples of the same sex and even criminalized an individual who assists in the marriage of a couple of the same sex. Jamie Reese, *Nigeria Senate Approves Bill Criminalizing Same-Sex Marriage*, JURIST (Nov. 29, 2011, 2:02 PM), <http://jurist.org/paperchase/2011/11/nigeria-senate-approves-bill-criminalizing-same-sex-marriage.php>. One day after the negative Nigerian action, Queensland joined the Australian states of Tasmania, Victoria and the Australian Capital Territory in recognizing unions between persons of the same sex. Max Slater, *Queensland Passes Civil Union Law*, JURIST (Nov. 30, 2011, 11:53 AM), <http://jurist.org/paperchase/2011/11/queensland-passes-civil-unions-law.php>. Also in Australia, the ruling party, the Australian Labor Party, changed its platform to support marriage between persons of the same sex. Dan Taglioli, *Australia Ruling Party Amends Platform to Support Same-Sex Marriage*, JURIST (Dec. 3, 2011, 1:13 PM), <http://jurist.org/paperchase/2011/12/australia-ruling-party-amends-platform-to-support-same-sex-marriage.php>.

<sup>14</sup> *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 14, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>. Washington State joined the other states on Monday February 13, 2012, when Governor Christine Gregoire signed legislation (HB 6239) legalizing marriage between persons of the same sex. *Washington Legalizes Same-Sex Marriage*, JURIST (Feb. 13, 2012, 6:15 PM), <http://jurist.org/paperchase/2012/02/washington-governor-signs-same-sex-marriage-bill.php>. It is also noteworthy that Maryland has become the next state to legalize marriage between persons of the same sex. The House of Delegates and the Senate passed the bill and Governor Martin O'Malley has signed it. See Sarah Breitenbach, *Maryland Gay Marriage: Governor Martin O'Malley Signs Bill Allowing Same-Sex Couples To Wed*, HUFFINGTON POST (Mar. 1, 2012, 5:39 PM), [http://www.huffingtonpost.com/2012/03/01/maryland-gay-marriage-martin-o-malley-signs-bill\\_n\\_1314352.html?ref=email\\_share](http://www.huffingtonpost.com/2012/03/01/maryland-gay-marriage-martin-o-malley-signs-bill_n_1314352.html?ref=email_share); Aaron C. Davis, *Maryland Senate Passes Same-Sex Marriage Bill*, Wash. Post (Feb. 23, 2012, 6:24 PM), [http://www.washingtonpost.com/blogs/maryland-politics/post/same-sex-marriage-bill-approved-by-maryland-senate/2012/02/23/gIQAupqSWR\\_blog.html](http://www.washingtonpost.com/blogs/maryland-politics/post/same-sex-marriage-bill-approved-by-maryland-senate/2012/02/23/gIQAupqSWR_blog.html). It is noteworthy that a New York Supreme Court judge permitted a constitutional challenge to the law that allows marriage between persons of the same sex. Jamie Davis, *Challenge to New York Same-Sex Marriage Act Allowed to Proceed*, JURIST (Nov. 30, 2011, 10:07 AM), <http://jurist.org/paperchase/2011/11/challenge-to-new-york-same-sex-marriage-act-allowed-to-proceed.php>.

couples.<sup>15</sup> California, Oregon, and Nevada provide same-sex couples in domestic partnerships with nearly all state-level spousal rights.<sup>16</sup> However, “[twenty-nine U.S.] states have constitutional bans on same-sex marriage, while twelve others have laws against it.”<sup>17</sup>

Only three Latin American locations allow persons of the same sex to get married: Argentina, Brazil and the Federal District in Mexico.<sup>18</sup> Although Colombia does not allow same-sex marriage, it is one of eleven countries, including Ecuador and Uruguay, that offers same-sex couples most rights of marriage.<sup>19</sup> Rio Grande do Sul in Brazil and the Mexican state of Coahuila also offer some such rights.<sup>20</sup> Significant for this work is the reality that, worldwide, only nineteen countries have immigration policies that allow the sponsorship of same-sex partners, with Brazil being the sole Latin American country that offers this possibility.<sup>21</sup> Although I have couched this discussion mostly in positive terms focusing on which states do grant some rights, it is evident that the majority of the states do not. Moreover, as the section below on the *cultura Latina* elucidates, even though most Latin American states do not proscribe homosexual conduct by formal law, it is prohibited by informal law: cultural norms.

## B. Cultura Latina

*La cultura Latina* rigorously and authoritatively defines, delineates, and enforces gender roles and identities. These boundaries are then used as tools of oppression and pressure to marginalize those who do not conform to the culturally rigid designations of gender and sex. Most of us are very familiar with the *machista/marianista* paradigms where men are strong and virile, and women are passive, long-suffering, self-sacrificing, docile, submissive, and pure.

<sup>15</sup> *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 14.

<sup>16</sup> *Id.* California allowed same-sex marriage for six months in 2008 during which 18,000 same-sex couples were married. Susan Donaldson James, *California Upholds Gay Marriage Ban*, ABC NEWS (May 26, 2009), <http://abcnews.go.com/US/story?id=7677819&page=1>. However, in November 2008, the people of California approved the ballot initiative, Proposition 8, which banned further same-sex marriages, and in May 2009, the California Supreme Court upheld the constitutionality of Proposition 8. *Id.* The passage of this popular initiative is another example of the GLBT marginalization by the “tyranny of the majority.”

<sup>17</sup> *Times Topics: Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES (Aug. 25, 2011), [http://topics.nytimes.com/top/reference/timestopics/subjects/s/same\\_sex\\_marriage/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html).

<sup>18</sup> OTTOSSON, *supra* note 3, at 49; Barrionuevo, *supra* note 13; Hileman, *supra* note 13.

<sup>19</sup> OTTOSSON, *supra* note 3, at 49.

<sup>20</sup> *Id.*

<sup>21</sup> Ramon Johnson, *Where Are Gay Partner Immigration Benefits Granted?*, ABOUT.COM: GAY LIFE (Feb. 13, 2009), <http://gaylife.about.com/od/gayimmigration/qt/visasponsorship.htm>.

