Marriage and Morality: Examining the International Marriage Broker Regulation Act

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ABSTRACT

This Article examines the International Marriage Broker Regulation Act (IMBRA) through the lenses of race, gender, and the institution of marriage. Legal scholarship about IMBRA has been sparse since its enactment in 2006, however the Act merits further investigation. Created to protect noncitizen women intending to marry U.S. citizen men met through international marriage brokers (IMB), the Act aims to give these women access to information about the U.S. citizens and to educate them about their rights and resources in the event of domestic violence. To do so, the Act regulates the IMB industry and the male clients of IMBs.

Looking beyond the purported purposes of IMBRA, this Article explores the historical schemas that inform the "unconscious" of the Act to better situate it as rooted in a discourse of moral judgments concerning race, gender, and marriage. Since the mid-nineteenth century, laws have been enacted to regulate the entry of immigrants into the United States. Notions about race, gender, and moral values were used as benchmarks to exclude immigrants and deny citizenship. To this day, these notions continue to influence laws regulating immigration and citizenship. Specifically, the ideological roots underlying IMBRA can be linked to earlier precedents, which were based on Western notions about race, gender, and marriage. By identifying and analyzing these precedents, we can better understand IMBRA's regulations, and use that knowledge to develop future immigration policy further.

INTRODUCTION

Congress enacted the International Marriage Broker Regulation Act (IMBRA) on January 5, 2006, as part of the reauthorization of the Violence Against Women Act (VAWA),[1] in response to a few highly publicized

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1. International Marriage Broker Regulation Act of 2005 (IMBRA), Pub. L. No. 109-162 (2006) codified at 8 U.S.C. § 1375a.

murders of women by their husbands, whom they had met through IMBs.[2] Two casualties of such murders were Anastasia King and Susanna Blackwell. King, murdered in 2000, was a twenty-year-old from Kyrgyzstan; Blackwell, murdered by her estranged husband in a courthouse in 1995, emigrated from the Philippines.[3]

IMBRA, along with VAWA, can be seen as part of a shift in immigration law that recognizes gender subordination as a wrong that needs to be corrected, and therefore aims to protect foreign women from potentially abusive American spouses and reduce their dependency on abusive husbands for legal status.[4] However, it can also be viewed as a law that unnecessarily burdens American citizens with additional regulation when they marry noncitizens. A closer study of U.S. immigration and citizenship laws suggests that IMBRA is perhaps the latest in a line of regulatory mechanisms fueled by American perceptions about race, gender, and marriage. This Article aims to reveal the "unconsciousness" of IMBRA's text, not by focusing solely on the language of the text itself, or the Congressional debate preceding its enactment, but by recognizing it as part of the broader regulation of immigration and citizenship.[5]

By examining the historical precedents that influenced this legislation, this paper seeks to situate IMBRA within a larger scheme of immigration regulation, which has specifically focused on the inclusion and exclusion of women in the United States' national polity. It is important to recognize how historical precedents and notions still influence today's immigration laws. Doing so helps us understand why immigration law regulates particular people and relationships in specific ways. Understanding these connections is a critical step in developing future regulations that account for their own "unconscious" influences, thereby creating a more comprehensive and "useful immigration policy."[6]

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2. *See* 149 CONG. REC. S9960 (daily ed. July 25, 2003) (statement of Sen. Cantwell).

3. Erin K. Pleasant, *The International Marriage Broker Regulation Act: Protecting Foreign Women or Punishing American Men?*, 29 CAMPBELL L. REV. 311, 314 (2007).

4. *See* Kerry Abrams, *Becoming a Citizen: Marriage, Immigration, and Assimilation, in* GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 39, 55-56 (Linda McClain & Joanna L. Grossman eds., 2009); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1696 (2007).

5. *See* Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1813 (1993) (engaging in a rhetorical reading of Bowers v. Hardwick to reveal the "unconsciousness" of the text by focusing on the passages in the decision that demonstrate the "psychic mechanisms of identification around which the Court's interpretation and adjudication of the law of 'homosexual sodomy' revolves." Thomas shows that the *Hardwick* decision is not "primarily or exclusively a judicial discourse about the legal regulation of 'homosexuality,'" but that it is better understood as "entailing the discursive construction and ideological consolidation of a certain 'heterosexual' identity").

6. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 716 (2005) (emphasizing that understanding the link between marriage and immigration law is important "to the development of a coherent and useful immigration policy").

Since the 1800s, laws pertaining to immigration and citizenship have been defined in relation to the institution of marriage as well as perceptions about race and gender.[7] There are numerous ways in which IMBRA is influenced by historical notions about race, gender, and marriage. The particular ways in which IMBRA regulates American citizens and their noncitizen spouses can be attributed to the historical perception of Asian women, who make up a large portion of women advertised through IMBs, as sexualized and servile; the perception of prostitutes as a corrupting force and threat to monogamous Christian marriage; the historical discomfort with marriages to noncitizens; the move from seeing foreign women as a threat to American citizens to now viewing them as threatened by our country's citizens; the shift toward family-based immigration as a means of attaining citizenship; and Western notions of marriage based on free choice and consent. The particular relationships the legislature chose to regulate, and ways in which it chose to regulate them, speak volumes about the historical stereotypes and moral-based judgments that underlie the Act. IMBRA illustrates how perceptions of race, culture, and gender continue to play a critical part in dictating the moral validity of marriages between citizens and noncitizens, thereby determining who can immigrate and eventually attain citizenship in the United States.

Moral worthiness is a theme that runs constant in the regulation of immigration and citizenship. Moral arguments used by anti-Chinese groups in the 1800s led to the first exclusionary laws, and moral arguments still determine who can enter the country, as evidenced by the frameworks of "moral turpitude," "good faith marriages," and "good moral character."[8] Immigration and citizenship are approved for those who "deserve" them based on moral judgments about personal character and acceptable forms of relationships. These moral judgments are influenced by notions of race, gender, and marriage. IMBRA is one such example of the intersection of moral judgment and the law.

As a means of explaining early immigration laws, the Article tracks the formation of sexualized stereotypes about Asian women, which were then used to exclude them from the United States. Part I explores the formation of the idea that all Asian female immigrants were prostitutes and the further promulgation of this sexualized stereotype during the time of U.S. military occupation in Asia. Part II then examines the regulations used

7. *Id.* at 643 (contending that concerns about preserving the traditional American conceptions of marriage and family is at the root of the American federal immigration system).

8. *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1101(f) (2006) ("good moral character"); INA, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) ("crime involving moral turpitude" makes aliens inadmissible); INA, 8 U.S.C. § 1182(a)(2)(D) (2006) ("any alien who is coming to the United States solely, principally, or incidentally to engage in prostitution . . . is inadmissible"); Immigration Marriage Fraud Amendments (IMFA) of 1986, 8 U.S.C. §§ 1184(d), 1186(a) (1988).

to exclude immigrants based on moral and racial concerns. Part III analyzes the fluidity of women's citizenship as defined by their marriages. This Part explores historical ideas about women, citizenship, and marriage, to show how these notions have informed U.S. immigration laws; it also explores the ways in which immigration laws give the federal government the right to regulate marriages, leading to norm-setting and moral judgments about acceptable types of relationships. Part IV examines IMBRA and shows that the Act is based on moral judgments about relationships and family formation, which are influenced by the historical conceptions of race and gender discussed in Parts I-III of the paper. This Part also explores questions arising from IMBRA's methods of regulation. The Act, through the particular relationships it regulates and the way it regulates them, raises questions about its own efficacy and the underlying assumptions on which it is based.

I. PERCEPTIONS OF ASIAN WOMEN AS PROSTITUTES

The history of Asian immigration to the United States has shaped current views about Asian women. After Asian immigrants first arrived to the United States, they were quickly met by antagonism and anti-Asian sentiment. Opponents to Asian immigration capitalized on perceptions of cultural difference between Asians and Americans. Western ideas of morality, sexuality, and marriage were contrasted with perceived "Oriental" values.[9] Legislators focused on Asian characteristics of despotism, hierarchy, polygamy, and unwillingness to assimilate to paint a picture of a people so different that they could never become U.S. citizens with American values of democratic government, freedom of contract, and Christian morality.[10]

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9. EDWARD W. SAID, ORIENTALISM 1-2 (Vintage Books 1979) ("[T]he Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience. . . . Orientalism is a style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the time) 'the Occident'"); *id.* at 4 (mentioning that such "'Oriental' ideals" include "Oriental despotism, Oriental splendor, cruelty, [and] sensuality"); ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943 25 (2003) (noting that racism against Chinese immigrants was "grounded in an American Orientalist ideology that homogenized Asia as one indistinguishable entity and positioned and defined the West and the East in diametrically opposite terms, using those distinctions to claim American and Anglo-American superiority").

10. *See* Abrams, *supra* note 6, 658-65 (noting how the anti-polygamist movement linked polygamy with slavery and associated polygamy with the Chinese); Martha Ertman, *The Story of Reynolds v. US: Federal "Hell Hounds" Punishing Mormon Treason*, *in* FAMILY LAW STORIES, 53-55 (Carol Sanger ed., 2007) (noting that the Supreme Court conflated polygamy with barbarism and Asian practices); Ming M. Zhu, *The Page Act of 1875: In the Name of Morality* 8 (July 1, 2010) (unpublished article, on file with the Social Science Research Network), *available at* http://ssrn.com/abstract=1577213 (indicating that Representative Thomas Fitch remarked to the House of Representatives that the Chinese were a people with "a distinct civilization, religion, habits, and language of their own; a race who are alike incapable and unworthy of assimilation with ours." (quoting CONG. GLOBE, 41st Cong., 2d Sess. 410)).

As part of this campaign, Chinese (and subsequently other Asian) women were portrayed as prostitutes and sexual slaves in contrast, and as a danger to, the American ideal of Christian monogamous marriage based on notions of love and consent.[11] During the Victorian era, "sexuality was carefully confined; it moved into the home"[12] and "monogamous marriage was the only acceptable outlet for female sexuality."[13] This early perception of Asian women as prostitutes, and subsequent fear of them as a dangerous corrupting force, continues to color current immigration and citizenship laws, which still aim to regulate sexuality, morality, and marriage.[14]

This Part focuses on specific aspects of the early immigration of Asian women and how such immigration affected the American perception of Asian women. Due to the immense scholarly focus on Chinese and Japanese immigration to the United States, and the fact that these two groups arrived earlier in time than other groups of Asian immigrants, I will primarily discuss Chinese and Japanese women.[15] The section also touches on women in Korea, the Philippines, and Vietnam as they relate to military prostitution, to show how notions of sexualized and submissive Asian bodies continued to shape images of Asian women into the late 1900s.

A. Before the Start of Immigration

Prior to the arrival of the first Chinese women in the United States, "images of them circulated . . . through travel accounts."[16] In 1830 Americans were given "lurid accounts of bizarre Chinese customs [and] sexual aberrations."[17] The reports portrayed the Chinese as "heathen, crafty, dishonest, and 'marginal members of the human race.'"[18]

The first recorded Chinese women came to the United States in the early nineteenth century and were portrayed as curious exotic objects.[19] These women included Afong Moy, who traveled through the country in 1841 as part of a sideshow, and Pwan Yekoo, who traveled with Barnum's

11. Abrams, *supra* note 6, at 643.

12. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION 3 (1978).

