NEGOTIATING THE NEXUS OF IMMIGRATION, SEXUALITY AND CITIZENSHIP

Canadian and American Comparisons

ABSTRACT

This article proposes an overview of the key differences, for gays and lesbians, in Canada and American immigration policy. The authors explore sexual and immigration implications in these neighbouring countries, which both have long-standing immigrant and refugee settlement traditions.

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For many American gay men and lesbians, the election of George W. Bush to a second term in November 2004 put into stark relief the differences in citizenship rights that they enjoy relative to their heterosexual friends and family members. In the run-up to election day, gays and lesbians bore witness to the United States Congress' attempt to pass a constitutional amendment to deny the possibility of same-sex marriage, as well as a sweeping array of measures by state governments to repudiate any public or, in some cases, private recognition of same-sex relationships. The differences in citizenship rights between homosexual and heterosexual Americans affect many areas of daily life – from hospital visitation to pension benefits – but are especially apparent for those gay Americans who are in bi-national same-sex couple relationships. For these people, the lack of recognition by the federal government of the legitimacy of these relationships and the inability to 'legitimize' such relationships through marriage means that gay Americans cannot sponsor their partners for permanent residence in the United States. Many state and local governments in the United States have successfully passed laws that ban many forms of discrimination against lesbian, gay, bisexual and transgender people. These laws do not, however, have any capacity to address immigration problems encountered by same-sex bi-national couples because the federal government retains sole jurisdiction in immigration policy. Family reunification is a cornerstone of contemporary American immigration policy, but sponsorship of a same-sex foreign-born partner is not an option that lesbians and gays can exercise as this provision crucially hinges on marital status.

After decades of broadly similar immigration and refugee policies between Canada and the United States, the recognition by Canada of same-sex bi-national relationships for immigration purposes highlights one of several important cleavages in social policy between Canada and the United States. It also emphasizes a significantly different understanding of the rights of citizenship and the ability of all citizens in each country, not just heterosexuals, to exercise their full rights as citizens in matters pertaining to the sponsorship of foreign nationals for immigration purposes. Given the significant differences that now exist between the two countries with regard to family reunification provisions and the recognition of same-sex relationships more generally, it is reasonable to ask if a point has been reached wherein many Americans will look to unify their families.

This short paper begins by outlining the major policy differences regarding immigration for gays and lesbians in Canada and the United States. The focus then shifts to the implications for these two neighbouring countries, each with deep histories of immigrant and refugee settlement, of adopting such different policy positions with regard to sexuality and immigration. Differences in family reunification provisions in Canadian and American immigration policy highlight important distinctions in understandings of 'family' and social citizenship rights, as well as emphasize the ways in which a state can use sexuality as a taken-for-granted way to distinguish between 'equal' citizens.

Immigration Policy and Sponsorship of Same-Sex Partners

The Canadian situation with regard to same-sex partners and immigration could not be more different than that which presently exists in the United States.[1] In April 2000, the Canadian federal government passed Bill C-23 (*Benefits and Obligations Act*) that gave same-sex couples the same social and tax benefits as heterosexuals in common-law relationships. This Bill affected 68 federal

statutes, including immigration law and regulations regarding the sponsorship of a common-law spouse for purposes of immigration. The ability of gay and lesbian Canadians to sponsor their same-sex partners was further entrenched under the family class provisions of the *Immigration and Refugee Protection Act* (Bill C-27) that was passed by parliament in 2002. The equality of same-sex relationships subsequently received further legal support in June 2003 when the Ontario Court of Appeal upheld a lower court ruling and recognized same-sex marriages. Since that time, six more Canadian provinces and one territory have legalized same-sex marriages after courts ruled that the restriction of the definition of marriage to a man and a woman is unconstitutional. The federal government has also tabled the *Civil Marriage Act* that will, if passed, extend the legal capacity to marry for civil purposes to same-sex couples across Canada.

