



KERRY ABRAMS

INVESTIGATING THE INTERSECTION OF IMMIGRATION AND FAMILY LAW

RECENT EVENTS have brought widespread attention to both immigration law and family law, but very few scholars have considered how these two fields can interact in profound and unexpected ways. Professor Kerry Abrams has emerged as the country's leading voice on this interaction, and she is helping to establish an insightful and sustained conversation about the links between immigration law and family law. By examining the histories, synergies, conflicts, and inconsistencies of these fields, Abrams is also able to capture broader cultural themes and influences that shape the very personal decisions governed by these laws.

Most immigrants to the United States come because of family ties. Lawful immigrants use these ties to obtain sponsorship from a spouse, child, or parent. Unauthorized immigrants have family ties, too, and these relationships are often the predominant factor in a decision to hop a fence or overstay a visa. Despite the deep connections between immigration law and the family, most scholars of immigration law have focused on other aspects of it, such as the breadth of executive power, constitutional rights of immigrants, or labor economics. Family law scholars, in turn, virtually ignore immigration law. Abrams sees things differently. Her work explores the underappreciated links between family law and immigration law, showing how family norms become deeply embedded in immigration law and how immigration law in turn shapes and regulates the family.

Abrams' interest in family law and immigration law initially stemmed from her undergraduate work in English literature, religious studies, and gender. As an undergraduate, she studied literary and

religious texts with an eye for how gender norms influenced and shaped culture. Upon graduating from Swarthmore College with Highest Honors and a degree in English literature, she worked in academic publishing, and later attended Stanford Law School and practiced commercial litigation at Patterson, Belknap, Webb & Tyler in New York. When a position in the Lawyering Program at New York University became available, Abrams jumped at the opportunity to teach.

Her initial attempts to write about her areas of practice—intellectual property, false advertising, employment discrimination, and civil rights law—proved frustrating. “Litigating a case is one thing,” Abrams explained. “You have a client with a real, pressing need, and those needs were always interesting to me. But sitting alone at a computer, deciding what to write about when I could write about absolutely anything ... that required a complete mental shift.” Abrams ultimately returned to her undergraduate roots. “I asked myself, ‘Why are you interested in law as an academic matter?’” she explained. And the answer was “because I don’t think law controls everything. Law is in a constant dance with culture. It is shaped by culture, and helps create culture.” Abrams ultimately decided that there were two areas where the connection between law and culture was especially salient and vexed: immigration law and family law.

Abrams was not concerned that most scholars failed to see a connection between these two fields. In some ways, they couldn’t be more different. Immigration is federal; family law is largely state-based. Immigration law is highly statutory and regulatory; family law is much more about case-by-case judicial decision-making. Immigration law is full of bright-line tests; family law uses amorphous standards such as “the best interests of the child.” And immigration law deals with questions of national identity and belonging, whereas family law deals with people’s individual identities and personal relationships. What Abrams saw early on, however, was that at the level of the individual person, the species of law regulating that person is irrelevant. If a person seeks lawful permanent residence based on a marriage to a U.S. citizen and immigration law refuses to recognize that marriage, then the outcome is just as personal and local for those two people as a state’s decision to forbid their marrying in the first place. On the flip side, if states forbid certain types of marriages (say, for example, between two people of the same sex, or between more than two people), then the state-level deci-

sion to define marriage affects who can be included in the polity on a national level.

In one of her early law review articles, Abrams rigorously analyzed the ways in which immigration law functions as a form of family law. “Immigration Law and the Regulation of Marriage,” 91 *Minn. L. Rev.* 1625 (2007), begins by delineating four stages in which law could regulate marriage: courtship, the entry into marriage, the intact marriage, and divorce. Abrams observed that in state family law, regulation of courtship is nonexistent, regulation of marriage is light (a license, a ceremony, a certificate, a small fee, and limitations on who can marry), regulation of the intact marriage is, again, minimal, and regulation on divorce is extensive. In contrast, she showed that immigration law regulates heavily in all four stages.

Consider, for example, courtship. Under state family law, courtship is completely unregulated. A convicted felon who claims falsely that he has never been arrested and that instead he is a decorated military hero with an M.B.A. from a top-10 school and a large trust fund can lie with impunity to a prospective spouse with no legal consequences. If they marry and the unfortunate spouse discovers the lie, the only remedy is divorce—most states would not grant an annulment, nor would they entertain a lawsuit for fraud. In immigration law, by contrast, the government intervenes in the courtship process. If a U.S. citizen sponsors a fiancé for a temporary visa, he or she must demonstrate that they have met in person before but that they have not known each other for more than two years. They must marry within 90 days of the fiancé entering the United States. And the U.S. citizen must reveal to the U.S. government (and his fiancé) any criminal convictions, including convictions for offenses relating to alcohol or domestic violence. These differences are only the beginning of the many ways in which immigration law regulates some marriages much more extensively than family law does.