13. Abrams, *supra* note 6, at 653.

14. *Id.* at 647.

15. Yen Le Espiritu, *Toward a Critical Refugee Study: The Vietnamese Refugee Subject in US Scholarship*, 1 J. VIETNAMESE STUD. 410, 418 (2006) (noting that in the field of Asian American studies, "many scholars have critically pointed to the field's privileging of East Asians over other Asian groups—a clear indictment of the suppression of diverse histories, epistemologies, and voices within the pan-Asian framework").

16. LAURA HYUN YI KANG, COMPOSITIONAL SUBJECTS: ENFIGURING ASIAN / AMERICAN WOMEN 115 (2002).

17. Abrams, *supra* note 6, at 650 (quoting Lucy E. Salyer, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 10 (1995)).

18. LEE, *supra* note 9, at 25.

19. KANG, *supra* note 16, at 116.

Chinese Museum.[20] Yekoo was described in the *New York Times* in 1850 as "prepared to exhibit her charming self, her curious retinue, and her fairy feet . . . to an admiring and novelty-loving public."[21] The description indicates the American public's fascination with Asian women. Although descriptions of Chinese women focused on their physical distinction from American women, the descriptions did not focus on race or morality.[22]

B. Immigration of Chinese Women

Recorded Asian immigration to the United States began in the mid-nineteenth century with Chinese men who first came to Hawaii and California.[23] They arrived in the United States partly as a result of the Gold Rush in 1849 and the subsequent need for cheap labor.[24] At the time of their arrival, entry to the United States was fairly easy, as national policies "encouraged and promoted immigration."[25] An estimated 370,000 Chinese entered the United States from 1840 to 1880.[26] In 1868 the United States and China signed the Burlingame Treaty, a bilateral agreement that forbade restrictions on immigration between the two countries.[27] The treaty was signed after the Civil War, when the United States was expanding its markets through international trade and encouraging the immigration of cheap labor.[28]

As early as 1852, with the depletion of gold and influx of immigrants, the Chinese became targets of racial hostility and resentment.[29] In fact, by the 1860s, California state politicians ran elections and won votes based on a platform of harsh anti-Chinese policies.[30]

Racism against the Chinese was based on an "American Orientalist ideology that . . . positioned and defined West and the East in diametrically

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20. *Id.* at 1, 116.

21. *Id.* at 116 (quoting JUDY YUNG, CHINESE WOMEN OF AMERICA: A PICTORIAL HISTORY (University of Washington Press 1989).

22. *Id.*

23. ERIK YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 32 (2001).

24. *Id.*

25. LEE, *supra* note 9, at 2.

26. YAMAMOTO, *supra* note 23, at 33 (noting that in 1870, the Chinese made up nine percent of the population in California).

27. Burlingame Treaty, U.S.-P.R.C., July 28, 1868, 16 Stat. 739 (affirming that the "inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects"); Zhu, *supra* note 10, at 5 (noting that "for the . . . Qing Dynasty, the Treaty was seen as a move towards the restoration of the Chinese Empire as a respected and forceful player on the international stage." For America, the Treaty was, in part, a way to ensure a supply of cheap labor for farms and railroads).

28. Abrams, *supra* note 6, at 650, 671.

29. KANG, *supra* note 16, at 117; Zhu, *supra* note 10, at 15.

30. Zhu, *supra* note 10, at 12-13.

opposite terms."[31] In the view of Americans, Chinese laborers endangered the American standard of living through a willingness to accept lower wages and worse working conditions than American workers.[32] Additionally, Congressional debates focused on the Chinese immigrants' inability to assimilate.[33] For example, during a Congressional session Senator Cowan stated that "it is very well ascertained that those people [the Asiatic population] have no appreciation of that form of government [republican government]; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding or carrying it out."[34] Such statements illustrate the concern that the Chinese endangered the American ideals of democracy and republican government due to their perceived inability to assimilate.[35]

While at first Chinese men came alone, soon Chinese women and children immigrated to the United States as well.[36] Around 1850, there were 4,018 Chinese men and seven Chinese women in San Francisco.[37]

Through the 1850s, the representation of Chinese women in the press became increasingly negative, although there were only a small number of Chinese women in the United States. An article published in 1852 in the *Daily Alta California* described Chinese women in San Francisco as "queer and diminutive specimens of the human family . . . walking through the streets with as much delicacy as a turkey treading on hot ashes."[38] An 1858 article in *Harper's Weekly* described "their supposedly grotesque hair styles, bound feet, and manner of dress."[39] These early articles focused on the Chinese women's physical appearance, to differentiate them from white women. Such negative descriptions would soon reach a peak after all Chinese women in the United States were perceived as prostitutes and as such, a threat to the nation's physical and moral well-being.[40] Soon, however, a shift occurred and the descriptions changed from the women's physical differences to their moral and cultural dissonance.

As the perceptions and descriptions of Chinese women became increasingly negative, a greater effort was made to prevent them from entering the United States. Anti-Chinese groups raised two arguments,

31. LEE, *supra* note 9, at 25.

32. *Id.* at 26.

33. *See* Zhu, *supra* note 10, at 8.

34. Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 412 n.26 (2005).

35. *Id.* at 462-63.

36. George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, *in* ASIAN AMERICANS AND THE LAW, VOLUME 1: CHINESE IMMIGRANTS AND AMERICAN LAW 318, 319 (Charles McClain ed., 1994).

37. KANG, *supra* note 16, at 117.

38. *Id.* (quoting DAILY ALTA CAL., Aug. 17, 1852) (citing YUNG, *supra* note 21, at 15).

39. *Id.*

40. *Id.* at 118.

based on gender and sexuality, to end the immigration of Chinese women. They contended that: (1) Chinese prostitutes were a threat to the institution of marriage and a danger to white males, and by association a threat to the nation; and (2) Chinese prostitutes were slaves and therefore antithetical to the post-Civil War nation, which was united by its condemnation of slavery. Since all Chinese women were assumed to be prostitutes, all Chinese women would eventually come to face tremendous challenges in immigration.[41]

C. The Threat of Chinese Prostitution

While opponents to Chinese immigration emphasized the threat posed by Chinese prostitution, it is difficult for historians to say with certainty how many of the Chinese women who came to the United States actually engaged in prostitution. Early scholarship on Asian American women highlighted the large number of prostitutes in the initial waves of Chinese immigration.[42] However, recent scholarly research has countered the idea that all early immigrant women were prostitutes.[43] The discrepancy stems from the fact that data from the 1800s is scarce and unreliable. For example, census takers may have failed to distinguish that Chinese second wives and concubines were not prostitutes, and therefore incorrectly listed them as such.[44]

Although there was a great focus on the evils of Chinese prostitution and slavery, the view that all Chinese women were prostitutes was not accurate. In the Chinese immigrant community, the distinction between wives and prostitutes was malleable; some Chinese women came to the United States as prostitutes and later married Chinese men, thereby changing their status.[45] Furthermore, there existed a spectrum consisting of wives, second wives, concubines, and prostitutes; a woman's status depended "on her sexual relationships with Chinese men."[46] This differed from the clear-cut American distinction between wives and prostitutes.[47] Other Chinese women lived together in groups, occasionally even adopting children together, but they, too, were sometimes wrongly categorized as prostitutes.[48]

In 1852, only four Chinese women were recorded as being prostitutes.

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41. Zhu, *supra* note 10, at 30.

42. KANG, *supra* note 16, at 118, 151-52.

43. *Id.* at 153-54, 295 n.10 (pointing out that several scholars, including Sucheng Chan and George Anthony Peffer, "have recently challenged the overemphasis on prostitution in earlier historiography").

44. Abrams, *supra* note 6, at 656.

45. *Id.* at 656.

46. *Id.* at 653.

47. *Id.*

48. *Id.* at 657.

However, in 1870, 2,157 out of 3,536 Chinese women living in California were recorded as being prostitutes.[49] By 1880, the total number of Chinese women had decreased to 3,171, and only 759 Chinese were listed as prostitutes.[50]

Regardless of how many Chinese women actually worked as prostitutes, the majority of Chinese women were perceived as such; and therefore immigration laws aimed at targeting prostitutes affected all Chinese women.[51] The widely held belief that all Chinese women were prostitutes was expressed in political debates and news articles.

Hostility toward Chinese women began in San Francisco, where a municipal committee reported in 1854 that most Chinese women in the city were prostitutes, and this then became the general conviction.[52] In the same year, San Francisco passed Ordinance No. 546 "To Suppress Houses of Ill-Fame Within the City Limits."[53] The law was facially neutral, but the police enforced the Ordinance mostly against Chinese and Mexican brothels.[54] However, prostitution itself remained a legal occupation.[55] This proves that prostitution itself was not the problem, but there was a fear of non-white prostitutes, particularly working in houses of prostitution.

In 1866, California passed "An Act for the Suppression of Chinese Houses of Ill-Fame."[56] The Act specifically declared that Chinese prostitution was a "public nuisance," invalidated leases of property to brothels, and made it a misdemeanor for landlords to let their properties be used as brothels.[57]

In addition to the regulations and enforcement against Chinese prostitution, journalists and politicians expressed especially critical views of Chinese prostitution.[58] In 1854, the *New York Tribune* accused the Chinese of being "lustful and sensual in their dispositions; *every* female is a prostitute, and of the basest order."[59] In April 1869, *Overland Monthly*

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49. Lucie Cheng Hirata, *Chinese Immigrant Women in Nineteenth-Century California*, *in* ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES 38, 40-41 (Nobuya Tsuchida ed., 1982).

50. *Id.* at 41, 43; *see* Abrams, *supra* note 6, at 701 (The decline in the number of Chinese women between 1870 and 1880 may be accounted for by a number of reasons, including the 1875 Page Law, which banned the immigration of Chinese prostitutes.).

51. Zhu, *supra* note 10, at 30.

52. Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, *in* ASIAN AMERICANS AND THE LAW, VOLUME 1: CHINESE IMMIGRANTS AND AMERICAN LAW 2, 5 (Charles McClain ed., 1994).

53. *Id.*

54. *Id.*

55. Zhu, *supra* note 10, at 18.

56. Act of Mar. 31, 1866, ch. 505, 1866 Cal. Stat. 641-42.

57. *Chan*, *supra* note 52, at 5; KANG, *supra* note 16, at 120 (noting that the "penalization and segregation of Chinese prostitution" along with the view that there were many opium dens and gambling houses in Chinese areas, led to the perception of "Chinatowns as a 'vice district'").

58. KANG, *supra* note 16, at 119.

59. Zhu, *supra* note 10, at 9 (quoting *Chinese Immigration to California*, N.Y. TRIBUNE, Sept. 28,

published an article describing San Francisco's Chinatown:

Vice of every form reigned unchecked; and there were not wanting those who were ready to traffic in anything which might bring grain to their pockets; and amongst such were a few shrewd, but unprincipled Chinamen . . . bringing with them the first of those women whose numbers have since increased from year to year, and whose presence is an offence to all respectable people, and a blot on the character of their own nation.[60]

The article asserted that, "nearly all Chinese prostitutes in San Francisco are a disgrace to their nation."[61] It also mentioned that Chinese custom was to sequester women at home, which led to the conclusion that all Chinese women who appeared in public were prostitutes.[62]

Political discussions through the 1860s and 1870s also critiqued prostitution. One Senator described the Chinese as "a race with whom polygamy is a practice and female chastity is not a virtue."[63] Another Congressman stated that "[t]he father sells his son into servitude and his daughter for prostitution . . . . Polygamy and concubinage are national institutions."[64] Yet another Senator from California remarked that, "[i]n morals and in every other respect they are obnoxious to our people. The women are prostitutes, and the men are petty thieves."[65] Even President Ulysses S. Grant said about the Chinese that, "[h]ardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the great demoralization of the youth of these localities."[66] These statements show that even in the highest echelons of government, policymakers regarded prostitution an inherent Chinese characteristic and perceived all Chinese women as prostitutes.

