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Non-heterosexual Bi-national Families: Resilient Victims of Sexual Prejudice and Discriminatory Immigration Policies

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An unprecedented number of American citizens are facing the challenge of being in a non-heterosexual bi-national relationship. Although immigration laws are based on the principle of family unification, under current federal law lesbian, gay and bisexual Americans cannot sponsor their same-sex foreign national partners for residency in the United States. Consequently, an estimated 36,000 couples face the threat of family separation because immigration's narrow definition of "family" excludes same-sex bi-national couples and their children. Despite the fact that family research indicates that long periods of separation have harmful effects on the family, immigration law continues to deny bi-national families the basic right of family unity afforded many of their heterosexual counterparts. Bi-national couples must learn how to function in a social system while dealing with heterosexism, overt discrimination, violence and the psychological symptoms that result from helplessness. This article will explore the ways in which non-heterosexual bi-national families must struggle to keep their families together as a result of the discriminatory ways in which laws are constructed in this country. We propose that discriminatory immigration policies have neglected contemporary family research that describes the family as a diverse array of intimate systems that provide mutual care.

KEYWORDS: bi-national couples, sexual prejudice, discrimination, immigration policies, Uniting American Families Act.

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Introduction

Imagine having a life story that involves being passionately in love with a “foreigner.” Continue imagining that this foreigner falls deeply in love with you and vows to make a permanent and exclusive commitment to your relationship. As a result, you both invest your love, time, effort and resources in building a hopeful future for your family. Now imagine this-- the United States government tells you, an American citizen, that it does not recognize your family as a legitimate family and that your same-sex partner is no longer able to remain legally in this country. That is right, the government just informed you that you do not have the fundamental right to keep your family together. You are given the following options: family separation as your partner is forced to return to her or his home country; moving to another country with your partner; or remaining in the U.S. with a foreign partner that you cannot fully protect. You chose the latter and are now facing discrimination and sexual prejudice for the mere fact that you chose to be a part of a *non-heterosexual bi-national relationship*. Non-heterosexual bi-national families are defined here as non-heterosexual couples and their children who comprise a combination of both American citizens and non-citizens.

Using a social constructionist framework, this article maintains that stressful events affect the *entire* family and create a ripple effect on all family members and their relationships. Rather than thinking about gays and lesbians as individuals, our theoretical orientation views their systemic interactions as being central to their wellbeing and health. Inspired by Michel Foucault (1980) and his analysis of the inseparability of power and knowledge, the present piece of literature is based on the belief that privileging specific cultural practices, under the guise of a natural or self-evident law, can invalidate and silence groups of people who are considered by the culture to be different. And by extension, we seek to make visible that the ideological

underpinnings inherent in immigration laws can have negative emotional and material effects on society's most vulnerable populations, in this case, on non-heterosexual bi-national families.

The heteronormativity of law for example, can be understood as emerging from the privileged in power and as a function of people's reactions to the behaviors of others (Green, 1994). Homosexuality and citizenship are both a type of status that is constructed by the state; its social constructedness has perpetuated heterosexual privilege and legitimized homosexual exclusion (Canaday, 2009). In sharp contrast to "natural law legal theorists" who believe that laws are natural, universal and timeless, we propose that laws should be fluid concepts that mirror the reality of the time and culture in which they emerge and develop (Green, 1994; Schauer, 2005); laws should mirror the reality of present diverse intimate family bonds and arrangements. We argue that family and immigration policies exclude non-heterosexual bi-national families not for some universal, essentialist, or "natural" reason, but because they are based on sexual prejudice that force gay, lesbian, bisexual, and transgender (GLBT) families into a second-class citizenship status. This article explores how non-heterosexual bi-national families struggle with immigration and family inequality within the larger social-historical-cultural context where heterosexual families hold more political, financial and moral power.

Marriage and *family* are socially, culturally and legally constructed terms used differently around the world (Demleitner, 2004). Their meanings have changed dramatically over time in some sectors of society to include non-heterosexual families and, in some cities and entire nations, non-heterosexual marriages. In the United States however, federal laws define both concepts using discriminatory policies that deeply affect non-heterosexual bi-national families. Interestingly, although U.S. policy is designed to help foreign spouses and fiancés immigrate in order to be united with their U.S. partners, it harbors ideological biases as immigration laws deny

family reunification provisions to non-heterosexual families. For instance, the U.S. Supreme Court's declaration in *Moore v. City of East Cleveland* states that family unity is a constitutionally protected right under the Fourteenth Amendment. Compared to lawful permanent residents and American citizens, non-heterosexual bi-national families *do not qualify* for family reunification provisions established under immigration law (*Moore v. East Cleveland*, 431 U.S. 494, 1977; Pabon, 2008).