Abrams’ observation was not an indictment of the immigration law system. Rather, her article aimed to show that rigid definitions between doctrinal areas such as “family” and “immigration” law fail to capture how the law actually regulates real families. Immigration law does not only regulate immigrants—it also regulates the family members of immigrants if they seek to reunify. Much of this regulation is subtle but nevertheless real. One example Abrams pointed out in her article is the extensive detail in the Code of Federal Regulations telling

immigration officials what evidence of a “bona fide marriage” for immigration purposes should look like. The CFR lists many types of evidence that might be pertinent, including documentation of joint ownership of property, joint leases, joint bank accounts, birth certificates of children born to the marriage, and “other” documentation—often, in practice, pictures of vacations, weddings, or honeymoons. The logic behind these regulations is sound: it is more likely than not that someone who has a child with another person, or buys a house with them, or opens a joint bank account, really wants to be married to them and isn’t just doing it for a green card. But these regulations have the effect of encouraging particular behavior in people who already have bona fide marriages. A loving, married couple might open a joint bank account when they otherwise wouldn’t, hurry up and have children, or jointly buy a home when they otherwise would have lived with extended family. They may hold a wedding ceremony (perhaps involving customs they wouldn’t have chosen) or take a honeymoon that they can’t afford to develop the right documentary evidence of a “bona fide marriage.” For many immigrants, demonstrating a “bona fide marriage” is one of their first experiences of the coercive assimilation demands imposed on them by the law.

As Abrams continued to explore these connections, she quickly realized that the link between family law and immigration law is not new. Family-based migration has been going on since the dawn of time, and, as Abrams argued in several legal history articles, has shaped the development of U.S. immigration law. In “Polygamy, Prostitution, and the Federalization of Immigration Law,” 105 *Colum. L. Rev.* 641 (2005), Abrams revealed how the dominant story of the history of Chinese exclusion has missed an important component—the role marriage norms played in Chinese exclusion during the late nineteenth century. Many, many scholars had written extensively about the Chinese Exclusion Act, an 1882 federal law that barred Chinese laborers from entry into the United States. But most had ignored an earlier law—the Page Law of 1875. On its face, the Page Law looks narrow; it essentially excluded Chinese prostitutes from entering the country. But Abrams delved deeper, studying the enforcement of the law. She uncovered the trial transcript of the most important case involving Chinese women and read hundreds of pages of legislative history of the Page Law and other anti-Chinese legislation. What she found was that the term “prostitute,” while sometimes used accurately, was also used in a

much broader fashion than one might imagine. Most female Chinese immigrants in the nineteenth century were not first wives because a first wife would typically stay back in China to care for her husbands' parents. Instead, they were second wives, which immigration officials classed as prostitutes. Virtually every Chinese woman entering the Port of San Francisco was a prostitute under this definition.

Although the percentage of Chinese immigrants who were women was small, the effect of excluding virtually all Chinese women was enormous. Chinese immigrants were ineligible for U.S. citizenship, and could therefore be deported at the whim of the government. But a child of Chinese parents, born on American soil, was a U.S. citizen under the Fourteenth Amendment to the Constitution. Anti-miscegenation laws deterred Chinese men from reproducing with white women, but if Chinese women were allowed to live in the United States, there was a real possibility of a second generation of Chinese-Americans who were citizens. The Page Law prevented this from happening; it was not until the 1950s, after the various anti-Chinese acts and the bar to Asian citizenship were repealed, that the gender gap began to close and the Chinese population rapidly began to expand. Thus, Abrams discovered, the Page Law is a prime example of the complicated relationship between law and culture; the law responded to cultural differences in a way that further entrenched the very differences to which it was responding.

After exploring the Page Law, Abrams turned to the next logical question. "I wondered," she explained, "if Chinese women were excluded because they were the 'wrong' kind of wives, is there anyone who was included? Does the law include as well as exclude?" This question once again led Abrams to look beyond doctrinal boundaries for answers. Immigration law, by its very nature, is about exclusion. But other laws, such as the Homestead Act, which encouraged settlers to farm land in the territories, were "inclusive" in that they were intended to create incentives for migration. In "The Hidden Dimension of Nineteenth-Century Immigration Law," 62 *Vand. L. Rev.* 1353 (2009), Abrams argued that we should think of laws such as the Homestead Act as a type of inclusionary immigration law. And she found that the family also played an important role in this type of legal system. The Homestead Act, for example, did not only encourage male farmers to migrate. It gave twice as much land to men who brought wives.

The Homestead Act was just one example of how certain types of

migrants were encouraged to move west. Abrams' article also included an extended case study of the migration of white women to the Pacific Northwest in the 1860s. Male pioneers, she showed, were cohabiting with Native American women and adopting their customs. In an effort to counteract this trend and "civilize" the west, local governments and local leaders up and down the West Coast engaged in schemes to import white women from New England and Europe to be brides for the pioneers. The most famous of these expeditions was that of the "Mercer Girls," named for Asa Mercer, the man who organized their voyage. Abrams retold the history of the Mercer Girls, long a founding folk tale of Seattle, as a story about legal history. Categorically, the Mercer migrants resembled the Chinese women excluded by the Page Law. Yet at every point where government might have intervened—whether to protect the women or to prosecute them for prostitution—it failed to act. The perceived need for white women, Abrams argued, was too great. And in the public imagination, the women were already "brides," even though most of them had been recruited not with promises of husbands but with promises of jobs teaching school in the new towns of the West.