The outside and inside views of sex and sexuality of the *cultura Latina* are very different. One example of the variance between these views is the perception of Latinas. The outside views the Latina as exotic and erotic – a J-Lo – yet the internal cultural tropes are much different. An oft-quoted passage of Octavio Paz, in his work entitled *El Laberinto de la Soledad*, sharply captures the Latinos’ image of woman and womanhood. A woman is “an instrument . . . of masculine desires” and her role is “assigned to her by morality, society and the law.”<sup>22</sup> Man is the actor and woman functions in his image as merely “a reflection of masculine will and desire.”<sup>23</sup> To be desirable – a “goddess” – she must be passive, representing “the earth, motherhood, [and] virginity.”<sup>24</sup> She, unlike men, is never an end in herself; she ostensibly has no need for self-actualization.<sup>25</sup> Thus, the Latino defines the Latina from his dominant position in the public and private spaces of state, church, and home.<sup>26</sup> She, in other words, is his fantasy creation.<sup>27</sup> He is the norm and she is a lesser afterthought.<sup>28</sup>

From the first days of her life, the Latina is socialized to be feminine, a mother, and a wife.<sup>29</sup> She is to sacrifice all for her family.<sup>30</sup> *La cultura*, reflecting its predominantly Catholic foundation, creates the aspirational goal for women: the Virgin Mary.<sup>31</sup> The *marianista* paradigm glorifies the Latina as a strong, long-suffering woman who has endured and is responsible for keeping the family and the culture intact.<sup>32</sup> This model mandates that women provide care and pleasure, but receive none.<sup>33</sup> It requires that women live in the shadows of and be deferential to all the men in their lives: fathers, brothers, sons, husbands, and boyfriends.<sup>34</sup> “Perfection . . . is submission.”<sup>35</sup> For Latinas, these *fronteras* of proper conduct are deployed from the male – Latino – vision of culture, sex, and gender identity.<sup>36</sup> Sexuality is central

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<sup>22</sup> Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811, 817 (1999). See also Berta Esperanza Hernández-Truyol, *Gender Bend: Culture, Sex, and Sexuality—A LatCritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283 (2008).

<sup>23</sup> Hernández-Truyol, *Latina Multidimensionality*, *supra* note 22.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 818.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 819.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

to Latinas' subordinate position in family and community.<sup>37</sup> Significantly, "sexuality and sex-roles within a culture tend to remain the last bastion of tradition[, thus making] sexual behavior (perhaps more than religion) . . . the most highly symbolic activity of any society."<sup>38</sup>

There are three readily ascertainable tenets of Latina sexuality.<sup>39</sup> One of these tenets is that sex is taboo for women.<sup>40</sup> Virginity is purity, cleanliness, honorability, desirability, and propriety.<sup>41</sup> This is the template for the *buena mujer* (good woman).<sup>42</sup> She must always reject the mandatory advances the men must make.<sup>43</sup> Two, to be a *puta*— a whore— is to be a *mujer mala* (bad woman).<sup>44</sup> Such a label is about the worst thing that could happen to a Latina.<sup>45</sup> If a woman consents to sex (the taboo), everyone, including the man with whom she had sex, will say she lacks virtue.<sup>46</sup> Sex for women is something, according to culture, to be endured and never enjoyed.<sup>47</sup> The third rule regarding sexual conduct for Latinas is modesty.<sup>48</sup>

But the ultimate outlaw Latina is the lesbian, as the saying, *mejor puta que pata* (better whore than dyke), captures.<sup>49</sup> In addition to the majority community's secular and religious reasons for rejecting sexual minorities — immorality, sinfulness, perversion, and unnaturalness — Latina lesbians also violate cultural, religious, and sexual norms.<sup>50</sup> After all, what could a culture that views sex as taboo, intercourse as a duty, modesty as mandatory, and women as objects of pleasure, do with two women enjoying sex with each other?<sup>51</sup>

Latina lesbians have many "outsider" identities: cultural, racial, and religious, *vis-à-vis* the culture at large.<sup>52</sup> They must grapple with and negotiate ethnicity and lesbianism — conflated factors that magnify their marginalization and alienation.<sup>53</sup> But these factors also ef-

<sup>37</sup> *Id.* at 820.

<sup>38</sup> Oliva M. Espin, *Crossing Borders and Boundaries: The Life Narratives of Immigrant Lesbians*, in *ETHNIC AND CULTURAL DIVERSITY AMONG LESBIANS AND GAY MEN* 191, 194 (Beverly Greene ed., 1997).

<sup>39</sup> Hernández-Truyol, *Latina Multidimensionality*, *supra* note 22, at 821.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 822.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 823.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

fect rejections and isolations within the family and community – locations that would otherwise be the refuge of the *cultura Latina*.<sup>54</sup> This renders Latina lesbians outsiders in all their spaces.<sup>55</sup> Significantly, one of the most important locations in the *cultura Latina*, *la familia*, could be lost to the Latina lesbian whose family might be embarrassed and reject the Latina family member for being a sexual, and thus a cultural, outlaw.<sup>56</sup>

Of course, the *cultura latina* also rejects gay Latinos.<sup>57</sup> Rather than be like real men, they are feminized and, as such, derided as weak, docile, submissive, and *pájaros* (birds).<sup>58</sup> Traits desirable in Latinas are transmogrified into sinister, immoral, and corrupt traits when possessed by the wrong sex.<sup>59</sup> In Latina/o communities, the least masculine men are those who “submit to the sexual advances of other men and are penetrated like women.”<sup>60</sup> Consequently, Latina/o masculinities are ranked in comparison to femininity and to sexual interaction whereby straight men are ranked higher than gay men; in the hierarchy of masculinities, gay men are subordinate men.<sup>61</sup>

One author notes that in Cuba, “modernism and nationalism” gave homosexuality “a new social meaning that it had previously lacked. Before the emergence of modern nationalism in Cuba, homosexuality mainly had been considered a sin; by the end of the nineteenth century its practitioners were viewed as sick and deviant.”<sup>62</sup> Interestingly, on March 6, 1889, “several influential Republican politicians” wrote an article in the Philadelphia *Manufacturer* titled “Do We Want Cuba?”<sup>63</sup> This piece discussed the annexation of Cuba and entirely contradicted the macho culture that still exists today.<sup>64</sup> The Congressmen explained that

[t]he Cubans are not much more desirable [than the Spaniards]. Added to the defects of the paternal race are *effeminacy* and an

<sup>54</sup> *Id.* at 823-24.

<sup>55</sup> *Id.* at 824.

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 827.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Athena Mutua, *The Study of Men as Gendered Human Beings*, in OXFORD ENCYCLOPEDIA OF LATINAS/OS AND THE LAW, POLITICS AND SOCIAL MOVEMENTS (forthcoming 2012).