Even if the couple has lived together for decades, even if their commitment is incontrovertible and public, even if they have married or formalized their partnership in a place where that is possible, all is useless for purposes of immigration. (Immigration Equality & Human Rights Watch Campaign, 2006, p.8)

U.S. citizens in non-heterosexual bi-national headed families experience barriers that include the inability to bring their partner/spouse from another country to the U.S. based on family reunification principles. In addition, they are not able to petition for citizenship for their settled immigrant partner living with them in the U.S. Consequently, a large number of bi-national families face family separation and the reality that they will continue living as mixed-status (citizen vs. non-citizen) families for an indefinite period of time or, perhaps, for a lifetime.

Contemporary Research on the Family vs. Immigration's Narrow Definitions

Researchers, scholars and practitioners in the helping professions are becoming increasingly aware of the notion of "family" as a social construction with multiple meanings, relational patterns and unique caring bonds (Walsh, 2011). Families that include lesbian and gay bi-national relationships are part of the increasingly diverse family landscape. Social constructionist perspectives offer definitions that capture open-ended possibilities for what a family can be while challenging essentialist notions of normality that privilege certain family

arrangements and marginalize others. In particular, many of today's family scholars have been influenced by Michel Foucault's (1980) statement that if our lens lacks the capability of observing multiple viewpoints, hegemonic "truth claims" can dehumanize and objectify many groups of people (pp. 80-84).

The open and visible celebration of diverse and plural realities contrasts previous research on lesbian and gay families that turned to "defensive normalizing constructions" that portray GLBT families as no different than heterosexual families (Kitzinger & Wilkinson, 2004, p.183). Research advocates for equal rights contend that granting rights to non-heterosexual individuals should not require finding similarities between heterosexual families and non-heterosexual families. Human rights should be guaranteed by the simple virtue of being human beings (Kitzinger and Wilkinson, 2004). They explain,

To argue that lesbians and gays deserve equal rights because we are like heterosexuals, and our children turn out just like theirs, is to concede the ground to those who would argue that differences are deficits that render us unworthy of equal human rights. (Kitzinger & Wilkinson, 2004, p. 183)

With diversity in mind, many GLBT family researchers propose that family complexities will continue to grow as family arrangements change and expand. Therefore, any attempt to rigidly define families becomes vulnerable to shifts in political and ideological movements (Laird, 1993). Evidence of increasing diversity includes the rise in lesbian and gay transracial adoptive parents (Goldberg, 2009), the increased visibility of trans individuals (i.e., transgender, transsexual, and gender nonconforming) within families (Brill & Pepper, 2008), and the growing presence of GLBT immigrants and refugees in the United States (Chavez, 2011). Social constructionist discourses decenter heterosexuality as the normative construction of family and

work systemically in celebration of multiple-definitions of family.

In sharp contrast, immigration and federal law have thus far adopted a narrow and restrictive definition of family that lags behind contemporary research and understandings on the family. Following the Standard North American Family model (SNAF), federal law policies are influenced by the concept of the “ideal family,” a nuclear family with a married male–female couple practicing the bearing and raising of children (Smith, 1993). The federal Defense of Marriage Act (DOMA) has restricted marriage to heterosexual relationships by defining it as a legal union between one man and one woman for purposes of all federal laws (Defense of Marriage Act, 1996). Although the Obama administration recently stated that it considers DOMA to be an unconstitutional “egregious injustice,” DOMA continues to govern all federal laws, including immigration law (Froomkin, 2011). Because immigration courts legally construct the term *spouse* as a “person who is married to a petitioner where the marriage was legally valid at the time performed, is still in existence, and was not entered into solely for immigration purposes” (Dueñas, 2000, p. 815), same-sex marriages are invalid for immigration purposes even if they are recognized at the state level. If the U.S. Citizenship and Immigration Services (USCIS) do not consider a same-sex partner a spouse, then same-sex couples with children are *de facto* not legally considered *families*.

Radically different however, is the new and controversial decision made by the White House and the Department of Homeland Security to change their narrow definition of *family* to include GLBT families (Kruse, 2011). Although this new definition in and of itself does not have the power to undo DOMA, it signals a shift in the discourse and creates room for new comprehensive definitions of *family* and *spouse* at the federal level.