In more recent work, Abrams has expanded her research in several new directions. First, she has moved beyond analyzing marriage and immigration to consider marriage in general, including how it is treated under a variety of laws not traditionally considered "family law." "When I was writing about marriage and immigration, I noticed that the tests in family law were often very different from the tests adopted by immigration law," she explained. "I wondered, what about tax law? Social security law? Military benefits? There are all of these pockets of federal law that use marriage to determine whether a person should get a benefit or not. I wondered if there was any consistency across these fields." In "Marriage Fraud," 100 *Cal. L. Rev.* 1 (2012), Abrams canvassed the tests of what makes a "bona fide marriage" across these different doctrinal areas. In doing so, she noticed that in some circumstances, a marriage certificate is enough to get the benefit; spousal health insurance eligibility is a good example. She called these legal rules "formal marriage" tests. In other contexts, however, marriage standing alone isn't enough to get the benefit; the potential recipient also has to meet additional qualifications. For example, to be eligible for death-related Social Security benefits, a divorced person must demonstrate that the marriage upon which the benefits are based

lasted at least ten years. Abrams termed tests like these “marriage-plus” tests. A third type, the “functional” test, asks whether a couple is functioning as married partners, not whether they really are formally married. The infamous “man in the house” rules of welfare law are a good example; a sexual relationship with a man used to render a mother ineligible for welfare benefits, even if there was no evidence that he was financially supporting her. Finally, the most elaborate tests are “integrated,” combing elements of the other types. Immigration law is a prime example of the integrated test: to have a bona fide marriage, the couple must demonstrate not only that they are legally married (form), that their marriage meets another qualification (e.g., they must have been married for at least two years or undergo additional evidentiary hurdles—a “plus”), but also that they “plan to establish a life together” (function). Thus, the integrated test includes elements of all three of the other types.

In “Marriage Fraud,” Abrams ultimately argued that the type of test the law will impose is quite predictable. We live in a time when divorce is relatively easy to get, sex outside of marriage is not illegal (or even socially frowned upon) and extensive public benefits come with marriage. It is now possible for people to use marriage instrumentally, to get the benefits they want, and then discard the marriage once they have them. Abrams argues that we might expect tests to be more and more elaborate as two things increase: (1) the extent of the benefit, and (2) the ease with which one party can exit the marriage while still retaining the benefit. If the state can keep the test simple, it will, because it’s less expensive to monitor. A person is unlikely to marry a stranger just to get health insurance, for example, because for most people, insurance is prospective—you don’t know when you’ll need it. But even if someone did marry a stranger just to get health insurance, they would need to stay married to keep the policy, so the state has little to worry about in the long run. By contrast, immigration benefits—which provide the right to work and a path to citizenship—are of immediate and substantial value to the recipient, and outlast the marriage they were based on. So, Abrams argued, it makes sense that the law would only lightly police health-insurance marriage fraud but devote extraordinary resources to policing immigration marriage fraud.

Abrams extended some of these arguments with the article “What Makes the Family Special?” 80 *Chi. L. Rev.* 7 (2013). Most of her work thus far had taken family-based immigration as a given. Abrams was

now interested in determining the extent to which immigration law functioned as a form of family law. In this article, she asked something new: Why would a country like the United States want to privilege family members as immigrants in the first place? Is there something special about the family that makes family members better potential citizens? And if so, do our current system's family reunification categories use those advantages effectively?

Abrams argued that there are three broad reasons why a country of immigrants would prefer family members over other immigrants: integration, labor, and social engineering. Family members might be more likely than other immigrants to integrate quickly into American society, especially if they are children whose values and language skills are still developing. Family members might be better screeners than employers for labor migrants. Imagine, for example, a man with five brothers who can afford to sponsor only one. The man has inside information about which brother will be the most industrious, and, since he will be required to sign an affidavit promising to support his brother financially, he has an incentive to make sure he picks the right one. In contrast, an employer will have short-term needs but will not necessarily know which potential employees will make the best citizens in the long run. And, in a nod to her early article "Immigration Law and the Regulation of Marriage," Abrams argued that immigration law allows forms of social engineering that might otherwise be unconstitutional. Think back to the example of fiancée visas. It would likely be a violation of an individual's privacy and freedom of association to require a criminal background check before asking someone out on a date, but immigration law allows precisely this type of intervention. It can thus be a mechanism for intervening in individual relationships, and also for tinkering with all kinds of social characteristics of a large population—gender balance, child-rearing propensity, or attitudes toward marriage. Allowing family members access to the limited number of green cards available means that people who are married with children will be disproportionately represented. Because women receive fewer educational and skilled-work opportunities worldwide, family reunification also means that women will have more access to legal status than they would if immigration were purely skills-based. Once again, law responds to culture, but can also change it.

Abrams has also extended her work on immigration and family law into questions about parentage. Like marriage, parentage is regulated

by state family law. Similarly, parentage is also a status that conveys important benefits in immigration and citizenship law. “Immigration’s Family Values,” 100 *Va. L. Rev.* 629 (2014), co-authored with Abrams’ former student, 2012 graduate Kent Piacenti, broadened the arguments made in “Immigration Fraud and the Regulation of Marriage” and “Marriage Fraud” to explore differences in how these two areas of law treat parentage. Abrams and Piacenti argue that, rather than faulting immigration and citizenship law for deviating from family law, these areas should be evaluated on their own terms, with an understanding of their institutional roles and purposes—what they call “immigration’s family values.” Sometimes, they argue, immigration law may have very good reasons for deviating from family law principles in determining parentage, since the purpose of immigration law is not to protect children or privatize dependency but rather to admit immigrants who are likely to succeed as permanent residents or citizens of the United States. The authors criticize immigration law, however, for not taking one of its core values—family reunification—seriously enough. Because a core value of immigration law is to vindicate the rights of U.S. citizens, they argue, immigration law should do more than it currently does to reunify families, even if the families do not have genetic ties.