<sup>61</sup> *Id.*

<sup>62</sup> Emilio Bejel, *Cuban Condemnation of Queer Bodies*, in CUBA, THE ELUSIVE NATION: INTERPRETATIONS OF NATIONAL IDENTITY, 150, 160 (Damián J. Fernandez & Madeline Cámara Betancourt eds., 2000).

<sup>63</sup> Emilio Bejel, *GAY CUBAN NATION* 11 (2001).

<sup>64</sup> *Id.* To be sure, this passage may reflect the role of colonization and its attendant rhetoric of feminization. *See id.*

aversion to all effort, truly to the extent of illness. They are helpless, lazy, deficient in morals, and incapable by nature and experience of fulfilling the obligations of citizenship in a great and free republic . . . .<sup>65</sup>

Notwithstanding the outsider (American) perception of Cuban male effeminacy, Cubans themselves grew increasingly homophobic. Homosexuality was called a disgusting plague – a degradation of human nature and an abortion of infamy.<sup>66</sup> Also, notwithstanding the outsider view of Latinas as “hot”, the culture insists on purity and submission. Thus, it is beyond peradventure that the *cultura Latina* soundly rejects homosexuality and lesbianism. The following part of this work connects these cultural tropes to the immigration issues surrounding GLBT Latinas/os.

### III. LATINA/O IMMIGRATION TO THE U.S.

There are an estimated 48,356,760 Latinas/os living in the United States,<sup>67</sup> and among those, 18.1 million are foreign born.<sup>68</sup> General wisdom puts GLBT persons at around 10 percent of the population so the math is simple.

Historically, *estado unidenses* have disliked newcomers even though this nation is composed largely of immigrants. The Irish, the Italians, the Jews, and the Germans are among the many migrations that have been targets of anti-immigrant sentiments. Then it was the Latinas'/os' turn. Since the late 1960's Latina/o immigration has been a source of debate in the high spheres of the U.S. government. The debate centers on immigration reform and the force behind the debate is the growing racism against Latinas/os existent in this country as the contemporary conversations about securing the Mexican bor-

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<sup>65</sup> Bejel, *supra* note 62, at 161. This reality can also be construed in the context of the role of colonization and its attendant rhetoric of feminization. See, e.g., Adrian Carton, *Review Article – Re-Writing the Turtle's Back: Gendered Bodies in a Global Age*, 8(2) NEW ZEALAND J. OF ASIAN STUDIES 177, 184, 185 (2006), available at [www.nzasia.org.nz/downloads/NZJAS-06/12Carton5.pdf](http://www.nzasia.org.nz/downloads/NZJAS-06/12Carton5.pdf) (reviewing, *inter alia*, Mrinalini Sinha, *Colonial Masculinity: The “Manly Englishman” and the Effeminate Bengali” in the Late Nineteenth Century*).

<sup>66</sup> Bejel, *supra* note 62, at 163-64.

<sup>67</sup> *Hispanic or Latino Origin by Specific Origin - Universe: Total Population*, U.S. CENSUS BUREAU (2009), [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-geo\\_id=01000US&-ds\\_name=ACS\\_2009\\_1YR\\_G00\\_&-\\_lang=en&-redoLog=true&-mt\\_name=ACS\\_2009\\_1YR\\_G2000\\_B03001&-format=&-CONTEXT=dt](http://factfinder.census.gov/servlet/DTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2009_1YR_G00_&-_lang=en&-redoLog=true&-mt_name=ACS_2009_1YR_G2000_B03001&-format=&-CONTEXT=dt).

<sup>68</sup> Jeanne Batalova & Aaron Terrazas, *U.S. in Focus: Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION INFO. SOURCE (Dec. 2010), <http://www.migrationinformation.org/feature/display.cfm?ID=818#1a>.

der and the flurry of anti-immigrant state laws that are proliferating reveal.<sup>69</sup>

#### A. General History: Cuento Normativo

Like with many other matters, the pattern of U.S. official policy on immigration has ebbed and flowed, changing with economic need. When the economy is flush, immigrants are welcome to fill necessary jobs. On the other hand, in times of economic contraction, the public mood swings in the other direction – much as we are seeing now – and takes a virulent anti-immigrant sentiment to which the government responds with restrictive legislation.

For instance, the *bracero* program, in place from 1942-1964, is an example of a permissive policy that aided the post WWII reconstruction period by providing the U.S. with agricultural workers.<sup>70</sup> On the advent of industrialization, the Hart-Cellar Act ended the program, but approximately five million Mexicans had already permanently moved to the U.S.<sup>71</sup> Although the program ended, the Act allowed *braceros* to become legal U.S. citizens if sponsored by an employer.<sup>72</sup>

Programs of industrialization that followed also played a role in later migrations. The *Maquiladora* programs, providing tax incentives to U.S. (and other international) companies, also created jobs on the Mexican side of the border.<sup>73</sup> Such jobs created a pull from the rural areas and attracted workers to the northern region, and the presence of the population across the border led to facilitate its crossing.<sup>74</sup>

There are other significant immigration policies of the U.S. that are relevant to a study of the Latina/o presence in the U.S. The National Origins Act of 1924 created restrictive national quotas as a response to the suspicion of foreigners that prevailed after WWI.<sup>75</sup> The Alien Registration Act of 1946 tightened controls and required fin-

<sup>69</sup> See Berta Esperanza Hernández-Truyol, *Narratives of Identity, Nation, and Outsiders Within Outsiders: Not Yet a Post-Anything World*, 14 HARV. LATINO L. REV. 375 (2011); see also Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare Reform*, 71 S. CAL. L. REV. 547, 555-56 (1998). For a discussion of the immigration laws, see *infra* notes 84-90.

<sup>70</sup> Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 274 (1997).

<sup>71</sup> DAVID COATES, GETTING IMMIGRATION RIGHT: WHAT EVERY AMERICAN NEEDS TO KNOW 53 (David Coates & Peter Siavelis eds., 2009).

<sup>72</sup> *Id.*

<sup>73</sup> Robine Van Dooren & Germán A. Zárate-Hoyos, *The Insertion of Rural Areas into Global Markets: A Comparison of Garment Production in Yucatán and La Laguna, Mexico*, 35(3) J. LAT. AMER. STUD. 571, 571 (2003).

<sup>74</sup> See *id.* at 574.