D. Prostitutes as a Corrupting Force

Chinese women came to symbolize the most fundamental differences between West and East; the Chinese prostitutes came to represent "sexually overcharged bodies that threaten[ed] the moral and physiological health of American manhood, and by extension, the nation itself."[67] The presence of

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1854, at 4).

60. KANG, *supra* note 16, at 119 (quoting Reverend A. W. Loomis, *Chinese Women in California*, OVERLAND MONTHLY, Apr. 1869).

61. *Id.*

62. *Id.* ("The women who are seen in the gambling houses gaudily dressed . . . are of that class . . . 'of no account'; so, likewise, are most of those . . . who are seen upon the streets and frequenting the shops and the theaters." (quoting Reverend Loomis, *supra* note 60, at 349)).

63. Zhu, *supra* note 10, at 10 (quoting CONG. GLOBE, 41st Cong., 2d Sess., at 410 (remarks of Sen. Fitch)).

64. *Id.* (quoting CONG. REC., 2d Sess., 1874, 4535) (remarks of Congressman Horace Page).

65. *Id.* at 9 (quoting CONG. GLOBE, 37th Cong., 2d Sess., 2939 (1862) (remarks of Sen. Aaron Sargent of Cal.)).

66. KANG, *supra* note 16, at 120.

67. *Id.* at 152.

Chinese women made miscegenation possible and caused fear of "racial pollution."[68] These women posed the threat of a second generation of Chinese children who would be American citizens or of interracial relationships that might result in mixed-race children that would cause the "pollution" of the white race.[69] This was especially a threat after the ratification of the Fourteenth Amendment in 1868, which guaranteed citizenship to any person born in the United States.[70] After a Supreme Court decision in 1898 extended birthright citizenship to Asians, children born to Chinese women would be American citizens, unlikely to leave the United States and return to China.[71] The fear was that these Chinese children would create a generation of American citizens with a culture of hierarchy, despotism, and slavery, antithetical to American values of democracy and free choice.[72]

The popular perception of Chinese women as prostitutes led to national policies aimed at excluding these women. Lawmakers and enforcers tried to keep out Chinese prostitutes, claiming they had virulent sexually transmitted diseases that were impossible to cure, encouraged the use of opium, and corrupted young white Christians.[73] They were perceived as "instruments for the debasement of white manhood, health, morality, and family life" and as such, "a threat to white civilization."[74] Stemming from Victorian views about sexuality and condemnation of sex outside of marriage,[75] prostitution was seen as a force that could destroy marital bonds and result in "[i]nfected wives and children, dissipated husbands[,] and mental anguish and moral indignation."[76] As prostitutes, Chinese women posed a "threat to the national citizenry" by endangering "youthful white masculinity."[77]

Even after Congress banned the immigration of Chinese prostitutes through the Page Law in 1875, medical experts, politicians, and anti-Chinese groups continued to point out the corruption and contamination caused by Chinese prostitutes. In 1875, the American Medical Association wrote a report characterizing Chinese prostitutes as a "risk to national health."[78] The report stated that ninety percent of sexually transmitted

68. LEE, *supra* note 9, at 26.
69. Abrams, *supra* note 6, at 662-63.
70. *Id.* at 662.
71. *Id.* n.118.
72. *Id.* at 664.
73. Chan, *supra* note 52, at 46.
74. *Id.*
75. Abrams, *supra* note 6, at 653.
76. FREDERICK K. GRITTNER, WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW 91 (1990).
77. KANG, *supra* note 16, at 123.
78. *Id.* (quoting Morag Bell, *Images, Myths, and Alternative Geographies of the Third World, in* HUMAN GEOGRAPHY: SOCIETY, SPACE, AND SOCIAL SCIENCE 184 (Derek Gregory et al. eds., Univ. of

diseases in San Francisco came from Chinese prostitutes, making them "the source of the most horrible pollution of the blood of the younger and rising generations."[79]

In 1876, a Congressional Joint Special Committee to Investigate Chinese Immigration was sent to San Francisco.[80] The investigation examined the "effects of Chinese immigration" on the nation by conducting interviews with "government officials, health department officials, policemen, judges, merchants, bankers, manufacturers, farmers" and others.[81] Even though Chinese prostitutes were being excluded under the Page Law, the committee found that those interviewed were concerned that a decision had to be made about how to handle Chinese women attempting to immigrate.[82] There was disagreement about a solution, as some people interviewed by the Committee believed that Chinese women immigrating to California were not "proper wives," and therefore undesirable, while others insisted that more Chinese women should be present so that Chinese laborers could form families and produce a generation of Chinese children educated in the United States who would be "a very much better class of people than the present race of Chinamen."[83]

In 1907, Congress created the Dillingham Commission to "survey the effects of recent immigration on economic conditions, charity, education, crime, vice, and insanity."[84] In its report, the Commission concluded that "offenses against chastity, especially those connected with prostitution" had increased as a result of immigration.[85] The Commission recommended changes in immigration law to deport prostitutes more easily and recommended criminalizing transportation of prostitutes across state lines.[86]

As illustrated by the views expressed in the media, by doctors, and by politicians, there was a widespread perception that all Chinese women immigrants were prostitutes. The general view was that these prostitutes were a threat to the nation through their corruption of marriage, infection of white men, and the possibility of weakening the white race through mixed-race children. The enactment of numerous laws to prevent Chinese women from entering the United States demonstrates how pervasive and effective this negative perception of Chinese women truly was.

Minn. Press 1994)).

79. *Id.* (quoting Joan B. Trauner, *The Chinese as Medical Scapegoats in San Francisco, 1870-1905*, CAL. HIST. 57, 75 (1978)).

80. Abrams, *supra* note 6, at 706-07.

81. *Id.* at 707.

82. *Id.* at 706-08.

83. *Id.* at 708-09 (quoting REPORT OF THE JOINT SPECIAL COMMITTEE TO INVESTIGATE CHINESE IMMIGRATION, S. REP. NO. 44-689, at 456-57 (1876) (statement of Dr. John L. Meares)).

84. GRITTNER, *supra* note 76, at 88.

85. *Id.* at 89 (noting, however, that the Commission's conclusions were not supported by quantitative data, which showed that immigrants were not more prone to crime than U.S. citizens).

86. *Id.* at 92.

E. Prostitution as a Form of Slavery

Another perception of Chinese women was that they had been forced into prostitution against their will. This perception may have stemmed from the Victorian view that women would only voluntarily engage in sexual intercourse for love or to have children.[87] In this sense, prostitution was seen as a form of slavery and Chinese men were portrayed as slave owners and traders. President Grant said of the Chinese, "the great proportion of the Chinese immigrants who come to our shores do not come voluntarily . . . but come under contracts with headmen who own them almost absolutely. In worse form does this apply to Chinese women."[88] Congress believed that the Chinese customs of polygamy and prostitution revealed "an underlying slave-like mentality."[89]

As part of the debate over the abolition of slavery, public attention focused on the evils of coerced labor, including prostitution.[90] In the aftermath of the Civil War, Chinese prostitution, framed as a form of slavery, was unacceptable in the United States; it defied America's post-war commitment to freedom.[91] Chinese slavery was portrayed as more evil than pre-war American slavery had ever been. In 1892, an article stated that "there exists in this country, wherever the Chinese have obtained a foothold, a slavery so vile and debasing that all the horrors of [N]egro American slavery could not begin to compare with it."[92]

Chinese prostitution, conceptualized as slavery, was portrayed as an inherent part of Chinese culture.[93] The American public believed that the Chinese condoned this form of sexual slavery that was antithetical to American notions of marriage based on free choice and consent.[94] Historian Nancy Cott described the dichotomy between prostitution and marriage: "where marriage implied mutual love and consent, legality and formality, willing bonds for a good bargain, prostitution signified sordid monetary exchange and desperation or coercion . . . ."[95]

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87. Abrams, *supra* note 6, at 658.

88. Volpp, *supra* note 34, at 465.

89. Abrams, *supra* note 6, at 641.

90. *Id.* at 658-59.

91. Volpp, *supra* note 34, at 462.

92. KANG, *supra* note 16, at 127.

93. *Id.* at 125; Volpp, *supra* note 34, at 459 n.246 ("They buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. You cannot make citizens of them." (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (statement of Rep. Higby))).

94. Zhu, *supra* note 10, at 19 ("[The Chinese] bring females under contracts for purposes too vile for me to even mention in this Chamber . . . ." (quoting 2 CONG. REC. 1976, 2300 (1874) (statement of Cal. Sen. Hager))); *Id.* at 20 ("[The Chinese] bring their women here as slaves to be sold into prostitution . . . ." (quoting 2 CONG. REC. 4001, 4535 (1874) (statement of Congressman Horace Page))).

95. Abrams, *supra* note 6, at 658 (quoting NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 136 (2000)).

These fears of prostitution as a corrupting force and as a form of slavery led to the enactment of both state and federal laws to stop prostitutes from entering the United States. In 1870, California passed "An Act to Prevent the Kidnapping and Importation of Mongolian, Chinese, and Japanese Females, for Criminal or Demoralizing Purposes."[96] The law made it illegal to bring any Asian woman to the United States unless she could prove that she came voluntarily and was of "correct habits and good character."[97] To protect American citizens from the corrupting force of prostitution and to curb the slave trade, this California law created restrictions to prevent Asian women from immigrating. As with the California law, the federal government also sought to exclude prostitutes from entering the United States and therefore, spurred by California's legislation, enacted the Page Act in 1875, which prohibited the entry of Asian prostitutes.[98]

The idea of prostitution as a danger to the United States influenced the use of "moral character" and "lewdness" as important criteria in U.S. immigration policy.[99] Granting entry to the United States contingent on a person's good moral character became standard practice in federal immigration laws, as will be explored in Part III. Framing all Chinese women as prostitutes and slaves, and therefore a threat to the nation, allowed both state and federal legislatures to exclude large numbers of Chinese immigrants in ways that would not have otherwise been permissible given the obligations of the Burlingame Treaty. By using vague morals-based language, but applying the laws broadly against all Chinese women under the presumption that they were all prostitutes, the laws excluded virtually all Chinese women.[100] These early laws ultimately paved the way to the renegotiation of the Burlingame Treaty and passage of the 1882 Chinese Exclusion Act, which broadly excluded groups of Chinese immigrants.

F. Immigration of Other Asian Groups

The immigration of other Asian groups and the ensuing reaction of the American public closely followed the pattern of Chinese immigration. Just as Americans treated Chinese immigrants with hostility, they also opposed and sought to exclude subsequent groups of Asian immigrants. Lawmakers continued to apply the framework of Chinese women as prostitutes to other Asian groups in order to halt their entry into the United States. The

96. Chan, *supra* note 52, at 6 (citing to Act of Mar. 18, 1870, ch. 230, 1869-70 Cal. Stat. 330).

97. *Id.*

98. An Act Supplementary to the Acts in Relation to Immigration (Page) Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

99. Zhu, *supra* note 10, at 34.

100. *Id.* at 30.