Abrams continues to write about the intersection of immigration and family law, even as she expands her scholarly approach into other topics. She has written on the rhetoric used by advocates for and against same-sex marriage, analyzed how marriage functions as a form of citizenship, and assessed changes in annulment law. Currently, Abrams is working on articles exploring such diverse areas as congressional regulation of genetic testing, the legalization of polygamy, families with three or more parents, and the evolution of domicile as a legal concept. She has also taken on a new leadership role within the University as Vice Provost for Faculty Affairs, a position that involves drafting policies affecting faculty. “It’s a big change from critiquing legal regulation to thinking about how to craft rules that work well for everyone,” she explained. “I have spent most of my scholarly career exploring how law and culture intersect; now I’m working to make sure that the rules that govern our scholarly community respect and reflect the cultures within that community.” As a leading scholar, popular teacher, and astute leader, Kerry Abrams is perfectly positioned to do exactly that.

EXCERPTS

**IMMIGRATION LAW
AND THE REGULATION OF MARRIAGE****91 *Minn. L. Rev.* 1625 (2007)**

Joe is single and looking for love. Frustrated with singles bars and blind dates, he does what millions of other people in his position do—he visits an Internet dating website where he meets Susanna. On their Internet profiles, both Susanna and Joe give inaccurate self-portraits. Susanna knocks ten pounds off her weight and omits her two kids by previous boyfriends. Joe adds two inches to his height, mentions that he never drinks, and fails to note that he is a recovering alcoholic with two DUI convictions. By the time they meet and discover these missing pieces of information, it doesn't matter. They have already fallen in love.

Susanna and Joe marry, and she and her two children move to Joe's hometown to be with him. Joe works construction, and Susanna stays home with the kids. About a year later, Susanna decides that the marriage isn't working and divorces Joe. The divorce court rules that the marriage was short-term and that, therefore, Susanna and Joe's separate property has not become "marital property"; the court essentially leaves each of them with the property they brought to the marriage. The court also rules against Susanna's request for alimony, noting that she is twenty-eight years old, has experience as a medical technician, and can easily find work. Susanna and Joe's marriage has a clean break—neither is required to provide for the other in the future.

If we change the facts slightly, however, the outcome changes dramatically. Imagine now that Susanna is not Susanna but instead Svetlana, an immigrant from Ukraine. She and Joe meet each other on an Internet dating website that enables American men to meet foreign women. Under U.S. immigration law, before the website can provide Joe with Svetlana's e-mail address, Joe has to disclose his criminal background (including his two DUIs), the number of minor children he has, any previous marriages, and a list of all states he has lived in since the age of eighteen. (He can still lie about his height.) Svetlana does

not have to disclose anything—including her two children.

Despite finding out about Joe's prior drinking problems, Svetlana falls for Joe. In order to qualify for a fiancé visa to come to the United States, Svetlana must meet Joe in person, so he makes an expensive trip to Ukraine for that purpose. They discover that they are as attracted to each other in person as they were over e-mail, and Joe also discovers that Svetlana has two children. In order to facilitate their living together, Joe sponsors Svetlana and her two kids on a fiancé visa; they come to the United States, and Joe and Svetlana marry less than three months later, as they must to prevent her deportation. When Svetlana applies to become a permanent resident, Joe files the required affidavit of support as her sponsor, attesting that his income is sufficient to support a wife and two children. The couple undergoes an interview in which they must prove to immigration officials that their marriage is bona fide—that they are marrying for love, and not just to obtain immigration status for Svetlana.

Joe and Svetlana are successful in demonstrating the bona fides of their marriage, and Svetlana obtains conditional permanent residency. Because she and Joe have been married for less than two years at the time of her immigration, she must wait two more years before achieving actual permanent residency (a green card). The marriage is rocky, and Svetlana suspects early on that it may have been a mistake. But she hopes for the best, and she wants that green card. So she does the things that her lawyer advises her to do to convince the immigration authorities that her marriage has been genuine from the beginning. (As it was—like most people, Svetlana thought her marriage was going to succeed when she entered into it.) She continues to live with Joe, opens joint bank accounts, and even becomes pregnant with his child. When the two years are up, Joe and Svetlana are interviewed again by immigration officials, who determine that their marriage is bona fide. Svetlana gets her green card, and within a few weeks files for divorce.

Along with the divorce papers, Svetlana files a lawsuit to enforce the affidavit of support that Joe filed to sponsor her as an immigrant. Despite the court's refusal to grant Svetlana alimony or a share of Joe's pre-marriage property, the court holds that Joe must pay Svetlana the amount of money per year that it would take to keep her and her two children above 125% of the poverty line: \$20,112 dollars in 2005, and likely more in future years. This obligation will end only when Svetlana becomes a citizen or has worked for forty Social Security quarters

(about ten years). Svetlana does neither, so Joe continues to support Svetlana and her children until his death.