In contrast, in the United States it is impossible for American citizens in same-sex relationships to use the family reunification provisions in current immigration law to sponsor their foreign-born partners. As the law is interpreted, any foreign national who marries or intends to marry a United States citizen or lawful permanent resident of *the opposite sex* is eligible for legal residence on the basis of marriage. There is no way for American citizens to petition for their same-sex partners to immigrate to the United States on the basis of their relationships. As a consequence, bi-national couples can legally remain together in the United States only if the foreign partner obtains a work or student visa, which is always of limited duration, or manages to convert such a temporary status into permanent residency by pursing an elaborate and expensive labour certification process. Another option is for the foreign national to make a sexual orientation-based asylum claim by asserting past persecution or a well-founded fear of persecution in their country of origin because of their sexual orientation. This asylum option has been available to gays and lesbians since 1994, but only a small number of such asylum applications have been positively evaluated; obviously, it is only realistic for claimants from countries with particularly harsh human rights records. It has also become a more difficult option to exercise in recent years because of the filing deadline that requires that claimants apply for asylum within one year of arriving in the United States. Essentially this means that the foreign national needs to appreciate quite early in her/his stay in the United States that the government will recognize sexual orientation-based asylum claims, a fact that is not particularly well-known. The final option, and by far the most risky and difficult over the long term, is to disappear into the "undocumented" or "illegal" population that is now estimated to be 10 million strong.[2]

In the United States, various types of non-discrimination policies and marriage and domestic partnership questions are regarded as states rights issues. While 25 states and the District of Columbia offer some protection against discrimination based on sexual orientation or gender identity, most limit that protection to public employees. Only 14 states and Washington (DC) extend the ban on employment discrimination based on sexual orientation to both the public and private sectors. Four states have whole or partially guarantees of same-sex spousal rights. No state has passed legislation that explicitly recognizes same-sex marriages, and only in Massachusetts have state courts interpreted the constitution in a manner that recognizes and legitimates same-sex marriages. In Vermont, as a consequence of court rulings that extended to same-sex couples the benefits and protections that flow from marriage under Vermont law, a parallel civil union system came into effect on July 1, 2000. Five other states and Washington (DC) have no law on the matter marriages or civil unions, and all of the rest have legislated the definition of marriage as between a man and woman, in line with the 1996 federal *Defense of Marriage Act.*

If American citizens and their foreign-national partners do marry in Massachusetts or obtain a civil union in Vermont, it does nothing to solve their immigration problem. Immigration law and policy is a federal responsibility, and the *Defense of Marriage Act* (DOMA) passed in 1996 by Congress, which defines marriages as between a man and woman, denies federal recognition of same-sex couples' marriages even if such marriages are legally recognized by individual states. Only if DOMA were made invalid and/or the sponsorship provisions of existing immigration law changed[3] would it be possible for a gay or lesbian couple, married in a state the recognizes same-sex relationships, to use their marriage as a basis for immigration sponsorship.

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Social Rights of Citizenship and a Migration North

The inability of bi-national same-sex couples to use existing immigration law for sponsorship purposes has been a long-standing, if seldom recognized, problem for gay Americans. In the run-up to the November 2004 elections, a number of other policy debates took place in many states that directly impinge upon the social citizenship rights and material wellbeing of all gay Americans, and not just the fraction who encounter the immigration system. As a

consequence, many reports began to appear in the Canadian and American news media about the possibility that many Americans, who were uncomfortable with the Republican agenda set forth during the election, might choose to leave the United States for Canada and a handful of other countries. For instance, the *New York Times* on November 7 reported that: "Analysts were saying the election had been a referendum not so much on Iraq, the deficit, health care and jobs as on God, guns and gay marriage. Many Kerry voters […] felt alienated by this new order in which divine intervention trumped rational argument...The impulse to flee to Canada was in the air, discussed in the schoolyard, at the office and on the phone with friends."[4] Many Americans were exasperated by various dimensions of American foreign and domestic policy that were discussed during the campaign, but lesbians and gay men directly experienced the election as a debate about their citizenship rights.

Most importantly, referenda held at the same time as the national election, which ostensibly sought to ban same-sex marriage in eleven states[5] through amendment of state constitutions, have been widely interpreted as constituting an all-out attack on gay rights. These referenda for the most part attempted to enshrine in state constitutions DOMA-like laws that are already in place and that already limit marriage rights to heterosexual couples. In eight of the eleven states, the measures also sought to bar any form of relationship recognition for same-sex couples and as such are an aggressive attack on social citizenship. Beyond the specification of marriage, these measures seek to prohibit a range of privileges commonly enjoyed by opposite-sex married couples, including health and insurance benefits, common property inheritance, and hospital visitation. In some states these measures also mean that *private* and *non-profit* employers will be prohibited from extending benefits to employees in same-sex relationships. The referenda passed by wide margins in every state, including Oregon (57%), a state that is usually considered to be socially liberal. Given the unwillingness of Americans to expand the definition of marriage in state law, it is unlikely that the federal government will move to address inequalities between heterosexual and homosexual couples in areas of federal jurisdiction.