Japanese and Korean practice of importing picture brides further reinforced the perception that many Japanese and Korean women were prostitutes and had been forced into sexual slavery.

G. Japanese Immigration and Picture Brides

After the 1882 law restricting Chinese immigration was enacted, the national focus turned to the next largest group of Asian immigrants in the United States—the Japanese. Most Americans viewed Japanese and Chinese as interchangeable and categorized them together as "Oriental."[101] Resentment toward the Japanese, just like against the Chinese, grew as their numbers did.[102]

The first immigrants from Japan arrived in San Francisco in May of 1869.[103] Between 1869 and 1885, only about 600 Japanese immigrated to the United States.[104] Because of their relatively small number, there was little open hostility directed at Japanese immigrants during this time.[105]

However, the number of Japanese immigrants in the United States soon grew. Between 1885 and1890, after the Japanese government allowed laboring classes to emigrate, 2,270 Japanese immigrants came to the United States.[106] By 1901, there were 12,000 Japanese immigrants living in the United States.[107]

As with Chinese immigrants, at first Japanese men came alone. Between 1880 and 1890 only a small number of Japanese women came to the United States.[108] However, within a few decades, many Japanese men began bringing wives with them.[109] Japanese women continued to immigrate to the United States until the 1920s, when the Japanese government stopped their emigration.[110] In 1900, there were 985 Japanese women in the United States. By 1910, the number of Japanese women increased to 9,087 and by 1920 there were 38,303 Japanese women in the United States.[111]

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101. YAMAMOTO ET AL., *supra* note 23, at 34.

102. *Id.*

103. FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 3 (1976) (noting that "pioneer immigrants" fled from Japan when Emperor Mutsuhito returned to power, because they were supporters of the Tokugawa Shogun regime).

104. *Id.* at 3.

105. *Id.* at 7.

106. *Id.* at 10-11.

107. Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, *in* ASIAN AMERICANS AND THE LAW, VOLUME 2: JAPANESE IMMIGRANTS AND AMERICAN LAW: THE ALIEN LAND LAWS AND OTHER ISSUES 25, 26 (Charles McClain ed., 1994).

108. Emma Gee, *Issei Women*, *reprinted in* ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES 66 (Nobuya Tsuchida ed., 1982); KANG, *supra* note 16, at 120 (noting that before 1890, only 279 Japanese women entered the United States).

109. Gee, *supra* note 108, at 66.

110. *Id.*

111. *Id. at* 67.

Americans used the Japanese custom of importing picture brides to point out the differences between Japanese and dominant white culture. This custom also led to the mistaken belief that many of the women immigrating as picture brides were actually prostitutes. From 1910 to 1921, more than one-third of Japanese marriages were "picture bride marriages," in which the prospective bride in Japan and groom in America exchanged photos before agreeing to marry.[112] Picture brides grew out of traditionally family-arranged marriages prevalent in Japan, but the practice was adapted to the needs of the immigrant society.[113] After the marriage was registered on the husband's family record in Japan, brides were given passports to join their husbands in the United States.[114] In 1921, Japan stopped this practice because the United States government raised concerns over this method of immigration.[115]

Just as with Chinese immigrants, growing opposition to Japanese immigration focused on the problem of Japanese prostitution in the United States, and the practice of picture brides further fueled anti-Japanese sentiment. The anti-Japanese movement viewed picture brides as an immoral custom in opposition to American Christian ideals.[116] This mirrored the earlier rhetoric linking Chinese prostitution to corruption and slavery, and thus a threat to American values of monogamous marriage based on consent and ideals of democracy and freedom.

H. Korean Picture Brides

As was the custom for Japanese immigrants, picture brides were also a component of the Korean community that immigrated to Hawaii between 1903 and 1924.[117] Korean immigrants immigrated to the United States to work in Hawaiian sugar plantations in the early 1900s. As had been true for the Chinese and Japanese immigrants before them, men first came alone. However, the sugar plantation managers considered the Korean bachelors a problem.[118] Hoping that the men would "settle down and work more steadily if they were married," the Korean government approved the emigration of young women who would agree to marry after exchanging pictures with potential husbands.[119] As a result, almost 1,000 women came

112. CHUMAN, *supra* note 103, at 107.

113. Gee, *supra* note 108, at 67.

114. *Id.* at 68.

115. CHUMAN, *supra* note 103, at 107.

116. Gee, *supra* note 108, at 68.

117. Alice Chai, *Korean Women in Hawaii, 1903-1945*, *in* ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES 75, 75-77 (Nobuya Tsuchida ed., 1982) (describing that the first immigrants were motivated by economic factors to work in Hawaii's sugar plantations).

118. *Id.* at 77.

119. *Id.*

to Hawaii as picture brides between 1910 and 1924.[120]

During the early period of Asian immigration to the United States, Asians were seen as a threat to American society and were subsequently excluded through regulation. This greatly affected Asian women, who were generally viewed as prostitutes, and therefore a corrupting force. The notion of Asian women as prostitutes originated with Chinese immigration, but was reinforced during subsequent waves of Japanese and Korean immigration. Many women who were not prostitutes, such as second wives, concubines, and picture brides, were nonetheless perceived as prostitutes because they did not fit in the American framework of marriage, as defined by consent, free choice, and monogamy. The virulent attacks levied by lawmakers, journalists, doctors, and the American public against the evils of prostitution ultimately paved the way for state and federal laws that precluded the immigration of prostitutes. Since all Asian immigrant women were suspected of prostitution unless they could prove otherwise, regulation to exclude prostitutes ultimately affected all Asian women and prevented a large number of them from immigrating.

The view of Asian women as prostitutes and sexual slaves was drilled into the national consciousness and ultimately fed into the perception of Asian women as inherently sexual and subservient. This perception contributed to, and was bolstered by, the connection between prostitution and American military occupation in Asian countries.

I. Military Prostitution

The stereotypes and conceptions around which early American immigration laws were formed were based on the perception of Chinese women as prostitutes who posed a moral and physical threat to the nation. While the early assumptions that all Chinese, and subsequently other Asian, women were prostitutes have lingered in the American consciousness until today, it is primarily the attention given to prostitution in U.S. military bases in Asia that created a further association between Asian female bodies and sex work.[121]

Asian women have been the most visible icons of U.S. military-prostitution. During their time in American-occupied territory in Asia, American soldiers "often developed strong perceptions of Asian women as

120. *Id.*

121. KANG, *supra* note 16, at 165 (contending that stereotypes of Asian women having characteristics such as "childlike innocence and docility, digital nimbleness, physical stamina, keen eyesight, sexual largess, and muscular flexibility" fuel the assumption that Asian women are naturally linked with assembly line production and sex work); *id.* at 196 ("[T]hat while prostitution occurs near military bases all over the world, it has 'attracted more notoriety around bases in poor countries in the Third World'" (quoting CYNTHIA H. ENLOE, BANANAS, BEACHES, BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS (1990))).

prostitutes, bargirls, and geishas."[122] These perceptions perpetrated the stereotype of Asian women as "servicing and serving men."[123] Many Hollywood films and television shows about the wars in Asia portray Asian women as prostitutes or bar girls.[124] For example, *The World of Suzie Wong* portrays Suzie Wong, a prostitute working in a bar filled with U.S. sailors and local Hong Kong women. Other movies that portray Asian prostitutes and American soldiers include *The Teahouse of the August Moon*, which is about U.S. forces on Japanese Okinawa Island in the late 1940s and *Cry for Happy*, which portrays American soldiers living in a Geisha house in Japan.[125] The portrayals of Asian women as prostitutes serving American troops have influenced the way in which Americans currently think of Asian women.

The military involvement in the Philippines, Korea, and Vietnam encouraged the development of a local sex industry to serve American troops. Until 1991, the United States maintained two significant military bases in Philippines.[126] The sex industry "constituted the most significant economic activity" near the bases.[127] A survey in the 1990s estimated that 55,000 prostitutes worked in Angeles and Olongapo, two cities near military bases.[128] Olongapo had 330 bars, massage parlors, and entertainment establishments where "hospitality girls" worked.[129]

The existence of the sex industry on military bases was also present in Korea and Vietnam. During the Korean War, about 300 Korean women were confined to a warehouse in Seoul and used at will by American forces.[130] Trucks would come onto American bases, transporting a few hundred women who would stay the night.[131] Even after the end of the Korean War, prostitution remained rampant around U.S. military bases. In

122. Chai, *supra* note 117, at 74 ("Asian women were perceived by American soldiers as prostitutes and sexual objects who provided rest and recreation from the war zone"); Venny Villapando, *The Business of Selling Mail-Order Brides*, *in* MAKING WAVES: AN ANTHOLOGY OF WRITING BY AND ABOUT ASIAN WOMEN 318, 324 (Asian Women United of Cal. ed., 1989).

123. Villapando, *supra* note 122, at 325.

124. KANG, *supra* note 16, at 196.

125. Renee E. Tajima, *Lotus Blossoms Don't Bleed: Images of Asian Women*, *in* MAKING WAVES: AN ANTHOLOGY OF WRITING BY AND ABOUT ASIAN WOMEN 308, 310, 314 (Asian Women United of Cal. ed., 1989).

126. KANG, *supra* note 16, at 172

127. *Id.*

128. Aida F. Santos, *Gathering the Dust: The Bases Issue in the Philippines*, *in* LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA 32, 37 (Saundra Pollock Sturdevant & Brenda Stoltzfus eds., 1992).

129. Saundra Sturdevant & Brenda Stoltzfus, *Olongapo: The Bar System*, *in* LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA 45, 45 (Saundra Pollock Sturdevant & Brenda Stoltzfus eds., 1992).

130. Bruce Cumings, *Silent But Deadly: Sexual Subordination in the U.S.-Korean Relationship*, *in* LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA 169, 172 (Saundra Pollock Sturdevant & Brenda Stoltzfus eds., 1992).

131. *Id.* at 171.

the 1990s, there were approximately 18,000 "registered women" working in bars near U.S. bases, as well as about 9,000 unregistered prostitutes.[132] The large numbers show the effect that the military activity in Korea had on the boom of prostitution as an industry.

As it had during the Korean War, the sex industry flourished during the Vietnam War. Throughout the War, "Thailand was officially designated as a 'rest and recreation' . . . site for American troops," and prostitution thrived.[133] As a result, Thailand gained a reputation as a destination for sexual recreation, and after the war ended the sex services industry reoriented itself toward civilian clients.[134] This contributed to a robust international sex industry focused on bringing American and European men to countries in Asia.

After the end of military activities in Asian countries, the military sex industry shifted to a sex tourism industry. In this international sex industry, foreign women are often represented as a contrast to the women in the men's home country. Asian women are promoted as exotic, sexually available, and subservient. In advertisements, the sex tourism industry emphasized the "exotic and compliant" nature of Asian women and their racial and sexual differences from women in the consumers' home countries.[135] To promote its services, one organization's advertisement emphasized that, "Asian women are without desire for emancipation, but full of warm sensuality and the softness of velvet."[136] In stressing the difference between Asian women and women at home, the advertisement solidifies the perception of Asian women as sexual and docile. These images are consistent with earlier images of Asian women promulgated as a means of highlighting their difference from American women and threat to the American nation. Now, the same images of Asian women as sexualized and submissive are being used to make them attractive to consumers of sexual services.