Joe and Susanna's encounters with family law are fairly typical examples of how state law regulation of marriage currently operates. Marriage can be thought of as having four stages: the courtship stage, in which the couple meets and decides to marry; the entry stage, in which the couple undergoes whatever licensing and ceremonial requirements are necessary to achieve marital status; the intact marriage stage, in which the couple is legally married; and the exit stage, in which the couple divorces, has the marriage annulled, or one of the spouses dies. State marriage law today primarily regulates marriage only during the entry and exit stages, and even then, the regulation is very light.

Typically, the only requirements for getting married are reaching a certain age, not being already married, and finding a mate of the opposite sex who is not a close blood relative. Likewise, in the vast majority of jurisdictions, couples can get divorced for any reason or no reason at all. No matter whether one spouse is a liar, a cheat, a thief, a killer, or an addict—and no matter whether he lies to his prospective spouse about the fact that he is one of those things—if he can find someone to marry him, he can get married, and the state will have nothing to say about it. And if he wants a divorce, he can get one, even if he behaved very badly during the marriage and his spouse was a saint.

In contrast, immigration law regulates heavily all four stages of marriage. As shown through the story of Joe and Svetlana, immigration law permits government intervention at all points in a marriage, from the very early stages of courtship until "death do us part," even when the couple has already chosen to part by divorcing. And immigration law does not just affect the marriages of immigrants—it also affects the marriages of citizens like Joe, if they happen to marry foreigners. If family law is defined as any law that regulates "the creation and dissolution of legally recognized family relationships, and/or determines the legal rights and responsibilities of family members," then for people in Joe or Svetlana's position, federal immigration law is family law.

It should not be surprising that federal immigration law has a lot to say about marriage. Legal immigration status is a scarce resource: many people want it and Congress has made the decision to limit access to a select group of people—those who are family members of U.S. residents or citizens, those who are sponsored by U.S.-based employers, and those lucky few who win a diversity lottery and are randomly cho-

sen for admission. Because marriage is the most common legal mechanism for creating state-sanctioned couplehood, marriage is an important category for family-based regulation. In 2005 alone, nearly 300,000 immigrants were granted permanent residence as spouses of U.S. citizens or residents. Once Congress has decided to use marital status as a means of granting immigration status, it necessarily follows that Congress will define and interpret what marriage means and shape and regulate marriage through the immigration process.

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This Article takes a first step toward mapping the architecture of marriage regulation in immigration law. It compares immigration law's regulation of marriage with that of traditional family law in each of the four stages of marriage and considers how immigration law might tell us something important about how Americans—or at least lawmakers—envision marriage today. The Article provides a taxonomy of reasons why Congress regulates marriage through immigration law and suggests how courts and scholars might determine the legitimacy of congressional action in this area.

POLYGAMY, PROSTITUTION, AND THE FEDERALIZATION OF IMMIGRATION LAW

105 *Colum. L. Rev.* 641 (2005)

In August 1874, the steamer *Japan*, sailing from Hong Kong, arrived in the port of San Francisco with five hundred passengers, eighty-nine of whom were women. The immigration commissioner for the State of California was Rudolph Korwin Piotrowski, a Polish immigrant who first came to California in 1849. When the *Japan* arrived in San Francisco, Piotrowski and his agents boarded the ship and examined each of the women, questioning them through an interpreter. Finding the testimony of twenty-two of the women to be “perfectly not satisfactory,” he concluded that they were lewd, debauched, or abandoned women within the meaning of the 1874 statute.

The questions Commissioner Piotrowski asked the women to determine whether they were lewd, debauched, or abandoned all cen-

tered on the validity of their marriages. When asked to summarize his line of questioning, he explained:

The questions which I gave them were generally where they were married; if they had any relatives or companions when they came here; or why & by what means they came. All of them answered that they were married. I asked "Where is your husband?" In California. When did he come? 3 years. How long have you been married? 4 years ago. How are you going to find him? We don't know. Have you any papers to show? They all said they were married; one of them said they were married in China; others say in California."

Women with children were permitted to land. Those without children, however, were suspect. Their lack of children, Piotrowski said, was "one of the principle reasons" he refused to let them land. Piotrowski ordered the ship's captain, John H. Freeman, to detain the twenty-two women whom he had deemed "lewd or debauched."

The detained women, through their lawyer, Leander Quint, petitioned the state district court for a writ of habeas corpus. The court issued the writ and transferred the case to the Fourth District Court in San Francisco. The lengthy transcript of the hearing is an important piece of the story of the shift from state to federal immigration, but it has been ignored by historians and legal scholars.

...

The transcript is also important because it shows us how California's strategy of state enforcement of immigration worked in practice. California immigration officials were primarily concerned with separating Chinese women into two categories: prostitutes and proper wives. California used two forms of evidence to make its case. First, through cross-examination of the women, its lawyers attempted to elicit testimony that would call into question the women's marital status. The women were not questioned about whether they were prostitutes or, more generally, whether they were "lewd or debauched." Rather, they were questioned about their marriages, and if their answers failed to satisfy the court, they were deemed "lewd or debauched." Second, lawyers for the state brought in witnesses to identify, through an analysis of the women's clothing and demeanor, whether the women were wives or prostitutes.