The referenda results sent a strong message about the degree to which Americans interpret marriage and its privileges as a strictly heterosexual prerogative. Lost in much of the discussion are the implications of these decisions for the everyday lives of lesbians and gay men. As a lesbian resident of Oregon remarked after the voting results: "It's the weirdest thing to have politics be so incredibly personal […] This is about the possibility that half of the state of Oregon thinks that I don't deserve to be treated equally as the majority of the people in the state. And I just can't fathom that […] "[6]

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Given the degree to which social and economic citizenship rights have become embroiled in the debate over definitions of marriage in the United States, it is not surprising that many other gays and lesbians have been considering much more seriously the option of moving to Canada. In regard to the question of either leaving the United States or staying on to fight for gay and lesbian equality, one reader wrote in *The Advocate*, a leading American gay and lesbian current affairs magazine with national distribution: "So […] why not move to Canada? […] Why not live in a country that supports and honors who you are? I can't think of a reason not to, aye."[7]

There are, of course, a limited number of lesbians and gays who can actually exercise this option. For those Americans involved in same-sex relationships with Canadian citizens, the ability of their Canadian partner to act as a sponsor under the family reunification provisions of the Immigration Act make emigration a real possibility. Moreover, well-educated, skilled and young (under 40), and English or French-speaking individuals have a very good chance of being admitted as permanent resident under the individual or economic class provisions of the Canadian *Immigration Act*. It is just such highly educated individuals, coming from urban American backgrounds, who are most likely to apply for permanent residence and to be accepted. But their acceptance as immigrants to Canada will not be based on their circumscribed social citizenship rights in the United States or their sexual identity; rather, it is their human capital that enables them to attain a sufficient number of points to be eligible as economic immigrants. Neither the sponsorship nor economic class options assist those lesbian and gay Americans who are not part of a bi-national relationship or do not possess sufficiently high levels of education and training to successfully obtain permanent residence status.

Judicial interpretations of rights under the Canadian Charter of Human Rights and Freedoms have led to the development of an immigration policy with regard to same-sex couples that departs radically from that which exists in the United States, and offers a limited set of options to lesbian and gay men who wish to, or need to, leave the United States. Emigration to Canada for Americans, however, reveals a great deal about the limits of belonging and the practice of antigay discrimination. Given the existence of nondiscrimination laws in many states and municipalities, as well as the landmark 2003 Supreme Court decision in the *Lawrence v. Texas* case which overturned the last sodomy laws and extended the right to privacy, it is easy to imagine that antigay discrimination is a thing of the past in the United States. It is also somewhat easier to argue that lesbians and gays no longer experience discrimination and therefore efforts to extend rights protection, including marriage, is really only an attack on the

normative character of heterosexual marriage and/or an attempt to create "special rights" for a minority. As George Chauncey has argued, "Erasing the history of gay political disfranchisement makes it easier to vilify gay people as a powerful, conspiratorial class whose struggle for full equality threatens the American dream instead of fulfilling it."[8] The issue of bi-national couples and immigration sponsorship, however, strongly demonstrates the limits of equality, as well as the state's enthusiasm for discrimination on the basis of sexual orientation. Coupled with the recent referenda on marriage and same-sex rights, an immigration policy firmly linked to heterosexual marital status lays bare the real social and economic limits of citizenship for gay Americans. Beyond formal rights of citizenship lie those of social and cultural inclusion, and the need or desire for full rights and protection in law may well encourage many Americans – gay and straight – who *can* move to look north for a new home.

Notes

1 See "Canadian Immigration Law and Same-Sex Partners" article in this edition for a detailed description of the evolution of federal immigration policy regarding the recognition of same-sex relationships.

2 Passel, J., R. Capps & M. Fix. *Undocumented Immigrants: Facts and Figures.* Washington, DC: Urban Institute, 2004.

3 *The Permanent Partners Immigration Act* (H.R.: 690) was introduced in the 108th Congress and sought to modify the *Immigration and Nationality Act* to provide same-sex partners of American citizens all the immigration rights that legal spouses currently enjoy. The bill did not enjoy broad enough support in the House of Representatives or the Senate to reach a vote.

4 "*Anemona Hartocollis.* Becoming The Land Of the Flee?" *New York Times* (Late Edition - East Coast). Nov 7, 2004. p. CY.1

5 Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Utah and Oregon.

6 "Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States." *New York Times* (Late Edition - East Coast). Nov 3, 2004. p. 9

7 "Moving to Canada – Letters." *The Advocate*, November 8, 2004.

8 Chauncey, George. *Why Marriage? The history shaping today's debate over gay equality*. New York: Basic Books, p. 12, 2004.

Authors

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