Thus, nineteenth century views about Asian female immigrants as prostitutes and sexual slaves were reinforced during the twentieth century military occupations and wars in Asia as a result of the flourishing sex industry that serviced American troops. Perceptions of Asian women as sexual and docile were further promulgated through the representation of Asian women in film and television, portraying Asian women serving and servicing American troops in Japan, Korea, Vietnam, and the Philippines.

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132. Saundra Sturdevant & Brenda Stoltzfus, *Tong Du Chun: The Bar System*, *in* LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA 176 (Saundra Pollock Sturdevant & Brenda Stoltzfus eds., 1992).

133. KANG, *supra* note 16, at 172.

134. *Id.*

135. *Id.* at 197.

136. *Id.* (quoting C. Michael Hall, *Sex Tourism in South-east Asia*, *in* TOURISM AND THE LESS DEVELOPED COUNTRIES (David Harrison ed., 1991)).

These notions about Asian women, once used to exclude them from immigrating to the United States, are now being promoted by the international sex industry and mail order bride industry to attract customers.

II. EXCLUSION BASED ON RACE AND MORALITY

The perception of Asian women as prostitutes, and thereby a physical and moral threat to the nation, has impacted American immigration law since the 1800s. American society, including journalists, religious leaders, politicians, and the medical profession, all worried about the corrupting effects that Chinese immigration, especially the immigration of Chinese women, would have on the nation. Due to this strong concern, lawmakers and courts zealously attempted to curb the immigration of Chinese women. Such efforts focused on both moral and racial arguments to exclude the Chinese from America.

Early immigration cases demonstrate how lawmakers and courts tried to exclude Asian women as prostitutes or public charges. Other cases, barring Asians from naturalization, pitted Asians in opposition to white American citizens, showcasing the different cultural values of each group.[137] An unfortunate legacy of these cases rests in the moral, gendered, and race-based judgments used to exclude immigrants. These moral and gender-based frameworks, grounded originally in the attempt to exclude Chinese immigrants and based on the perception of Asian female immigrants as prostitutes, are still used today to regulate immigration and citizenship. This section will focus on the moral and racial arguments used to limit immigration, beginning in the late 1800s.

A. Act to Prevent Kidnapping and Importation of Mongolian, Chinese, and Japanese Females

The early focus on exclusion came from California, where the majority of Asian immigrants had settled. As a result of the fear of the destructiveness of Asian prostitution and sexual slavery, in 1870 California passed an "Act to Prevent Kidnapping and Importation of Mongolian, Chinese, and Japanese Females for Criminal or Demoralizing Purposes."[138] As part of the Act, any Asian woman immigrating to California needed to

137. *See* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 56 (1996) ("some prerequisite courts expressed racial antipathies . . . denigrating applicants not only in terms of color, but also cultural and intellectual unfitness for citizenship"); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) ("[T]he Chinese race . . . a race so different from our own that we do not permit those belonging to it to become citizens of the United States.").

138. Act of Mar. 18, 1870, ch. 230, 1869-70 Cal. Stat. 330; *see* KANG, *supra* note 16, at 120 (noting that since only 279 Japanese women entered the U.S. before 1890, the mention of Japanese females in the Act "suggests a precautionary measure against future Japanese women's immigration").

obtain a license "confirming her voluntary desire to migrate" and validating that she possessed "correct habits" and "good character."[139] The law presumed guilt and it was the responsibility of the individual woman to prove she was not a prostitute.[140] By targeting women and classifying them as prostitutes or otherwise debauched, California found a way to exclude a large number of Chinese immigrants.[141] This Act was amended in 1874 to apply generally to immigrants, requiring a five-hundred-dollar bond for any immigrant who was a "lewd or debauched woman."[142]

The 1874 Act was put to use in August 1874, when a steamship from Hong Kong with 89 Chinese women docked in San Francisco.[143] The State Commissioner of Immigration questioned the women on board and concluded that 22 of the women had immigrated for "immoral purposes," so they were detained at the port on grounds of prostitution.[144] The Commissioner determined that the women were prostitutes based on their demeanor, manner of dress, and responses about their marital status.[145] A former missionary to China observed that the style of dress these women wore was similar to the style of dress that courtesans wore in China.[146] Several other missionaries, Chinese merchants, and male passengers "gave contradictory opinions about whether it was possible" to identify Chinese prostitutes by inspecting "their looks and clothing."[147] The women were jailed, but the Ninth Circuit reversed the detention basing its decision on the Burlingame Treaty, the Fourteenth Amendment, and federal preemption of state laws regulating immigration.[148] This case shows how much discretion immigration officials had to determine a woman's good character and truthfulness based on her demeanor, look, and clothing. It stands as an early example of the power given to the commissioner to "perceive and judge the acceptability of immigrant subjects" regardless of the way in which the immigrants presented themselves.[149] Immigrant women were always under suspicion of being prostitutes, unless they proved otherwise, and their moral character was judged by Western standards and perceptions.

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139. Abrams, *supra* note 6, at 675.

140. KANG, *supra* note 16, at 120-21.

141. Abrams, *supra* note 6, at 686.

142. 1873-1874 Acts Amendatory of the Codes of California § 70, at 39; Abrams, *supra* note 6, at 676.

143. KANG, *supra* note 16, at 121.

144. *Id.*; Chan, *supra* note 52, at 7.

145. KANG, *supra* note 16, at 121 (quoting Charles McClain, IN SEARCH OF EQUALITY: CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA 57 (1994)).

146. *Id.* (quoting Reverend Otis Gibson).

147. Chan, *supra* note 52, at 8; Abrams, *supra* note 6, at 681-84.

148. In re Ah Fong, 1 F. Cas. 213 (C.C.D. Cal. 1874) or "Case of the Twenty-Two Women"; KANG, *supra* note 16, at 121; Chan, *supra* note 52, at 7-11.

149. KANG, *supra* note 16, at 129.

B. The Page Law

Up until this point, immigration exclusion was handled on a state level, with California leading the charge against Chinese immigration. This changed in 1875 when the federal government passed the first restrictive federal immigration statute: An Act Supplementary to the Acts in Relation to Immigration, also known as the Page Law.[150] This law prohibited entry for Chinese, Japanese, and Mongolian workers, prostitutes, and felons.[151] Its goal was to end immigration of "cheap Chinese labor and immoral Chinese women."[152] The law required U.S. consular officials to examine all Asian immigrants at their port of departure to assess whether any immigrant had entered into a contract for "lewd and immoral purposes."[153] The focus on prostitution may have been essentially a "smoke screen," using the rhetoric of morality as a way to "avoid legal and political scrutiny."[154] Through a ban on prostitution, the law aimed to prevent all Chinese women from immigrating to the United States.[155] By using language about protecting marriage and sexual purity, the Page Law was able to achieve the otherwise prohibited exclusion of Chinese women.[156]

Due to the widespread suspicion that all Chinese women were engaged in prostitution, the immigration of Chinese women became much more limited after the Page Law was enacted.[157] From 1876 to 1882, the number of Chinese women entering the United States decreased 68 percent as compared to the previous seven years.[158] Even the U.S. Consul to Hong Kong admitted that all women would ultimately be excluded based on a fear that they were prostitutes, remarking, "[i]t is a useless and superfluous task for me to undertake to investigate the character of female emigrants and to grant them passports which are treated as nullities in San Francisco on the mere presumption that every Chinese woman is a prostitute."[159] Here, the government itself admitted that it treated all Chinese women as prostitutes, presuming they were inadmissible unless they could prove otherwise. This meant that even though the laws were facially narrowly tailored to exclude only prostitutes, they were applied in an overly broad manner in such a way that all Chinese women were essentially

150. Page Act, ch. 141, 18 Stat. 477; *see* Volpp, *supra* note 34, at 460 n.253 (noting that there is an argument that the 1862 Act to Prohibit the "Coolie Trade" should be considered the first restrictive immigration law, but "scholars generally have conceptualized the 'Coolie Trade' Act as an antislavery law rather than an immigration law").

151. Chan, *supra* note 52, at 13.

152. Peffer, *supra* note 36, at 318.

153. Abrams, *supra* note 6, at 695.

154. Zhu, *supra* note 10, at 4.

155. Abrams, *supra* note 6, at 641.

156. *Id.* at 647.

157. KANG, *supra* note 16, at 122.

158. Peffer, *supra* note 36, at 320.

159. *Id.* at 334.

inadmissible.

As a result of the perception that all Chinese women were prostitutes, even married women were suspect. Thus, entry to the United States was only possible after a subjective determination by a U.S. consular official or immigration officer that the female immigrant had not come for lewd or immoral purposes. Not even proof of a marriage was enough, in and of itself, to convince authorities that a Chinese woman was not a prostitute. This led to concerns that marriages between Chinese women and Chinese American men were used as a cover-up for prostitution.[160] The questioning of the validity of marriages is still present in immigration law today, as evidenced by the Immigration Marriage Fraud Amendments.[161]

After passage of the Page Law, anti-Chinese forces continued to advocate for an end to cheap Chinese labor.[162] As discussed earlier, Congress set up the 1876 Joint Special Committee to investigate the effects of Chinese immigration. As a result of the committee's findings, President Hayes appointed a commission to renegotiate the 1868 Burlington Treaty, which called for open and unrestricted borders between the United States and China.[163] A dramatic shift occurred in 1880, when the Burlingame Treaty was renegotiated to allow the United States to limit immigration of Chinese laborers whose entry would affect American interests or endanger the "good order" of the country.[164] Even though the United States had already begun excluding Chinese immigrants with the passage of the Page Law in 1875, the renegotiation of the Burlingame Treaty shows that the anti-Chinese sentiment was so strong in the United States that the government felt the need to amend its international agreement with China.

C. The Chinese Exclusion Act

Building upon the changes to the Burlingame Treaty, the anti-Chinese sentiment in the United States culminated in the 1882 Chinese Exclusion Act.[165] Unlike the earlier Page Law, the Exclusion Act restricted immigration based on a person's race and occupation, without regard to the morality of their conduct.[166] The Act excluded all laborers arriving from

160. Volpp, *supra* note 34, at 461; Peffer, *supra* note 36, at 332.

161. Immigration Marriage Fraud Amendments, 8 U.S.C. §§ 1184(d), 1186a (1988); Michelle J. Anderson, *A License to Abuse: the Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1411 (1993).

162. Abrams, *supra* note 6, at 706.

163. *Id.* at 709-10.

164. *Id.* at 710.

165. An Act to Execute Certain Treaty Stipulations Relation the Chinese (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (1882) (repealed 1943); LEE, *supra* note 9, at 40 (noting that the Chinese Exclusion Act "ushered in drastic changes in immigration regulation and set the foundation for twentieth-century policies designed" to inspect and process new immigrants as well as to control those immigrants who had already arrived).