The assumption was that there was a strict dichotomy between wives and prostitutes—a dichotomy at variance with the more

nuanced reality of Chinese culture. Proper wives dressed, looked, and behaved in one way, “lewd” women in another, and these were the only options.

...

Although much contradictory testimony was elicited during the day-long hearing on a variety of topics, three general themes emerged. Most of the witnesses either supported (or refuted) the view that Chinese women who traveled without their husbands or a male relative chosen by their husbands were likely to be prostitutes, or supported (or refuted) the view that a Chinese prostitute was identifiable through her clothing, hair, and general demeanor. Finally, there was a surprising amount of testimony regarding the Chinese practice of polygamy, given that California’s law did not, on its face target polygamy.

Christian missionaries who had spent time in China tended to believe that a Chinese woman would never travel without her husband. Dr. Otis Gibson, for example, testified that “[i]t is not the custom at all for the wives to go away without their husbands.” Similarly, Ira M. Condit stated that in China, “respectable women travel very little. They are occupied at home. They have their o’n [sic] private apartments, & they leave them but very little. There is not much traveling of women; very little. I have seen but very little of it.” Some Chinese witnesses testified that respectable wives would only travel to the United States if they were accompanied by their husbands, or in rare circumstances, by a close friend or relative.

As for identifying a woman as a prostitute based on her dress, the missionaries once again provided testimony helpful to the state. Dr. Gibson stated that Chinese prostitutes usually wore bright-colored silk clothing underneath their dark outer clothing, “probably yellow or pink or red, & some figures on it of some kind.” The “figured flowered garments,” he said, “are not generally worn by wives.” Ira Condit testified that prostitutes generally wear “a gayer style of dress, a dress with yellow in it, & brighter colors.” Fang Hoy, a resident of San Francisco’s Chinatown, gave more specific testimony about differences in dress:

There is a distinction between whore & Chinese good woman . . . Chinese high class we call mandarin or rich folks. They dress in silk garments; common people dress in cotton or woolen. But the whore or prostitute, they have dresses just like rich folks . . . Wide sleeves, & have what we call a fancy border on the dress.

In its coverage of the hearing, the San Francisco Chronicle dubbed Fang Hoy's description of prostitutes' apparel "the badge of the scarlet sisterhood."

Several other Chinese men, however, testified that they could not tell the difference between a prostitute and a married woman by the way she dressed. Fun Pak explained:

If a woman is walking the streets you cannot tell whether she is a married woman; besides, because some of them married woman walk the streets; but there are a higher class of woman that are not going out walking around the streets; but some of a poorer class women walk around the street. Some of the whores or prostitutes may walk the streets, but you could not tell which is the prostitute or the family woman.

Ultimately, much of the testimony had the same "I know it when I see it" quality as the Supreme Court's obscenity jurisprudence nearly a century later. Ira Condit explained, "There is no definite dress which distinguishes them as such from the others. . . . It is more in their general character & appearance perhaps than anything else." Dr. Gibson identified one woman as a prostitute based on her clothing, but then had trouble explaining why he was so certain that the others were as well:

The flowers on that girl at the end, & her whole get up indicate without a doubt; the others haven't got that on. It is not discoverable in all of them as I look at them to-day. In half of their cases there is evidence to my mind that they belong to that class from the clothing they have on. I don't know only by that, and I know by the fact of their comming [sic] as they do here.

Thus, the hearing was devoted primarily to ferreting out women who were "lewd or debauched" from those who were married, even though the definition of "lewd or debauched," on its face, had nothing to do with marriage. This imposition of a strict marriage-prostitution dichotomy was typical of the times. It also foreshadowed the arguments presented by Horace Page to Congress several months later in support of the Page Law.

Also foreshadowing the Page Law was the emphasis on the Chinese practice of polygamy in the California hearings. In theory, polygamy had nothing to do with the hearings. The issue to be decid-

ed was whether the women had been improperly detained—whether or not they were, in fact, prostitutes. No one suggested at the hearing that a woman who was a second wife should be sent back to China because she was “lewd or debauched.” But an underlying theme of the hearing was that the Chinese had very odd marriage customs, and that Chinese women in general were untrustworthy and sexually aberrant. Chinese women in polygamous marriages seemed more akin to prostitutes than to proper wives. Accordingly, there were a significant number of witnesses who testified about the practice of polygamy, even if it was technically irrelevant.

At the hearings, Dr. Gibson distinguished between proper, monogamous wives, and wives in polygamous marriages. When questioned about the number of Chinese in San Francisco who were married, Dr. Gibson volunteered that even those women who were married were not really proper wives:

Q: What proportion of the Chinese women coming to this country are married? Could you say from you [sic] own knowledge of the Chinese here?

A: I don't suppose there are in this city to-day perhaps 100 married women. . . . There may be that I don't know of, but I don't think think [sic] there are 20 first wives in this city. . . . I think not, unless you call it married where they have second wives. They, some of them, take this class of women for a second wife, & leave them with the family when they leave here, & somebody else take' [sic] them.