<sup>75</sup> Ian Davies, *Latino Immigration and Social Change in the United States: Toward an Ethical Immigration Policy*, 88 J. BUS. ETHICS 377, 380 (2009).

gerprinting and registration of all immigrants during the McCarthy's era fear of communism.<sup>76</sup>

The 1965 Immigration and Nationality Act (INA) moved away from a labor-need model to a family-reunification model, loosening the definition of "family member" and reconsidering the quota system in light of the emerging civil rights movement and the anti-colonial, self-determination sentiment around the world.<sup>77</sup> This resulted in a large influx of Mexican nationals whose numbers were no longer restricted by the national origins quota.<sup>78</sup> However, in 1975, an amendment to the Hart-Cellar Act established the present national quota of 20,000.<sup>79</sup>

The 1986 Immigration Reform and Control Act (IRCA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) both have affected the Latina/o presence.<sup>80</sup> IRCA granted asylum and the chance of legal residency, eventually leading to naturalization for those who wanted it, sanctioned employers who hired undocumented foreigners, and heightened border security.<sup>81</sup> While it made legal presence possible for those here, it made entry more restrictive. IIRAIRA was also restrictive by reducing social programs and public benefits for non-citizens, regardless of legal status.<sup>82</sup> While these initiatives and policies hurt the most vulnerable, others availed themselves of the citizen option of IRCA; this action resulted in the creation of a body of empowered citizens who could vote and let their voice be heard in the political arena.<sup>83</sup>

Recently, we have begun to see many states pass harsh anti-immigration legislation. Arizona began this trend in 2010,<sup>84</sup> and many other states, including Alabama,<sup>85</sup> Georgia,<sup>86</sup> Oklahoma,<sup>87</sup> Texas,<sup>88</sup> and

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 381.

<sup>83</sup> *Id.*

<sup>84</sup> Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23 2011), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

<sup>85</sup> *Alabama Governor Signs Tough New Immigration Law*, CNN (June 10, 2011), <http://www.cnn.com/2011/US/06/09/alabama.immigration/>.

<sup>86</sup> *Georgia Senate Passes Arizona-style Immigration Law, But Drops Requiring Use of E-Verify*, FOX NEWS LATINO (Apr. 12, 2011), <http://latino.foxnews.com/latino/politics/2011/04/12/georgia-senate-passes-arizona-style-immigration-law-removes-requiring-employers/>.

<sup>87</sup> Michael McNutt, *Oklahoma House Passes Anti-illegal Immigrant Bill*, NEWSOK (Mar. 11, 2011), <http://newsok.com/anti-illegal-immigrant-bill-passes-house/article/3547553>.

Utah,<sup>89</sup> enacted laws with similar or even more severe consequences for illegal immigrants.<sup>90</sup> Legislatures in countless other states have introduced similar legislation and are currently debating the constitutionality of these types of laws.<sup>91</sup> This current anti-immigrant sentiment also has resulted in the failure of Congress to pass the Development, Relief and Education for Alien Minors (DREAM) Act. Fortunately, President Obama recently reassured the Congressional Hispanic Caucus Institute that he would do everything in his power<sup>92</sup> to enact the DREAM Act, stating that “[i]t’s heartbreaking, to see innocent young people denied the right to earn an education, or serve in the military, because of their parents’ action, and because of the actions of a few politicians in Washington.”<sup>93</sup>

## B. GLBT Immigration: the Invisible Story

In all of the conversations in the community concerning these endeavors, Latina/o GLBT persons are invisible. But the reality is that we do exist; therefore, *the comunidad latina* needs to reconsider other aspects of the Latina/o immigration story. There are two primary contexts in which the issue of GLBT immigration arises. One is with respect to binational couples. In 2010, approximately

79,200 same-sex couples living in the United States include at least one partner who is currently not a U.S. citizen or was naturalized as a citizen. Of the nearly 650,000 same-sex couples in the US . . . 28,574 are binational couples [in which] one partner is a U.S. citizen and one is not . . .<sup>94</sup>

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<sup>88</sup> Jim Vertuno, *Texas Immigration Bill Approved by Senate*, MYSA (June 15, 2011), <http://www.mysanantonio.com/news/article/Texas-immigration-bill-approved-by-Senate-1424597.php#ixzz1PYxRsToR>.

<sup>89</sup> Marjorie Cortez, *Utah Gov. Gary Herbert Signs Immigration Bills Into Law*, DESERET NEWS (Mar. 15, 2011), <http://www.deseretnews.com/article/705368733/Utah-Gov-Gary-Herbert-signs-immigration-bills-into-law.html>.

<sup>90</sup> Julia Preston, *In Alabama, a Harsh Bill for Resident Here Illegally*, N.Y. TIMES (June 3, 2011), <http://www.nytimes.com/2011/06/04/us/04immig.html>.

<sup>91</sup> *Arizona and National Immigration Crisis*, HUGH & HAZEL DARLING LAW LIBRARY (Sept. 30, 2011), <http://libguides.law.ucla.edu/content.php?pid=129802&sid=1113372>.

<sup>92</sup> Dave Boyer, *Obama Targets Republicans for Blocking Dream Act*, WASH. TIMES (Sept. 14, 2011), <http://www.washingtontimes.com/news/2011/sep/14/obama-targets-republicans-blocking-dream-act/>.

<sup>93</sup> *Id.*

<sup>94</sup> Craig J. Konnoth & Gary J. Gates, *Same-sex Couples and Immigration in the United States*, WILLIAMS INST. (Nov. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf>; see also Shankar Vedantam, *Gay Couples Seeking Immigration Rights*, WASH. POST (Sept. 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/12/AR2010091204159.html> (noting that “[a]bout 24,000 gay and lesbian couples in the United States include at least one

Of the same-sex couples living in the U.S., “11,442 are dual non-citizen couples [and] 39,176 are dual citizen couples with at least one naturalized partner.”<sup>95</sup> Significantly, because of the anti-gay and lesbian laws and sentiments around the world, “[m]ore than half of binational same-sex couples (53 percent) are categorically barred from pursuing permanent residency as a couple in either partner’s country of origin.”<sup>96</sup> Because this is a work about Latina/o immigration and a culture that rejects gay and lesbians as normatively Latina/o, it is noteworthy that 45 percent of non-citizens in binational same-sex couples are Latina/o<sup>97</sup> and that 25 percent were born in Mexico.<sup>98</sup> On the other side of the coin, 33 percent of the citizens in same-sex binational couples are Latina/o.<sup>99</sup>