In opposition to the disparity between the federal definition of *family* and the present reality of society's diverse family systems, Hawthorne (2007) argued the following:

When a government chooses to adopt a strong family reunification policy, it must follow through by recognizing that "family" cannot be limited to a statute's narrow view of who is and who is not "family", when society itself reflects different models than those embodied in the statute. (p. 824)

Because non-heterosexual bi-national families exist outside the confines of the traditional nuclear family, they unfortunately go unrecognized and are considered by some to be pathological. This lack of recognition is noticeable in the "profound heteronormativity" of immigration and sexuality scholarship which often explores immigration and GLBT concerns separately and assumes that GLBT live in this country as citizens (Chavez, 2011, p.189). Despite empirical evidence that illustrates the harmful psychological effects of policies restricting marriage rights for same-sex couples (American Psychological Association, 2010), immigration policies neglect the former scientific contributions and continue to marginalize same-sex-bi-national couples with knowledge that these families are experiencing distress.

Present Barriers Facing Same-Sex Bi-National Families

The politics of fear vs. visibility. The 2000 U.S. Census reported that of 594,391 self-identified same-sex couples living together in the United States, there were 35,820 (reported) same-sex bi-national couples (US Census, 2000). Although the 2010 census data is available, recent statistics indicating the number of bi-national couples living in the U.S. have not been published. It is important to note that these numbers are likely understated and do not reflect the most accurate estimate of same-sex couples living in the United States. Referring to the

government's Census, Immigration Equality and Human Rights Watch (2006) stated the following:

They do not count couples who hide the fact that they are partners, lest the one applying to stay face homophobia in the immigration or asylum process. They do not count couples that avoid the census, because the foreign partner lives here illegally to maintain the relationship, or fears being forced to do so after a visa expires. They do not count couples that do not share a home—or who live in different countries because U.S. immigration law, and marriage policy, will not permit them to share their lives together within its borders. They do not count couples where the U.S. partner has chosen exile, so that they can lead common lives in another, friendlier country than this one. (p. 7)

The Immigration Equality and Human Rights Watch (2006) research report proposed that non-heterosexual bi-national couples suffer from emotional hardship and feelings of immobility, isolation, fear, anxiety, and terror as a result of the “forced confidentiality” that comes with fears of facing family separation or deportation. According to their report, same-sex binational families sometimes perceive invisibility as a helpful, adaptive mechanism that prevents the attention that might otherwise come from adversely affecting their foreign partner's status. Unfortunately, in order to raise awareness, the needs of GLBT bi-national couples must also be made visible in scholarship. According to Chavez (2011), the lack of research studies on GLBT migrant populations suggests that they are “flying under the radar of service provision” (p. 195). Chavez's *Identifying the Needs of GLBTQ Immigrants* provides a wealth of information on the needs of GLBT migrants pertaining to health care, housing, and legal concerns.

Family separation and psychosocial stressors. In the mid-1990s, under a wave of anti-immigrant sentiment, the United States passed a series of laws that facilitate the arrest, detention

and deportation of noncitizens. These newer laws contrast sharply with the post-World War II immigration policies that increasingly provided rights to immigrants and their citizen and non-citizen families (Hagan, Castro, & Rodriguez, 2010). The tide against more progressive immigration policies began to turn in the wake of the shifts in the demographics of third-wave immigrants (e.g., immigrants from the southern hemisphere) (Koven 2010). It is no secret that today's strict enforcement of laws is evidence of the U.S. Immigration and Customs Enforcement (ICE) official strategic plan against terrorist activity, however, the fallout for non-heterosexual bi-national families has been devastating. Before September 11, 2001, the possibility that a bi-national family would face arrest and removal was low because enforcement was predominantly focused on border protection (Thronson, 2008).

Presently, however, stricter immigration laws induce ongoing psychological stress for many family members living in the interior of the nation as they potentially face long-term family separation as a result of deportation or voluntary departure (Thronson, 2008). The list of deported individuals includes a wide spectrum of cases. On one extreme it is first time attempted unauthorized entry individuals who are deported; on the other extreme some deportees are settled migrants, even young adults brought to the U.S. as young children. With respect to settled migrants, deportation may interfere with previously established family and household relationships and seriously disrupt parent-child attachments (Chacon, 2007). Evidence suggests that if separation takes place, partners and children often wait years to be reunited with their deported family member (Pabon, 2008).

Children in immigrant families form the fastest growing segment of the United States child population. In 2001, Fix, Zimmerman and Passel reported that one of every ten children living in the United States lives in a heterosexual or non-heterosexual mixed-status family. In

2006, Leiter indicated that 15 percent of all children in the United States were native-born children with immigrant parents and 4 percent of children were foreign-born children with at least one immigrant parent. All things considered, the government continues to separate mixed-status families despite research showing that when separated from their parents for extended periods, children have difficulties forming secure attachment bonds; in addition, they experience withdrawal, depressive symptoms, sadness, guilt, anger, hopelessness and “ambiguous loss” (Pabon, 2008; Suarez-Orozco, Todorova & Louie, 2002; Boss, 1999).