166. Volpp, *supra* note 34, at 467.

China, except those that had resided in the United States since 1880.[167] The Act made exceptions for merchants, students, teachers, and tourists.[168] In addition, the Act barred any state or federal court from allowing a Chinese person to naturalize as a citizen of the United States.[169] Ultimately, the Chinese Exclusion Act was successful in reducing Chinese immigration to the United States.[170]

The Exclusion Act led to particular complications for Chinese immigrant women. Here again, their marriages came under scrutiny by government officials. Because women's exclusion under the Act was directly linked to their marital status, immigration officials and courts scrutinized the validity of Chinese women's marriages.[171] Often, Western marriage norms based on notions of informed consent, free choice, monogamy, and love dictated the validity of these marriages.[172] At least two Chinese marriages were concluded to be invalid based on these norms. In one marriage, there was a large age gap between husband and wife, which was considered improper by Western standards, and in another case the court considered whether a marriage between spouses who had never met could be valid, and ultimately decided such a marriage was invalid.[173]

Under the Chinese Exclusion Act, Chinese women took on the same status as their husbands, regardless of their own occupation. Thus, the wife of a Chinese laborer took on laborer status, even though she herself was not a laborer, and therefore she was excluded from entry without the proper certificate.[174] Officials were more likely to believe that a Chinese woman was a merchant's wife, and therefore not excluded by the Exclusion Act, if she possessed "fine clothing, a respectable manner, and, especially bound feet." [175] Just as with the earlier Page Law, women's conduct and appearance were used as proof of their status as wives of merchants, wives of laborers, or prostitutes.

The Exclusion Act made no mention of U.S.-born Chinese women who had left the country and attempted to re-enter.[176] Therefore,

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167. Chinese Exclusion Act, *supra* note 165 (mandating that "the coming of Chinese laborers to the United States be, and the same is hereby, suspended . . . .").

168. Volpp, *supra* note 34, at 467.

169. KANG, *supra* note 16, at 126.

170. Zhu, *supra* note 10, at 6 (noting that in 1880, there were over 105,000 Chinese immigrants in the United States, but in 1920, fewer than 62,000 remained).

171. Abrams, *supra* note 6, at 712.

172. *Id.*

173. *Id.* at 712-713; Chew Hoy Quong v. White, 244 F. 749, 750 (9th Cir. 1917); In re Lum Lin Ying, 59 F. 682 (D. Or. 1894).

174. Chan, *supra* note 52, at 18-19.

175. Volpp, *supra* note 34, at 469 (quoting JUDY YUNG, UNBOUND FEET: A SOCIAL HISTORY OF CHINESE WOMEN IN SAN FRANCISCO 24 (1995)).

176. United States v. Wong Kim Ark, 169 U.S. 649 (1898) (holding that any person born in the United States, regardless of race, was an American citizen under the Fourteenth Amendment, and thus, after 1898 U.S.-born Chinese women were considered American citizens).

immigration officers and courts had to determine how to approach their requests to enter the country. Treatment of such women was inconsistent and became increasingly less favorable. In one case, two U.S.-born Chinese women were denied re-entry to the United States by immigration officials, but were subsequently allowed entry into the country by courts.[177] However, in later years, Chinese women who claimed U.S. birth did not fare as well. Many were detained and denied entry into the United States because of discrepancies between their testimonies and witness statements during hearings.[178] Similarly, wives of U.S.-born Chinese men were allowed to enter the United States because they took on the same status as their husbands, and thus should have been treated as American citizens. However, many women claiming to be the wives of U.S.-born Chinese men were turned away at the port for discrepancy in their testimony or as a result of having a dangerous disease.[179] Again, women's claim of marriage was not always enough to overcome the presumption of marriage fraud.

To further prevent the entry of Chinese immigrants, the Chinese Exclusion Act was strengthened in 1884 to exclude laborers of Chinese decent coming from any foreign country, not just from China.[180] The Scott Act of 1888 went even further by prohibiting entry of "all Chinese laborers," including U.S. residents who had left the country.[181] This prevented Chinese men already residing in the United States from going to China to marry or to have children with their wives living in China.[182] That same year, amendments to the Chinese Exclusion Act allowed only teachers, students, merchants, and travelers to enter the United States.[183] The Exclusion Act was renewed several times and then extended indefinitely, but it was ultimately repealed in 1943.[184] This proliferation of legislation in the late 1800s and early 1900s shows the furor with which the United States sought to exclude Chinese immigrants.

D. The Immigration Act

In addition to the Exclusion Act, the United States simultaneously enacted new immigration laws that sought to tighten borders and restrict the immigration of undesirable foreigners. Unlike the Chinese Exclusion Act, which excluded based on race and occupation, [185] the immigration laws passed in 1891, 1903, and 1907 excluded based on the conduct of the

177. Chan, *supra* note 52, at 26-27 (citing Ex Parte Chin King, 35 F. 354 (C.C.D. Or. 1888)).
178. *Id.* at 28.
179. *Id.* at 30.
180. LEE, *supra* note 9, at 45.
181. Abrams, *supra* note 6, at 710 (citing Act of Oct. 1, 1888 (Scott Act), ch. 1064, 25 Stat. 504).
182. *Id.*
183. LEE, *supra* note 9, at 45.
184. *Id.* at 46.
185. Volpp, *supra* note 34, at 467.

intended immigrant, with a specific focus on excluding prostitutes and other morally questionable women.

First, the 1891 Immigration Act regulated the immigration of criminals, paupers, the insane, and those with contagious diseases.[186] The 1891 Act also excluded women on moral grounds, including "sexual misdeeds such as adultery, fornication, and illegitimate pregnancy."[187] Later, the 1903 Immigration Act excluded all prostitutes from entering the United States.[188] Furthermore, in 1907, prostitution became a ground for deporting women already in the United States.[189] Specifically, the 1907 Immigration Act made female immigrants deportable if they were "found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States."[190] This provision was used to deport women who had entered the United States legitimately and were later suspected of prostitution.[191] The 1907 Act also criminalized transporting women for prostitution or "any other immoral purpose."[192] This provision was intended to address situations where it was unclear whether the women in question were either wives or prostitutes, such as concubines, mistresses, second wives, and women in arranged marriages.[193]

The first case in which the 1907 law was applied involved Loue Shee, a Chinese woman, who came to the United States as a wife of a U.S.-born Chinese man.[194] Loue Shee was deported for prostitution despite the fact that she was legitimately admitted as the wife of an American citizen.[195] Under the same 1907 Immigration Act, Li A. Sim, a wife and mother of U.S. citizens, was deported in 1912 for being found in a house of prostitution.[196] The court concluded that because she was involved in prostitution, she had lost the legal protections afforded to her by her marriage to an American citizen.[197] Other women were also deported for prostitution although they claimed U.S. citizenship by birth or were married to U.S. citizens.[198] The status of American citizenship and the legal protections of marriage were not enough to keep a suspected prostitute in

186. Abrams, *supra* note 6, at 711.
187. LEE, *supra* note 9, at 31.
188. *Id.* at 30.
189. Abrams, *supra* note 6, at 713.
190. *Id.* (citing Act of Feb. 20, 1907 (Immigration Act of 1907), ch. 1134, § 3, 34 Stat. 898, 900).
191. *Id.*
192. *Id.* at 714.
193. *Id.*
194. Chan, *supra* note 52, at 43.
195. *Id.*
196. *Id.* at 43-44 (citing Low Wah Suey v. Backus, 225 U.S. 460 (1912)); Abrams, *supra* note 6, at 714.
197. Abrams, *supra* note 6, at 714.
198. Chan, *supra* note 52, at 43.

the United States, even if she had entered the country legally. The shift from simply excluding prostitutes from entry to then deporting prostitutes even once they had entered the United States shows the extent of the government's attempt to exclude foreign prostitutes from the national polity.

The 1907 Immigration Act was not enforced exclusively against Asian women. In 1907, John Bitty, an American citizen, attempted to bring his mistress from England to the United States.[199] Bitty was charged with violating the 1907 Act.[200] In the case against him, the Supreme Court equated his mistress with a prostitute and concluded that, "[t]he lives and example of such persons [prostitutes] are in hostility to the 'idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony' . . . Congress, no doubt, proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people."[201] The Court noted that prostitutes, particularly alien prostitutes, were a threat to American moral values and even a physical threat to the American people. By extension, Chinese women who were all thought to be prostitutes, were all a threat to the nation. Again, the Western notion of marriage as a Christian monogamous union is used as a measure by which to judge the validity of other relationships. Thus, Bitty's relationship with his mistress was considered morally flawed and antithetical to American moral values.

To further curb prostitution, Congress passed the White Slave Traffic Act (Mann Act) in 1910.[202] The Mann Act made it a crime to transport any woman across state lines for the purposes of prostitution or debauchery.[203] The Mann Act also extended the length of time after entry to the United States during which an immigrant could subsequently be deported for violation of the Act.[204]

Unlike the earlier Immigration Acts that focused solely on morality of conduct of immigrants, the 1917 Immigration Act not only further excluded foreigners based on morality of conduct, but also race.[205] The Act created an "Asiatic Barred Zone," excluding Asian immigrants from countries such as India, Burma, Siam, Malay, Arabia, Afghanistan, Russia, and

199. Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 772 (2006).

200. *Id.* at 771

201. United States v. Bitty, 208 U.S. 393, 401 (1908).

202. White-Slave Traffic (Mann) Act, ch. 395, §§ 2, 6, 36 Stat. 825, 825-27 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)).

203. Mann Act, 18 U.S.C. § 2421 (2000).

204. Volpp, *supra* note 34, at 457-58 n.240.

205. Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952).

Polynesia.[206]

As a way to further exclude foreign women, the 1917 Immigration Act allowed immigration officials to deport women suspected of prostitution after nothing more than an executive hearing, leaving women without recourse to judicial hearings.[207] The Act also expanded the reasons for which women could be deported (such as working at a "place of amusement or resort habitually frequented by prostitutes").[208] As a result of fear of fraudulent marriages between foreign prostitutes and American citizens, the 1917 Act did not allow a woman to naturalize if she married a citizen soon after the woman's arrest for prostitution.[209]

Extending the "Asiatic Barred Zone," the 1924 Immigration Act excluded almost all Asians from entering the United States. By excluding all aliens who were ineligible to citizenship, the 1924 Act essentially made all Asians ineligible to enter because Asians still could not naturalize.[210]

However, in 1943, the government changed its official policy toward the Chinese, as a result of foreign policy concerns during the Second World War.[211] The 1943 Magnuson Act repealed the Chinese Exclusion Act; it allowed Chinese to become naturalized citizens and established a quota of 100 Chinese immigrants per year.[212] A 1946 amendment to the Magnuson Act exempted Chinese wives of U.S. citizens from the annual immigration quota and also allowed Filipinos and Indians to naturalize.[213] An earlier law, the War Brides Act of 1945, which allowed some foreign wives and children of American servicemen to enter the United States, was amended in 1947 to include Asian women who married American servicemen.[214]

206. LEE, *supra* note 9, at 39; *see* Volpp, *supra* note 34, at 414 (noting that Japan and the Philippines were not included, as the State Department did not want to offend the former's government and the latter was a colony of the United States at the time).

207. Chan, *supra* note 52, at 44 (noting that this was different than the earlier 1907 Immigration Act, which recognized that the Chinese Exclusion Act allowed Chinese people to petition for a judicial hearing before their deportation. In 1921, the Ninth Circuit confirmed that as a result of the 1917 Immigration Act, immigration officials could deport Chinese immigrants without a court hearing) (citing Chin Shee v. White, 273 F. 801 (9th Cir. 1921)).