American lesbian and gay individuals are often forced to move outside of the U.S. because, in many cases, one of the partners in binational couples must leave the country or stay out of the country. Take the story of two friends, whose names and story I am editing to protect their privacy, not in the closet way, but in the way that I love them and they have had enough to deal with. Ada and Melina have been a couple now for approximately eight years. Ada is Latina and a U.S. citizen. Melina is from Costa Rica. They met when Ada lived and worked there. Ada returned to the U.S. to help run her family’s restaurant – she is a superb chef. Melina had a tourist visa that she used to visit for six months at a time. They tried everything they could to obtain a permanent visa for Melina so that she could stay in the U.S.; unfortunately, they were unsuccessful. However, if they had been a heterosexual couple, they could have gotten married and Ada could claim Melina. So Ada has now moved to Costa Rica where they are thriving. They have opened a fabulous restaurant in San Jose that is a huge success; they are happy together. But they are not in the U.S., which was their first choice. I am saddened because my dear friends are much more than a quick bike-ride away. Not insignificantly, there are also economic consequences. A nice college town has lost a wonderful, “locally-owned” restaurant. This is just one example of an *estado unidense* being forced to leave the country, although she would

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foreign partner, according to an analysis of census data by researcher Gary Gates at UCLA’s Williams Institute”).

<sup>95</sup> Konnoth & Gates, *supra* note 94, at 3.

<sup>96</sup> *Id.* at 6.

<sup>97</sup> *Id.* at 7.

<sup>98</sup> *Id.* at 4. In non-citizen same-sex couples, fifty-eight percent claim Mexico as the birthplace. *Id.* Other Latin countries follow with five percent from El Salvador, three percent from Guatemala, and two percent from each Cuba and Honduras. *Id.*

<sup>99</sup> *Id.* at 7.

have preferred to stay, because there was no way for her partner to obtain a legal presence. Stories like this one abound.

The other context in which GLBT migration arises is when people are persecuted for their GLBT identity in their home country. In this situation, an individual can apply for asylum in the U.S. The applicant must show that he or she is a refugee as defined by 8 U.S.C. § 1101 (a)(42)(A), which provides, in pertinent part, that:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>100</sup>

Claims for protection from prosecution on the basis of sexual orientation became available in 1994, when the *In Re Matters of Toboso-Alfonso* case declared homosexuality a social group for asylum purposes.<sup>101</sup> Toboso-Alfonso was a gay Cuban man who allegedly had suffered repeated abuse from the Cuban Government.<sup>102</sup> He was being deported because he was a foreigner with criminal charges in the United States. Toboso-Alfonso asked for asylum based on his sexual orientation because sending him back to Cuba would subject him to severe mistreatment from the Government.<sup>103</sup> The immigration court withheld the deportation of Toboso-Alfonso, but the Immigration Naturalization Service appealed, claiming this was in violation of American beliefs and laws.<sup>104</sup> The B.I.A. held that Toboso-Alfonso was targeted because of his status, and not for his conduct, and thus, the case set valid precedent for the grant of asylum to gays based on their membership in a social group.<sup>105</sup> However, issues remain with these kinds of cases, such as when courts and immigration judges deploy their own prejudices and stereotypes to deny asylum to people who do not look or act gay, whatever that may be.

It is important to note, however, that it is increasingly difficult to establish a fear of persecution in some cases. Notwithstanding the

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<sup>100</sup> 8 U.S.C. § 1101(a)(42)(A) (2006).

<sup>101</sup> See Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 FORDHAM URB. L.J. 265, 273-74 (2005).

<sup>102</sup> See *Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990).

<sup>103</sup> *Id.* at 820.

<sup>104</sup> *Id.* at 822.

<sup>105</sup> *Id.* at 822-23.

*cultura Latina's* real social disdain for homosexuals, the laws in many countries, as I already discussed, have moved away from the cultural norm. Such laws give the appearance of acceptance that would then run contrary to the evidence that is needed to show a fear of persecution. Thus, it is necessary to change the negative norms affecting GLBT Latinos/as not only in law, but also in fact.

These two contexts for GLBT migrations are outside the laws and the compelling stories we usually discuss when we consider the *cuento normativo* of Latina/o immigration. The invisibility of Latina/o GLBT from the immigration narrative is dovetailed and exacerbated by the exclusion, not only from the debates, but also from the coverage of the laws. For example, the 1990 Immigration Act (IMMACT) limited the number of immigrants and emphasized that family reunification was the main immigration criterion.<sup>106</sup> Before this Act, about eighty percent of the visas were given to family reunification applicants.<sup>107</sup> In the Immigration and Nationality Act (INA) spouses are included among the family reunification standards, but permanent partners are not.<sup>108</sup> Moreover, to compound these exclusions, marriages between persons of the same-sex are considered invalid for immigration purposes.<sup>109</sup> Family reunification is a policy of utmost importance to Americans, but only for certain families – only for families as defined in the traditional way.

### C. The Problem: GLBT Legal Exclusions

The current immigration laws are not the first laws to discriminate against gay, lesbian, and gender non-conforming persons. Historically, immigration laws have been unwelcoming of GLBT persons. Under the INA of 1952, gays and lesbians could be excluded aliens under the “psychopathic personality” category because homosexuals and other “perverts” were considered to be mentally defective.<sup>110</sup> The Supreme Court, in *Boutilier v. Immigration and Naturalization Services*, supported a homosexual man’s deportation to Canada because the Court found Congress wanted to exclude homosexuals from entering the country.<sup>111</sup> In *Adams v. Howerton*, the United States Court of Appeals for the Ninth Circuit found that Congress did not intend to

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<sup>106</sup> See Christopher A. Dueñas, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 815 (2000).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 815-16.

<sup>109</sup> *Id.* at 816.

<sup>110</sup> *Id.* at 816-17.