Ambiguous loss in family separation is experienced when the parent is physically absent but psychologically present (Boss, 1999). “Since the parent is not dead but simply gone for what is expected to be a short time, ‘permission to grieve’ may not be granted” (Suarez et al., 2002, p. 628). Many children separated from their parents by immigration challenges report feeling a sense of abandonment, even though the parent did not leave voluntarily. Further, children that stay in this country apart from their parent and are later reunited find that they may later suffer the loss of the person that took care of them during the separation. Not surprisingly, researchers found that when separation is prolonged, children and parents report that they feel like strangers to one another (Suarez et al., 2002).

Understandably, one of ICE’s main goals is to stop and prevent danger from entering into U.S. territory. A question remains however: Why are peaceful non-heterosexual bi-national couples denied entry or citizenship to this country? Are they a real threat to American society or is the denial based on sexual prejudice? While policy makers attempt to answer this question, families are being disrupted by physical separation, economic instability and psychological symptoms of helplessness, anxiety and depression.

Sexual prejudice in the law: a historical and present barrier. The progress of civil rights for sexual minorities has been slow, falling behind that of women and ethnic minorities in terms of legal rights. Many sectors of society have endorsed heterosexism with knowledge that this system of privilege overtly oppresses “sexual minorities and creates institutional barriers to their full participation in society” (Herek, 2007, p. 5). Herek (2009) suggests that the socially constructed term homosexuality, which originally denoted a pathological form of behavior, categorized heterosexuals as *people* and homosexuals as *deviant*. Unfortunately, non-heterosexual individuals have historically and are presently encountering the barriers in the law created by these ideological biases stemming from the medicalization, or pathologization, of same-sex orientation (Somerville, 2000).

The Immigration Act of 1952 was established to exclude “aliens with psychopathic personality, epilepsy or a mental defect” (INA, 1952, 212(a)(4)). The term “psychopathic personality” included homosexuality because society, psychiatrists, psychologists and the diagnostic norms of the time considered sexual minorities to be mentally defective (Rosenberg v. Fleuti, 374 U.S. 449, 1963). Although victims of this policy challenged the court’s rulings with arguments that homosexuals did not suffer from psychopathic personality, the Supreme Court firmly ruled in the end that the classes of what they referred to as “mental defectives” did in fact include “homosexuals and other sex perverts” (Boutilier v INS, 387 U.S. at 121, 1967). In 1973, after the American Psychiatric Association’s Board of Directors voted to remove homosexuality from the second edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), the U.S. Surgeon General stated that homosexuality was no longer an issue that had to be medically certified for immigration purposes because same-sex attraction was not a mental disorder (Hill v. INS, 714 F.2d 1472-1473, 1983). Finally, in Hill v. INS (775 F.2d 1037, 1980),

because the Public Health Service, the only authority in this matter, had previously stated that issuing the certificates based on sexual orientation was no longer necessary, the courts ruled that homosexuals could not be excluded without such certificates.

The court's conclusion was a partial win for gay and lesbian bi-national couples. Although gays and lesbians are now granted admission into the country on grounds that they are not mentally defective, immigration laws continue to separate their families because gays and lesbians are, by immigration's standards, considered to be "individuals" rather than "family members." Although today's dominant mental health institutions such as the American Psychiatric Association and the American Psychological Association have recognized their historical role in exposing sexual minorities to distress, U.S. legislators have lagged behind and continue to inflict stress on lesbians, gays and bisexuals by denying them the basic right to marriage and, in the case of many immigrants, citizenship. In the following section we discuss a case that brings into relief the cultural flux that presently surrounds the status of same-sex bi-national families.

Bradford and Anthony: A Case Example of Today's Discriminatory Immigration System

Bradford Wells and Anthony John Makk are a San Francisco gay bi-national married couple that have been together for nineteen years (Wilkey, 2011). Makk is an Australian national and San Francisco business owner who has lived in the United States for more than 20 years. He has no criminal history, has never lived in the U.S. illegally and has also served as the primary caregiver to his husband Wells who suffers from advanced AIDS-related symptoms. Makk applied for permanent residency as a spouse of a U.S. citizen when his visa expired, however, despite Makk's clean record, immigration ordered his deportation to Australia. Wells could join Makk in Australia, but he would be forced to give up the medical insurance that is crucial for his

survival. Although Makk's deportation date was set for August 25, 2011, the couple continues living together in the U.S. after they were granted a two-year reprieve against the threat of deportation. Although this couple may be considered low priority, the threat of deportation and sexual prejudice will persist unless the case is altogether dismissed. This case is an illustration of immigration's earlier discriminatory practices that has only recently been met with some change of heart. The winds of change have blown, but up to what point and for how long?