208. Immigration Act of 1917 § 19; Volpp, *supra* note 34, at 457-58 n.240.

209. Immigration Act of 1917 § 19; Volpp, *supra* note 34, at 458, n.245 (noting that the legislation was enacted following the Dillingham Commission's report, which claimed that foreign prostitutes often married American citizens as a way to avoid deportation).

210. LEE, *supra* note 9, at 39 (noting that while Filipinos were not included in the early "Asiatic Barred Zone," the Immigration Act was amended in 1934 to exclude Filipinos from entry into the United States).

211. KANG, *supra* note 16, at 131; Neil Gotanda, *Toward Repeal of Asian Exclusion, 1943-1950, in* ASIAN AMERICANS AND CONGRESS 309, 311-312 (Hyung-chan Kim ed., 1996).

212. KANG, *supra* note 16, at 141; Gotanda, *supra* note 211, at 316.

213. KANG, *supra* note 16, at 141.

214. War Brides Act, Pub. L. No. 79-271, 59 Stat. 659 (1945); KANG, *supra* note 16, at 131.

E. Immigration and Nationality Act

A critical shift occurred in 1952, when Congress enacted the Immigration and Nationality Act (INA), which provided that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[215] The INA, which is still the law today, removed all racial barriers to naturalization. The law may have been a result of the United States' desire to portray itself as a leading democracy in the post-war period.[216]

The next far-reaching change occurred in 1965, when Congress provided a more inclusive approach to immigration.[217] The 1965 amendments abolished national origin quotas for immigration as well as immigration restrictions relating to Asians.[218] Instead, the Act instituted a new immigration system, with categories based on family status and employment.[219]

Since 1870, laws seeking to exclude immigrants have used race and morality as categories by which to judge immigrants. Even though current immigration laws no longer exclude immigrants based on their race, the laws still focus on morality and conduct, excluding individuals who have committed crimes of "moral turpitude" or who do not exhibit the requisite "good moral character" while also invalidating marriages that are not entered into in "good faith."

III. MARRIAGE IN IMMIGRATION AND CITIZENSHIP

As outlined above, the first immigration regulations distinguished people based on their race and morality of conduct (especially the morality of female immigrants). The laws excluded certain immigrants who were considered a threat to the nation because of their moral character and culture, which were at odds with American values. Women's ability to immigrate was especially based on judgments about their moral character, which was in large part affected by their marital status. In many cases, women were only eligible to immigrate based on their marriage to a man who was eligible to enter the United States. Unmarried women were often excluded as prostitutes, while married women were also oftentimes

215. Immigration and Nationality (McCarran-Walter) Act of 1952, 82 Pub. L. No. 414, 66 Stat. 163; HANEY LOPEZ, *supra* note 137, at 46.

216. KANG, *supra* note 16, at 138.

217. Immigration and Nationality Act of 1965, 89 Pub. L. No. 236, 79 Stat. 911; STEPHEN H. LEGOMSKY ET AL., IMMIGRATION AND REFUGEE LAW AND POLICY, 18 (5th ed. 2009).

218. LEGOMSKY ET AL., *supra* note 217, at 19.

219. *Id.*; *see* Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1441 (1998) ("The admission priority given to members of American citizens' nuclear families distinguishes the United States from most other immigrant-admitting nations, which look first to economic or occupational considerations.").

excluded if they could not prove the "validity" of the marriage that would have made them eligible to immigrate. Definitions and conceptions of marriage, as applied by immigration officials and courts, were therefore integral to the development of immigration policy.[220]

Gender and marriage also played important roles in laws pertaining to citizenship. "[C]itizenship is a distinctive form of social classification that colors personal standing in any community . . . and expresses belonging."[221] Similarly, "marriage is also a civil status . . . that has a powerful impact on personal identity."[222] By regulating marriage and privileging certain relationships, a nation can create and control its demographics. For example, there is a long history in the United States of antimiscegenation laws, which invalidated or criminalized marriages that crossed racial boundaries.[223]

Even today, marriage continues to be an important factor in immigration policy. Officials still evaluate the legitimacy of marriages through judgments about what constitutes a proper marriage. This policy privileges some types of marriages over others, thereby allowing certain people to immigrate or gain citizenship, while excluding others based solely on a Western conception of marriage. This is especially apparent in the context of IMBRA, where regulations are imposed based on a couple's decision to enter into a marriage through an international marriage broker.

A. History of Marriage and U.S. Citizenship

The emphasis on marriage in immigration, naturalization, and citizenship has generally had a greater impact on the status of women than that of men. In the nineteenth century, under the doctrine of coverture, a married woman's identity was merged with that of her husband. [224] In such a relationship, the husband was the primary decision maker and possessor of rights.[225] Following the doctrine of coverture, women's citizenship in the

220. Abrams, *supra* note 6, at 715.

221. Cott, *supra* note 219, at 1440; *See* Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 71-72 (2001) (quoting Linda Bosniak, *Citizenship Denationalized*, 7 INDIANA J. OF GLOBAL LEGAL STUD. 447 (2000) (noting several forms of citizenship including "citizenship as legal status, citizenship as rights, citizenship as political activity, and citizenship as identity/solidarity")).

222. Cott, *supra* note 219, at 1440-41.

223. *Id.* at 1443.

224. Volpp, *supra* note 34, at 418 n.61, (quoting Ariela R. Dubler, *"Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family,"* 4 THEORETICAL INQUIRIES L. 797, 802 (2003)); KANG, *supra* note 16, at 138 (quoting Eileen Boris, *The Racialized and Gendered State: Constructions of Citizenship in the United States*, SOCIAL POLITICS (Summer 1995)) (noting how the doctrine of coverture defined married women as economic and political dependents, protected by the law and their husbands and deprived of independent legal identities. The fiction of *femme covert* dictated that "married women merged their identities into that of their husbands.").

225. Volpp, *supra* note 34, at 418.

United States was ultimately determined by their husbands' citizenship.[226]

At the founding of the American nation, women's nationality was not affected by their marriages.[227] American women who married noncitizens did not lose their U.S. citizenship as a result of the marriage.[228] A Supreme Court decision in 1830 confirmed that marriage to a foreigner did not negate an American woman's citizenship.[229] Similarly, foreign women's citizenship was not affected by their marriages to American citizens. This changed in 1855 when Congress granted American citizenship to any alien woman who married a U.S. citizen male.[230] The Congressional debates about the 1855 Act included a remark that, "by the act of marriage itself the political character of the wife shall at once conform to the political character of the husband."[231] A woman's marriage to an American became "an act of political consent to the U.S. nation state."[232] However, the privilege of citizenship through marriage was only granted to women who could naturalize under existing laws.[233] The Naturalization Act of 1790 limited naturalization to "free white persons."[234] As a result of the Naturalization Act, until 1870 only free white women could attain citizenship when they married American citizens.[235] Other foreign women, such as Chinese, could not attain citizenship through their marriage to American citizens.

While the 1855 Act defined which women could join the American nation, the 1907 Expatriation Act clearly delineated which women were not welcome as American citizens and it marked a shift in the relationship between American women's citizenship and marriage. The Expatriation Act provided that any female U.S. citizen who married a foreigner was

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226. *Id.* at 418-19.

227. *Id.* at 418.

228. *Id.*; Cott, *supra* note 219, at 1455.

229. Shanks v. Dupont, 28 U.S. 242, 246 (1830) ("[M]arriage with an alien . . . produces no dissolution of the native allegiance of the wife. . . . [I]t does not effect [sic] her political rights or privileges"); Cott, *supra* note 219, at 1455.

230. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604 ("Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.").

231. Volpp, *supra* note 34, at 452 (quoting CONG. GLOBE, 33d Cong., 1st Sess. 170 (1854) (statement of Rep. Cutting)); *see* Cott, *supra* note 219, at 1459 (stating that the 1855 Act aligned with the aim to restrict Chinese infiltration into the body politic "by holding a [potential] threat over American women who might marry Chinese men" and leaving open the question of what would happen to American women's citizenship).

232. Volpp, *supra* note 34, at 421.

233. HANEY LOPEZ, *supra* note 137, at 46.

234. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103; Abrams, *supra* note 6, at 662; Volpp, *supra* note 34, at 412 (noting that the Naturalization Act was amended in 1870 to extend the right to naturalize to African Americans and that racial barriers to naturalization were rescinded only after the Immigration and Nationality Act of 1952) (citing to Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254).

235. Volpp, *supra* note 34, at 422; HANEY LOPEZ, *supra* note 137, at 46 (describing that in 1868, the Supreme Court held "that only 'white women' could gain citizenship by marrying a citizen").

stripped of her U.S. citizenship.[236] This proved to be a significant problem for women who became stateless when their husband's country of citizenship did not automatically grant the woman citizenship as a result of her marriage, or when they married men who had lost their citizenship.[237] The Expatriation Act especially affected U.S.-born Asian women who married noncitizens, because they lost their citizenship and could not regain American citizenship through naturalization even after their marriage ended because they became "aliens ineligible to citizenship" under the Naturalization Act.[238] In some cases, this forced Asian women to choose between American citizenship and marriage.

The reasons given for the Expatriation Act included the danger posed by dual nationality and the goal of bringing American law in line with that of other countries.[239] The U.S. Supreme Court opined that marriages between American women and foreigners might "bring the government into embarrassments and, it may be, into controversies."[240] However, the provision seems harshly punitive and specifically designed to punish American women by stripping them of their citizenship if they married foreigners.[241] One member of Congress charged that women who "married foreign dukes and counts . . . when there are enough Americans for them to select from" had only themselves to blame for their loss of citizenship.[242] Because the Expatriation Act punished American women who married foreign men, the Act can be compared to state antimiscegenation laws, which prevented individuals from marrying outside their own race.[243] Through the Expatriation Act, Congress was effectively stating its disapproval of marriages between American women and foreign men.

An important change relating to women's citizenship came with the 1922 Cable Act, which partially repealed the Expatriation Act. The Cable Act made some women's citizenship independent of their husbands'

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236. Expatriation Act, ch. 2534, § 3, 34 Stat. 1228 (1907) ("Any American woman who marries a foreigner shall take the nationality of her husband").

237. Volpp, *supra* note 34, at 425.

238. KANG, *supra* note 16, at 139.

239. Volpp, *supra* note 34, at 426.

240. Abrams, *supra* note 4, at 1641 (quoting Mackenzie v. Hare, 239 U.S. 299, 312 (1915)).

241. Volpp, *supra* note 34 at 426; *see* KANG, *supra* note 16, at 140-41 (noting how the denationalization of foreign women contradicts the spirit of Trop v. Dulles, 356 U.S. 86, 101 (1958), where a soldier was stripped of his citizenship for deserting the army and the Court concluded, "we believe . . . that the use of denationalization as punishment is barred by the Eighth Amendment . . . . [Denationalization] is the total destruction of an individual's status in organized society").

242. Volpp, *supra* note 34, at 426 n.107 (quoting *Immigration and Citizenship of American-Born Women Married to Aliens: Hearing on H.R. 4057, H.R. 6238, and H.R. 9825 Before the H. Comm. on Immigration and Naturalization*, 69th Cong. 18 (1926) (statement of Congressman Dickstein)).