Indeed, one witness had accompanied his second wife to San Francisco aboard the Japan. While his wife's status as a second wife was legally irrelevant, he was nevertheless questioned at length about the details of his marriage customs:

Q: Are you a married or a single man?

A: He has a wife.

Q: Where is your wife living?

A: He says, my wife is living at home in China, & the other wife, or the other concubine or second wife is here.

Q: Then you have two wives [sic], one living here and the other in China, have you?

A: Yes, sir; the older or principal wife is in China, & this secured wife is here.

This series of questions was an early example of what would become a common theme in courts and legislatures in the decades to come: the scandalous practice of polygamy as practiced by the Chinese. Although it does not appear that second wives were excluded through enforcement of these early California statutes, once immigration law became federalized, polygamy became grounds for exclusion.

MARRIAGE FRAUD

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The mere fact that marriage can be used instrumentally, however, does not mean that the government should waste resources preventing people from doing so. After all, people enter into relationships all the time for instrumental reasons, such as when they enter into employment contracts to earn money. What makes marriage fraud different from some other instrumental uses of institutions is its harm to the state, or at least lawmakers' perception of this harm. The intensity of the (perceived) harm must vary, because of the wide range of responses, from simple formal marriage rules to highly intrusive, and expensive to administer, integrated rules such as the "establish a life" test. What follows is an analysis of the potential harms to the state and why the tests vary as much as they do.

1. THE CONCEPT OF HARM: FRAUD ON THE MARKET

A first step to understanding why the state feels harmed by marriage fraud is to understand marriage fraud not as private contractual fraud, but as fraud on the public. In contractual annulment-for-fraud cases, identifying the victim was easy—so easy, in fact, that the fraud made the marriage voidable but not void. The victimized spouse, and only the spouse, could end the marriage, but the victim's family members, community, the public at large, and the state had no standing to challenge the validity of the marriage if the victim was content to remain married. In the public benefits marriage fraud cases, harm to one of the spouses suddenly becomes irrelevant, or, at most, only part of the problem.

Instead, the harm is to the public at large or even to the state itself. In this respect, the new marriage fraud doctrines resemble another body of twentieth-century law, the federal criminal law that established new crimes, including financial fraud. As William Stuntz observed, the old canard that “ordinary lying is not a crime” is no longer true: “a good deal of ordinary lying fits within the definition of one or another federal felony.” Criminal financial fraud, like marriage fraud, no longer requires an individual victim. In fact, in many cases the person who normally would be in the place of “victim” may have benefited from the fraud. Just as two people might collude in marriage fraud to seek the benefits of marriage, the shareholders of a particular corporation might benefit from fraud that enhances the corporation’s stock prices even if the fraud harmed the public by distorting the market.

The financial fraud context offers a preliminary answer to the question of how the public can be a victim. Altering the functioning of the market could harm everyone, because participants in the market rely on the “integrity” of the market price, which is in turn set by the millions of exchanges occurring on the market every day. This “fraud on the market” theory is useful for thinking about marriage fraud because it recognizes that the harms of fraud might be diffuse and difficult to quantify and nevertheless cause genuine harm. The analogy also suggests that marriage fraud will be difficult to police and require ever-changing methods as defrauders develop new techniques for working the system.

2. HARMS TO THE PUBLIC IN MARRIAGE FRAUD CASES

Marriage fraud, like financial fraud, might impose diffuse harms on the public. Hence, even without individual, identifiable victims, lawmakers appear to have a strong hunch that they must do something to prevent the instrumental use of marriage. Although marriage fraud does not distort stock prices, it could entail significant harm to the public, both financial and expressive.

A. FINANCIAL HARMS

First, marriage fraud might harm the public by costing it money. If the evil-doers did not commit fraud to gain access to benefits, then society could better spend the money somewhere else. Social security

benefits given to a spouse could instead go back into the social security system to be spent on someone else. If the entity giving the benefit is a private employer, as with health insurance, employer-sponsored pensions, or even gym memberships, the harm to the public is less direct but still present—the fraud will cost the employer money, and the employer will pass on these costs to consumers, that is, the public. The employer may also pass the costs on to other insureds in the pool—other employees of that particular employer, or other employees who use the same services.

But in the case of marriage, a problem lurks behind this theory of harm. What if the couple had a bona fide marriage and not a “fake” one? Then, presumably, they would be entitled to claim the benefit. In theory, each “ideal worker” is entitled to include one spouse as a beneficiary on his insurance policy, as a beneficiary for social security purposes and as a dependent for tax purposes. It is not as if we ration marriage licenses because we cannot afford to have everyone in society marry. Why should the public care how successful, honest, or satisfying his marriage is, so long as he is not claiming benefits for more than one spouse?

Perhaps the answer lies in the structure of the benefits markets themselves. On their surface, these markets appear to assume that benefits should be freely allocated to ideal workers, their spouses, and their children. In reality, however, the system operates on the tacit assumption that not everyone has a spouse. Single workers effectively subsidize health insurance for their married co-workers’ spouses. Similarly, in the context of immigration, U.S. citizens are entitled to sponsor an immigrant spouse, but the system assumes that most citizens will marry other citizens so that the number of citizens sponsoring immigrant spouses will remain low as a percentage of the total population. And we could even think of the federal tax system as burdening some types of couples to benefit others: the total cost of the marriage “bonus” given to some couples is largely offset by the marriage penalty imposed on others.