Like Bradford and Makk, thousands of other non-heterosexual bi-national couples and their children are faced with psychological stressors. Unlike Bradford and Makk however, many of these families' stories have not been narrated, heard and understood in family research, psychotherapy settings, or the media. The question now turns to how mental health professionals can help non-heterosexual bi-national families overcome these risks, demands and stressors. What are the implications for current family practice? And, what is needed for mental health practitioners to develop competence in working with these families?

Implications for Current Family Practice

Walsh (2011) proposes that healthy family functioning can be found in a variety of kinship arrangements; what matters most are the family processes that nurture caring, safe, and committed relationships. Thus, practitioners might find it useful to empower same-sex bi-national families to celebrate their differences and to perform, that is, engender the narratives that they prefer around the rich uniqueness of their lives (Freedman & Combs, 1996). Adopting the notion of family as a social construction can create a space for practitioners to understand these families within the context of their own heroic worldviews, and independent from heteronormative understandings. Further, in order to help empower these families, practitioners may find it helpful to use a strengths-based systemic approach that focuses on the protective

factors, inherent strengths and resiliencies that help non-heterosexual bi-national families survive and thrive despite the stressors induced by sexual prejudice and discriminatory immigration policies (Walsh, 2003; Walsh, 1996). Influenced by the Family Resiliency Framework (Walsh, 2003), this review advises practitioners working with non-heterosexual bi-national families to: 1) challenge the myth that the Standard North American Family (i.e., white intact nuclear family headed by father) is healthier than any other family; 2) elicit and amplify family strengths under stress; 3) seek to understand the socio-cultural context in which non-heterosexual families are situated; and 4) promote the idea that families have the resources to recover and grow from adversity.

Schauer (2005) argued that cultures have the capacity and control to shift the concept of law by collectively redesigning it. We contend that family researchers and practitioners can contribute to the emergence of a society with laws that are inclusive of non-heterosexual bi-national families. With that stated, researchers and practitioners interested in the advocacy of equal immigration rights for same-sex bi-national couples should consider becoming familiar with the Uniting American Families Act (UAFA, H.R. 1537, S. 821, 2011). If passed, this piece of legislation would allow U.S. citizens and permanent residents in same-sex relationships to sponsor foreign partners for residency in the United States. Permanent partners would be subject to the same restrictions, requirements of evidence of marriage, and enforcement mechanisms as heterosexual married couples. UAFA establishes that a permanent partnership is not “marriage” in the legal sense of the term and would not affect the federal definition of marriage; it would simply provide immigration benefits to such families.

Conclusion

Improving the quality of life for non-heterosexual bi-national families is a crucial

humanitarian issue. In bringing awareness to these issues, this review questions equality in the larger society and increases our understanding regarding the specific psychological and sociopolitical issues that same-sex bi-national couples are struggling to overcome. Learning about their problems, struggles and challenges is not enough. What really matters is for researchers, academicians and practitioners working with families, to explore ways in which they can help non-heterosexual bi-national families survive and thrive despite the barriers they are facing. It must be clear, then, that this review is not value-free and seeks to reduce the suffering of non-heterosexual bi-national families; it raises questions about the continued injustice, discrimination, and sexual prejudice found in immigration law and the broader society. Further, this review seeks to turn bi-national families into visible members of society and bring to light the fact that U.S. immigration's socially constructed narrow definition of family does not represent the diverse array of intimate family systems present in today's society.

Of those federal benefits denied to same-sex, bi-national families are federal immigration benefits based on family unification principles. Due to the social construction of DOMA and other such legislative efforts, the United States government has continually failed to recognize non-heterosexual bi-national couples as families. Therefore, gay and lesbian Americans cannot enjoy the fundamental right of family unity that has been granted by the government to their heterosexual counterparts based on family unification provisions. Bi-national families endure hardship and psychological stress when a non-citizen family member is unable to legally remain in the country. Today's heterosexist immigration policies that work to discriminate against sexual minorities have separated thousands of families. Unfortunately, although family research points to the multiple realities of diverse family arrangements, the U.S. government has fallen behind contemporary family research as immigration policy continues to employ a narrow

definition of “family” that excludes non-heterosexual bi-national families. The authors of this review recommended using strengths-based, systemic approaches when working with non-heterosexual bi-national couples as these forms of intervention can help these families navigate their complex sociopolitical and psychological struggles.

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