<sup>111</sup> *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 120-22 (1967).

give the same treatment to gay couples as to heterosexual couples.<sup>112</sup> Indeed, the *Adams* court “developed a two-part test to determine whether a person of the same-sex could be considered a spouse for immigration purposes:” (1) “whether the marriage is valid under state law,” and (2) “whether that state-approved marriage qualifies” under the INA.<sup>113</sup> This test is the central judicial standard that immigration officials apply in regards to married couples of the same sex.<sup>114</sup> “Emphasizing the second prong of the test, [the] *Adams* [court] concluded that Congress intended a marriage to be between spouses of the opposite sex and that it did not want to give immigration benefits to same-sex couples.”<sup>115</sup>

Of course, many would benefit if GLBT persons could claim or be claimed by their spouses.<sup>116</sup> However, although several states of the U.S. recognize marriage between persons of the same sex, federal law governs immigration.<sup>117</sup> In that context, DOMA, interestingly named the Defense of Marriage Act, defines marriage as “the union between one man and one woman as husband and wife.”<sup>118</sup> This makes it impossible for same sex couples to utilize marital status as a way to facilitate immigration. This state of affairs could be in flux. In February 2011, President Obama asked the Justice Department to stop defending the DOMA against lawsuits contesting its constitutionality.<sup>119</sup> However, the composition of the Supreme Court does not appear to be amenable to interpreting existing law to extend to couples of the same sex the right to marry.<sup>120</sup> Similarly, the majority of the current

<sup>112</sup> *Adams v. Howerton*, 673 F.2d 1036, 1040-41 (9th Cir. 1982).

<sup>113</sup> *Id.* at 1038.

<sup>114</sup> *Id.*

<sup>115</sup> Jordana Lynne Mosten, *Imagining Immigration Without DOMA*, 21 STAN. L. & POL'Y REV. 383, 386 (2010).

<sup>116</sup> At present, same sex couples are recognized for immigration benefits in only 25 countries. Konnuth & Gates, *supra* note 94, at 6 (citing Press Release, *Leahy Introduces Bill To Bring Equality To Lawful Partners In Immigration Law* (Apr. 14, 2011) (on file with author), available at <http://leahy.senate.gov/press/pressreleases/release?id=1ab23875-4703-466a-ba35-846d7d20d985>)).

<sup>117</sup> See *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 14.

<sup>118</sup> 1 U.S.C. § 7 (2006). Significantly, DOMA's conflict of laws provision (the non-recognition clause) changes the longstanding presumption that marriages are valid if valid where celebrated. *Id.* The U.S. Supreme Court made explicit that immigration is an area where that principle need not be applied. *Lutwak v. United States*, 344 U.S. 604, 610-11 (1953).

<sup>119</sup> *Times Topics: Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 17.

<sup>120</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (“That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state.”).

membership in Congress does not appear to support making the fundamental right of marriage available to couples of the same sex. The tensions in Congress are evident in the developments surrounding the Uniting American Families Act (UAFAs).

Indeed, GLBT persons are currently at the center of the UAFAs, a proposed law that would allow reunification for same-sex permanent partners.<sup>121</sup> In 2000, New York Representative Jerrold Nadler introduced the Permanent Partners Immigration Act to amend the Immigration and Nationality Act.<sup>122</sup> In 2001, the bill was reintroduced, this time in the Senate as well, under its new name, the UAFAs.<sup>123</sup> The bill was further considered in 2003, 2005, and 2007, but never made it out of committee.<sup>124</sup>

In 2009, the legislation was again introduced in both houses of Congress, although this time it enjoyed broad support from powerful politicians, such as Senators Chuck Schumer<sup>125</sup> and Patrick Leahy,<sup>126</sup> in addition to California Representative Michael Honda.<sup>127</sup> By 2010, the bill garnered 121 co-sponsors in the House, as well as 24 co-sponsors in the Senate.<sup>128</sup> However, not surprisingly, there is almost no Republican support for the amendment.<sup>129</sup> Thus, the UAFAs's eventual passage is placed in further doubt by the new composition of Congress that resulted from the 2010 mid-term elections.

The UAFAs would allow permanent partners of U.S. citizens and permanent residents to be treated the same way as heterosexual married couples for immigration purposes.<sup>130</sup> Permanent partners are defined in the bill as: an individual 18 years of age and older who – '(A) is in a committed, intimate relationship with another individual 18

<sup>121</sup> See generally *The United American Families Act*, OUT4IMMIGRATION, <http://www.out4immigration.org/immigration/page.html?s=immeqla&cid=1131> (last visited Dec. 9, 2011).

<sup>122</sup> Ramon Johnson, *Uniting American Families Act*, ABOUT.COM: GAY LIFE, <http://gaylife.about.com/od/gayimmigration/p/unitingfamilies.htm> (last visited Sept. 30, 2011).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See Kerry Eleveld, *Schumer Signals UAFAs Inclusion*, THE ADVOCATE (Mar. 18, 2010, 11:45 PM), [http://www.advocate.com/News/Daily\\_News/2010/03/18/Schumer\\_Signals\\_UAFAs\\_Inclusion/](http://www.advocate.com/News/Daily_News/2010/03/18/Schumer_Signals_UAFAs_Inclusion/).

<sup>126</sup> Johnson, *supra* note 122.

<sup>127</sup> See Seth Hemmelgarn, *May Day March Urges Support for UAFAs*, THE BAY AREA REPORTER (May 7, 2009), <http://www.ebar.com/news/article.php?sec=news&article=3902>.

<sup>128</sup> Gay Politics, *For Gay Americans, Love Gets Complicated at U.S. Border*, IMMIG. EQUALITY ACTION FUND (Mar. 1, 2010), <http://www.immigrationequality.org/clippings/for-gay-americans-love-gets-complicated-at-u-s-border/>.

<sup>129</sup> *Small Change, Big News*, UNITING AM. FAMILIES (Sept. 25, 2011), <http://www.unitingamericanfamilies.net/making-our-case/small-change-big-news/> (reporting that the first two republicans have indicated support of UAFAs).

<sup>130</sup> Johnson, *supra* note 122.

years of age or older in which both parties intend a lifelong commitment; ‘(B) is financially interdependent with that other individual; ‘(C) is not married to or in a permanent partnership with anyone other than that other individual; ‘(D) is unable to contract with that other individual a marriage cognizable under this Act; and ‘(E) is not a first, second, or third degree blood relation of that other individual.<sup>131</sup>

The most recent version of the bill would also allow for both biological and adopted children of the foreign partner to be eligible for green cards.<sup>132</sup>

Unfortunately, the legislation does have many flaws. It does not take into account the virulent homophobia that prevents many same-sex couples from publicly displaying their love and affection in other countries. This makes it difficult for the applicants to prove that they are indeed committed permanent partners. Further, many countries outlaw or discourage the co-mingling of funds between members of the same sex, another problem in meeting the threshold for permanent partner status under the UAFAs.