If we understand marriage benefits as subsidized by those who do not use them (or, in the case of the marriage bonus and penalty, subsidized by those who do not perform marriage in a traditional breadwinner/homemaker fashion), the “marriage-plus” rules and functional tests suddenly look not only like fraud prevention mechanisms but also like methods for cabining the definition of marriage.

This limitation ensures that not everyone can claim marital benefits and enough benefits will remain for those who conform to the privileged definition. The contractual system of marriage as privatized welfare worked best when everyone was married; the more recent system of using marriage as a proxy for entitlement to benefits works best if not everyone can qualify.

This theory of harm may partially explain the myriad cases involving gay people who, helped by their friends, engage in marriage fraud in order to be with, or obtain benefits for, their partners who are ineligible because of the different-sex requirement discussed previously. Numerous immigration and military benefits cases, for example, involve a U.S. citizen marrying the partner of a gay friend so that he can be reunited with his partner. In these cases, the fraud does not result from too many immigrants being sponsored but rather from the wrong person sponsoring the immigrant. The U.S. citizen sponsor is not sponsoring a second spouse; he is merely using his ability to sponsor a spouse, which would otherwise go unused, to help a friend. Nor is the “real” husband—the gay U.S. citizen—sponsoring anyone at all; in fact, he is forgoing his ability to sponsor a spouse and instead allowing a friend to do it for him. The harm, then, is not that an “extra” person obtained a status—both U.S. citizens were, in fact, entitled to sponsor someone for that status. Instead, the harm is that the system is simply not designed to allow everyone to claim a spouse, and someone whom the system has excluded is nevertheless attempting to claim the benefit.

A slight twist on this theory is the theory that marriage fraud robs insurers, both private and public, of their ability to adequately predict the payouts they must make. Health insurance and life insurance companies, for example, set rates and make predictions based on actuarial tables showing the statistical likelihood of death at given ages; insurance companies and public insurance programs, such as social security, make similar predictions about the likelihood of a person having a disability, being married, or having other dependents. The harm to the public if someone claims a spouse who is not “really” his or her spouse is not only that the state is forced to pay for someone it did not anticipate having to pay for, but that the claimant has robbed the state of its ability to make predictions about the number of claimants and ensure that its programs are adequately funded.

B. EXPRESSIVE HARMS

So marriage fraud might be expensive for the state. Might it also result in expressive harms? Many of the antifraud pronouncements Congress has made involve not expense but concern about protecting marriage itself. As Representative Barney Frank put it during hearings on the IMFA, “[m]arriage is a very important and a very sacred institution, and we should not stand by while people trifle with it to get into the country.” This kind of expressive harm might be thought of not as fraud on the market, but as fraud on the voters. Voters elect legislators who put a certain kind of public benefits program in place, which rewards certain kinds of marriages—that is, heterosexual and gender-traditional. Use of marriage fraud to obtain the benefit without conforming to the statutorily imposed definition of marriage denies voters and the citizenry their public policy preferences as expressed in voting practices.

Anxiety about harm to marriage as an institution could also justify the “establish a life” test. The logic goes something like this: if a couple is willing to marry and to live so as to create the appearance of sincere companionship, then their private motives for marrying will not damage the institution. Put differently, their willingness to embrace the “stick” aspects of marriage—commitment, mutual support, and conjugality—justifies their interest in a particular “carrot.” But if they are unwilling to embrace the stick, the institution might crumble.

According to some critics, the instrumental use of marriage does not just cheapen marriage. It also undermines marriage from within by de-gendering the institution. In this view, the fact that public benefits are structured to encourage traditional breadwinner/homemaker gender roles cuts in favor of maintaining them. Individuals who are not willing to take on these roles but want the benefits anyway threaten the institution by making it less about civilizing men, protecting against female dependency, and nurturing children. Instead, for couples unwilling to conform to traditional marriage roles, marriage is about the two individuals who make up the marital unit and their autonomous needs. With this theory in mind, we can read Boyter, the “divorce fraud” tax case, as punishing a couple for having the audacity to create a dual-breadwinner family. Marriage in this view is not an equal institution, but instead a status that shapes behavior along gendered lines to produce societally beneficial results.

A similar critique underlies the common charge that same-sex marriages are “counterfeit” or “fake.” Since same-sex couples cannot procreate with each other without outside help, some scholars have accused them of seeking “marriages of convenience entered into primarily for the tangible benefits.” A “real” marriage, on this theory, would be one in which the couple engaged in procreative sex. To return to the example mentioned in the financial harms section above, a person who uses a fraudulent immigration marriage to a third party to facilitate reunification with that party’s same-sex partner might be understood as harming the public financially by taking a spot that would not otherwise have been used. But such a marriage also alters marriage itself by introducing an alternative model that involves neither gendered roles nor procreative sex.

A problem with both of these critiques is that they make assumptions about what marriage is that may simply be untrue for many people. In order to identify an expressive harm to marriage, we must identify what marriage is, and how exactly the expression of a different vision dilutes, misrepresents, or destroys it. But there seems to be little cultural consensus on what marriage is today. The greater harm to marriage may occur not from opening it up to more types of people, but from insisting that it is a coercive, gendered institution, one that many people might find unappealing.

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