Many powerful lobbyists and special interest groups, including the Human Rights Campaign,<sup>133</sup> the ACLU,<sup>134</sup> and the League of United Latin American Citizens and the Mexican American Legal Defense and Education Fund,<sup>135</sup> have expressed support for the amendment. In the business world, Intel, American Airlines, Nike and Pfizer, among many other corporations, all support the bill.<sup>136</sup> Other organizations supporting the legislation include the National League of Cities, the U.S. Conference of Mayors, and the American Bar Association.<sup>137</sup>

However, notwithstanding the broad support that these endorsements signal, there are political fault lines that might be difficult, if not impossible, to overcome. Same-sex partner benefits are threatening to divide the faith community’s support for family reunification. Kevin Appleby of the U.S. Conference of Catholic Bishops said that the inclusion of same-sex couples made it “impossible” for the group to support the bill, noting that “[i]mmigration is hard enough without adding same-sex marriage to the mix.”<sup>138</sup> Bishop John C. Wester, the

<sup>131</sup> Uniting American Families Act of 2009, H.R. 1024, 111th Cong. §2 (2009).

<sup>132</sup> Reuniting Families Act, H.R. 2709, 111th Cong. §3 (2009).

<sup>133</sup> See *Uniting American Families Act*, HUMAN RIGHTS CAMPAIGN (May 2, 2011), <http://www.hrc.org/resources/entry/uniting-american-families-act>.

<sup>134</sup> See *ACLU Letter to Senate on the United American Families Act*, ACLU (June 2, 2009), [http://www.aclu.org/lgbt-rights\\_hiv-aids/aclu-letter-senate-united-american-families-act](http://www.aclu.org/lgbt-rights_hiv-aids/aclu-letter-senate-united-american-families-act).

<sup>135</sup> *Endorsements of UAFAs*, IMMIGRATION EQUALITY ACTION FUND (2011), <http://immigrationequalityactionfund.org/legislation/endorsements/>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Vedantam, *supra* note 94.

chair of the Catholic Bishops Committee on Migration, wrote that the UAFAs would “erode the institution of marriage and family [by taking a position] that is contrary to the very nature of marriage which pre-dates the Church and the State.”<sup>139</sup> The National Hispanic Christian Leadership Conference is also opposed to including family reunification for GLBT families. The president of the organization, Rev. Samuel Rodriguez, has stated that such provision would constitute the “death knell” of the bill.<sup>140</sup> So much for family values.

#### IV. MULTIPLE DISPLACEMENTS

All the legal, religious, and socio-cultural opposition to GLBT migrations have one thing in common: they completely ignore the human condition. Most sadly and poignantly, they are hugely insensitive to the plight of the multiple displacements experienced by GLBT persons who wish to migrate. One displacement is the marginalization of individuals within their own society based on the prevalence of homophobia in *sociedades Latinas*. From that marginalization comes the urge to migrate, which itself is a displacement from one’s society of origin. The next layer of displacement is the marginalization of Latinas/os within U.S. society on the multiple grounds of race, language, ethnicity, culture, and religion, which in the case of GLBT Latinas/os, is also compounded by sexuality. Exacerbating these displacements are two hugely significant ones for GLTB Latinas/os: marginalization and possible exclusion from the family and the *comunidad Latina* in the U.S. Finally, even the law casts aside protections for GLBT migrants.

Fortunately the tide may be changing for bi-national gay couples as the Obama administration recently directed “immigration officials to reconsider deporting illegal immigrants who have strong community and family ties.”<sup>141</sup> In August 2011, White House officials and Homeland Security Secretary, Janet Napolitano, explained that for the first time, same-sex marriages would be considered a family tie.<sup>142</sup> Officials have begun a case-by-case determination of the 300,000 pending deportation cases with this new policy in place, and already, three

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<sup>139</sup> Julia Preston, *Bill Proposes Immigration Rights for Gay Couples*, N.Y. TIMES, June 2, 2009, at A19, available at <http://www.nytimes.com/2009/06/03/us/politics/03immig.html?scp=1&sq=julia%20preston%20Bill%20Proposes%20Immigration%20Rights%20for%20Gay%20Couples&st=>.

<sup>140</sup> Vedantam, *supra* note 94.

<sup>141</sup> Matt O’Brien, *Deportation Tide Changing for Gay Couples*, MERCURY NEWS (Aug. 27, 2011), [http://www.mercurynews.com/samesexmarriage/ci\\_18765724](http://www.mercurynews.com/samesexmarriage/ci_18765724).

<sup>142</sup> *Id.*

bi-national gay couples have been spared from separation.<sup>143</sup> Despite this positive trend, we must keep in mind which couples can benefit from this policy change – those who can afford lawyers, who tend to be wealthier and whiter.

## V. FINDING INCLUSION IN THE INTERNATIONAL REALM

### A. Human Rights System

The above discussion demonstrates that we are quite distant from a very elusive equality when we consider the condition of GLBT Latinas/os and immigration. We are certainly far from being a post-heteronormative society. In this regard, the human rights system can be of assistance in establishing goals and finding solutions. International human rights documents provide an expansive protection of rights for the GLBT community.<sup>144</sup> For one, international documents prohibit discrimination and protect equality on the basis of many more classifications than the U.S. Constitution, such as language and social origin.<sup>145</sup> For another, the system recognizes social, economic, and cultural rights, as well as solidarity or group rights – categories which are non-existent in the U.S.<sup>146</sup> Moreover, the interpretation and meaning of sex in international documents includes sexual orientation,

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<sup>143</sup> *Id.*

<sup>144</sup> See generally *Sexuality and Human Rights*, INT'L COUNCIL ON HUMAN RIGHTS POL'Y (2009), [http://www.ichrp.org/files/reports/47/137\\_web.pdf](http://www.ichrp.org/files/reports/47/137_web.pdf).

<sup>145</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 72 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml> (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”); see also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI), at 49-50 (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm> (“1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI), at 53 (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/cescr.htm> (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *Sexuality and Human Rights*, *supra* note 144.

<sup>146</sup> See *Sexuality and Human Rights*, *supra* note 144, at 13.

thus raising protections that are far from a reality in the U.S.<sup>147</sup> Thus, the expanded categories of international protections are a useful tool.

Another marker of the human rights system that is useful is its embrace of multi-dimensionality – the recognition that rights are interdependent and indivisible.<sup>148</sup> This paradigm understands the complex web of the human condition as dependent on the whole panoply of rights that enable human thriving. To be sure, this is not a wholesale embrace of the human rights system as it exists today. As I have noted, the system is flawed and shares some of the structural inequities that the U.S. and other systems reveal. But a reformed human rights ideal, stripped of the structural foundational inequalities, provides a paradigm that can promote equality.

## B. Regional and International Trends

The basic idea of the expansive protected categories and the embrace of multi-dimensionality may explain the regional and international trends that favor GLBT full personhood. In May 2009, the UN Committee on Economic, Social and Cultural Rights passed a General Comment on Non-Discrimination interpreting the non-discrimination provision of the International Covenant on Economic, Social and Cultural Rights.<sup>149</sup> This interpretation affirms that “other status” includes sexual orientation, which means that the covenant prohibits discrimination on such grounds.<sup>150</sup> Moreover, the comment provides that “gender identity is also recognized as a prohibited basis of discrimination.”<sup>151</sup>

Significantly, this is the first time an official UN body recognized the definitions outlined in the Yogyakarta Principles, a comprehensive set of international human rights laws regarding gender identity and sexual orientation.<sup>152</sup> The Principles serve to: (1) “constitute a ‘mapping’ of the experiences of human rights violations experienced by people of diverse sexual orientations and gender identities”; (2) provide a clear and precise application of international human rights law to such experiences; and (3) provide a detailed list of the obligations

<sup>147</sup> See *id.* at 7-10.

<sup>148</sup> See G.A. Res. 217 (III), *supra* note 145, at 71-72; see also G.A. Res. 2200A (XXI), *supra* note 145, at 49, 52-53; *Sexuality and Human Rights*, *supra* note 144, at 7-9 (specifically with respect to sexual rights).

<sup>149</sup> See Gen. Comment 20, Comm. on Econ., Soc. and Cultural Rights, 42d Sess., May 4-22, 2009, U.N. Doc. E/C.12/GC/20 (May 22, 2009).

<sup>150</sup> *Id.* at 10.

<sup>151</sup> *Id.*

<sup>152</sup> Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 231 (2008).

on States for “effective implementation of each of the human rights obligations.”<sup>153</sup>

The Human Rights Committee (HRC), the body in charge of interpreting the International Covenant on Civil and Political Rights, reached a similar, but not identical, conclusion as the UN Committee on Economic, Social, and Cultural Rights reached in *Toonen v. Australia*.<sup>154</sup> In *Toonen*, the HRC decided that the prohibition against discrimination on the basis of sexual orientation was included in the prohibition against sex discrimination.<sup>155</sup> Thus, international bodies have found that the prohibition against sexual orientation discrimination is a norm in the international arena.

Regionally, there has been progress too. In June of 2008, the Organization of American States (OAS) unanimously passed the Human Rights, Sexual Orientation and Gender Identity resolution.<sup>156</sup> It was the first time all thirty-four states of the OAS condemned “human rights violations based on sexual orientation and gender identity.”<sup>157</sup> This Brazil-sponsored resolution recognizes the human rights violations endured by persons because of their GLBT status and underscores the importance of the adoption of the Yogyakarta Principles.<sup>158</sup> In June 2009, the fourth plenary session of the OAS adopted the Human Rights, Sexual Orientation and Gender Identity resolution.<sup>159</sup> The resolution condemns acts of violence and human rights violations against persons based on sexual orientation or gender identity.<sup>160</sup> It also condemns violence committed against advocates who seek to fight against such violations.<sup>161</sup>

There is another recent development of note. In March of 2011, the Inter-American Commission ruled against Chile in a case where the State took away a mother’s custody of her child because the mother is a lesbian.<sup>162</sup> The case went to the Inter-American Court because Chile did not comply with the Commission’s mandate prohibit-

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<sup>153</sup> *Id.* at 232-33.

<sup>154</sup> *Id.* at 216.

<sup>155</sup> *Id.*

<sup>156</sup> *OAS Adopts Resolution to Protect Sexual Rights*, HUMAN RIGHTS WATCH (June 6, 2008), [http://hrw.org/english/docs/2008/06/06/colomb19049\\_txt.htm](http://hrw.org/english/docs/2008/06/06/colomb19049_txt.htm).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See* A.G. Res. 2504 XXXIX-O/09, O.A.S. Doc. AG/RES/2504XXXIX-O/09 (June 4, 2009).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Macarena Sáez, *Karen Atala v. Chile in the Inter-American Human Rights System*, FOCAL <http://focal.ca/en/publications/focalpoint/408-march-2011-macarena-saez-en> (last visited Jan. 14, 2012).

ing such discrimination.<sup>163</sup> On February 24, 2012 the Court ruled that the Supreme Court of Chile violated the mother's right to equality and non-discrimination in violation of Articles 1 (obligation to respect and guarantee) and 24 (equality) of the American Convention when it deprived her of custody based on sexual orientation.<sup>164</sup>

## VI. CONCLUSION

Where does this leave us? Well, for one, I hope this work has underscored why GLBT Latinas/os need to be brought out of the shadows of the immigration conversations in the U.S. This requires a re-consideration of the *cuento normativo* of immigration. We need to craft a new *cuento normativo* that is inclusive of GLBT immigrants. There is support, indeed even a mandate, for such inclusiveness in both the international and regional spheres. The cultural tropes against which this move will push are strong and deep-seated. They are likely to threaten fissures within the community as already suggested with the UAFA. But to be a strong, united community, we cannot consider any of our folks as disposable people. *El pueblo unido jamás será vencido.*<sup>165</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> See Atala Riffo y Ninas v. Chile (Inter-Am. Ct. H.R. Feb. 24, 2012), available at <http://static.latercera.com/20120320/1497026.pdf>. The Court's judgment also found violations of Articles 1 (respect and guarantee), 19 (rights of the child), and 24 (equality), with respect to the children's rights. *Id.* Moreover, the Court found violations of the right of privacy of Article 11.2 (honor and dignity) and of Article 17.1 (protection of family) of both the mother and the children. *Id.* The Court also found a violation of procedural rights, concluding that Chile violated Article 8.1 (judicial guarantees) with respect to the mother. *Id.* It is not insignificant that the mother happens to be a judge. See also Brandon Gatto, *IACHR: Chile Wrong To Revoke Custody of Children Based on Woman's Sexual Orientation*, JURIST (Mar. 22, 2012, 2:31 PM), <http://jurist.org/paperchase/2012/03/jurist-the-inter-american-court-of-1.php>.

<sup>165</sup> The people united will never be defeated.