243. Cott, *supra* note 219, at 1461-62 (pointing out the stark difference between the treatment of U.S. citizen men—whose wives and "children were welcome into political belonging" unless barred by race—and U.S. citizen women who, along with their foreign husbands, were rejected "from the national community").

status.[244] No female citizen could lose her U.S. citizenship as a result of her marriage to an alien as long as her foreign husband was racially eligible to become a citizen.[245] To correct the effects of the Expatriation Act, the Cable Act also provided that women who had lost their American citizenship as a result of their marriage to a noncitizen prior to 1922 could naturalize if their husbands were racially eligible for citizenship and if they themselves were eligible for citizenship.[246] However, this only ended expatriation of white or black women married to white or black men.[247]

While the Cable Act corrected some wrongs of the Expatriation Act, the Cable Act did not help any women married to aliens who were ineligible to citizenship. Any such woman would cease to be an American citizen upon marriage to an alien, and she could not regain her citizenship without renouncing her marriage.[248] This provision mostly affected U.S.-born Asian women who married foreign-born Asian men, although some white women also married foreign-born Asian men and lost their U.S. citizenship.[249] For example, a congressional delegate from Hawaii testified that about 80,000 Asian women would be unable to regain American citizenship after their expatriation as a result of their marriages to Asian men.[250] In addition, it was presumed that women who lived abroad during their marriage had renounced their citizenship.[251]

The Cable Act also affected foreign women's citizenship. As a result of the Act, no alien woman could automatically acquire citizenship simply by marriage to an American or by the naturalization of her husband.[252] The Cable Act provided that the marriage gave these women the right to petition for naturalization, but even if they acquired U.S. citizenship by marriage, they lost their citizenship if they divorced or in the event that their husbands died.[253] Alien women ineligible to citizenship still could not gain U.S. citizenship, even if they married a U.S. citizen.[254] Thus, these

244. An Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, 42 Stat. 1021 (1922); Cott, *supra* note 219, at 1464 (positing that the repeal happened as a result of the Nineteenth Amendment, which extended suffrage to women).

245. Volpp, *supra* note 34, at 433.

246. *Id.*

247. *Id.* at 432.

248. KANG, *supra* note 16, at 140; Volpp, *supra* note 34, at 432-34 (noting that the Cable Act went further than the Expatriation Act by explicitly mandating a loss of citizenship).

249. Volpp, *supra* note 34, at 435-37; Cott, *supra* note 219, at 1467 (presenting the story of Mary K. Das, a white American who married a naturalized Indian in 1914. When, in 1923, the Supreme Court decided that Indians were not white and thus could not naturalize as citizens, Mr. Das was stripped of his citizenship and Mary was also denationalized).

250. Volpp, *supra* note 34, at 441-42.

251. *Id.* at 434.

252. KANG, supra note 16, at 140 (quoting REED UEDA, NATURALIZATION AND CITIZENSHIP IN IMMIGRATION 135 (Richard A. Easterlin et al. eds., 1982)).

253. Volpp, *supra* note 34, at 438, 441.

254. Cable Act, *supra* note 244, at 1022 (marriage to an American citizen gave women "eligible to

foreign wives of American citizens were still subject to deportation and exclusion under immigration laws.

As a result of lobbying efforts by women's groups and Asian American organizations, the Cable Act was amended.[255] The 1930 amendment simplified the naturalization process for women who were "eligible to citizenship" but had lost their citizenship as a result of their marriage under the earlier version of the Cable Act.[256]

Another amendment to the Cable Act in 1931 allowed women who had lost their American citizenship as a result of their marriage to a foreigner ineligible for citizenship to regain it through naturalization.[257] The 1931 amendment further provided that any woman who was born a U.S. citizen, but had lost citizenship because of her marriage, would not be disallowed to naturalize because of her race, even if she otherwise would be racially barred from naturalization.[258] This was the first action by Congress since 1870 that repealed a racial barrier to citizenship.[259] Racial barriers were further rescinded through the 1932 amendment to the Cable Act, which extended birthright citizenship to women born in Hawaii before 1900, regardless of their race.[260]

Further allowing marriage to affect immigration and citizenship, the War Brides Act was enacted in 1945 to expedite the admission of alien spouses and minor children of U.S. Armed Forces into the United States by providing them nonquota immigrant status.[261] At the outset, Asian women could not take advantage of the War Brides Act, because the 1924 Immigration Act "categorized them as racially ineligible for both immigration and naturalization."[262] A 1947 amendment to the War Brides Act allowed Asian wives of U.S. servicemen to immigrate.[263] Many of the first women to take advantage of the 1947 amendment were Chinese

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citizenship" the right to petition for naturalization).

255. Volpp, *supra* note 34, at 443.

256. *Id.* (noting that the Act of July 3, 1930 eliminated termination of citizenship for women who married foreigners and resided abroad) (citing Act of July 3, 1930, ch. 835, 46 Stat. 854).

257. *Id.* at 445; Act of Mar. 3, 1931, ch. 442, 46 Stat. 1511 (1931).

258. Volpp, *supra* note 34, at 445-46.

259. *Id.* at 444 n.184 (indicating that opponents of the 1932 amendment, such as Representative Robert Green of Florida, warned of the possible negative effects if American women could retain their citizenship after marrying aliens ineligible for citizenship: "I fear this bill may mean trouble. I want our American women to have full privileges, but I think it is rather dangerous to permit what may turn out to be a marriage lottery whereby foreign races of different creeds and colors may marry American women and come here to reside in the United States by virtue of this law.").

260. *Id.* at 446.

261. War Brides Act, Pub. L. No. 79-271, 59 Stat. 659 (1945); Abrams, *Immigration Law*, *supra* note 4, at 1637-38 (noting that "Congress has repeatedly made it possible for U.S. military personnel living overseas to marry people living in those countries and bring them back to the United States as immediate relatives").

262. KANG, *supra* note 16, at 131.

263. *Id.*

women married to Chinese American servicemen.[264] Japanese and Korean women also immigrated to the United States as a result of the military occupation of Japan and the Korean War, which resulted in many marriages to American servicemen.[265]

These laws illustrate that since the mid-nineteenth century women's citizenship has been inextricably tied to marriage. For American women, the choice of whom to marry affected their citizenship status. Women were penalized for marrying foreign men through the loss of their birthright citizenship. For noncitizen women, marriage afforded them an opportunity to gain citizenship, although race-based restrictions still affected the ability of some women to naturalize. The same military occupations and wars that highlighted and reinforced the perception of the sexualized and submissive Asian woman also ultimately opened the channels for Asian wives of U.S. servicemen to immigrate and gain citizenship.

B. Modern Immigration and Naturalization: Privileging and Shaping Marriage

The regulation of sex, morality, marriage, and the family is at the root of much of U.S. immigration law. Starting with the 1875 Page Act, federal immigration law has defined and shaped marriages based on Western morals and values.[266] Today, marriage continues to be an important factor in decisions concerning immigration and naturalization. Not only are certain marriages privileged, but couples shape their marriages in a way that comports with American notions of a valid marriage, even if that notion deviates from that couple's cultural norm. Judgments about a valid marriage inform IMBRA's regulations, which only affect marriages that are perceived to deviate from Western norms of marriage based on the notions of free choice and consent.

In 1965, with the enactment of the Immigration and Nationality Act (INA), marriage played an even more important role in immigration and naturalization as family-based visas became the principal means of immigration.[267] In 2005, around 300,000 immigrants gained residence as spouses of U.S. citizens and legal permanent residents (LPR).[268] The rationales for family-based visas include the notions that American citizens have an interest in forming families, both with citizens and noncitizens.[269] American citizens also have the right to exercise their own citizenship by

264. *Id.* at 132.

265. *Id.* at 131-32.

266. Abrams, *Immigration Law*, *supra* note 4, at 1631.

267. LEGOMSKY, *supra* note 217, at 262 (stating that family provisions account for roughly 80% of all immigrant admissions to the U.S.).

268. Abrams, *Immigration Law*, *supra* note 4, at 1629.

269. *Id.* at 1637.

passing it along to others. Marriage indicates that a person is member of the American community because through marriage, the American citizen demonstrates their close ties to their spouse, whom they have chosen to include in the American community. Marriage, in this sense, is evidence of cultural assimilation, as the spouse of a U.S. citizen is perceived as likely to adopt American values.[270]

Since 1965, marriage has become a significant way in which individuals can immigrate to the United States or gain American citizenship.[271] Moreover, marriage to a citizen or LPR can help qualify the spouse for an exception or waiver if they are denied entry on certain grounds. As such, marriage has become more important for Congress to regulate. Immigration law, in essence, burdens American citizens wishing to marry aliens in a way they would not be burdened if they married a fellow American citizen. Immigration law is thus being used to regulate the marriages (and by extension, the family) of U.S. citizens. Today's regulations hark back to previous immigration laws that once stripped American women of their citizenship based on their decisions to marry noncitizen men.

One such regulatory burden requires U.S. citizens to fill out an affidavit of support demonstrating that they can support their noncitizen spouse "at an annual income that is not less than 125% of the federal poverty line."[272] Here, Congress regulates marriage by creating a permanent financial obligation to support a spouse, which does not apply to marriages between two American citizens.[273]

Another burden imposed on American citizens and their foreign spouse is that in order for the noncitizen spouse to naturalize, the couple must prove that their marriage meets the standards for a valid marriage based on Western norms, regardless of what marriage means to that particular couple.[274] Any decision about the validity of a marriage requires a judgment about what constitutes a proper marriage.[275] Legal documentation of a marriage does not suffice.[276] As outlined in the INS regulations that accompany the Immigration Marriage Fraud Amendments (IMFA) of 1986, a couple may demonstrate the legitimacy of their marriage through—among other factors—joint ownership of property, comingling of finances, and children.[277] These hallmarks of a good faith

270. Abrams, *Becoming a Citizen*, *supra* note 4, at 47-49.

271. Immigration and Nationality Act of 1965, 89 Pub. L. No. 236, 79 Stat. 911; LEGOMSKY, *supra* note 217, at 18-19.

272. Abrams, *Immigration Law*, *supra* note 4, at 1700.

273. *Id.* at 1701.

274. *Id.* at 1683.

275. Abrams, *supra* note 6, at 715.

276. Abrams, *Immigration Law*, *supra* note 4, at 1683.

277. 8 C.F.R. § 216.4(a)(5)(i)-(vi) (2009); Abrams, *Immigration Law*, *supra* note 4, at 1683-1685

marriage by American standards do not comport with marriages in other countries, or even some marriages in America. For example, not all married couples share bank accounts, own property jointly, or choose to procreate. However, because of these benchmarks of a "legitimate marriage" under IMFA standards, immigrants are often pressured to "self-police their marriages, crafting the types of marriages they think will pass" immigration interviews.[278] Immigration officials and courts continue to use cultural norms and stereotypes of marriage, privileging and promoting certain marriages over others.[279]

Under the definition of a good faith marriage, the beneficiary spouse must enter the marriage with the intention of establishing a life together, and not for immigration benefits.[280] The beneficiary spouse is under suspicion of immigration fraud until proven innocent. This is reminiscent of nineteenth century immigration policies, which presumed that all Asian females seeking to immigrate to the United States were prostitutes, unless they could prove their good moral character and voluntary immigration before being admitted to the United States.[281]

In assessing the "good faith" of a marriage, the beneficiary's motives for entering the marriage are questioned, but not the sponsor's motives. While the absence of immigration-related motives on the beneficiary's part is enough to establish a good faith marriage, the sponsor may have married the beneficiary to get free domestic labor or a free sex partner. When the beneficiary is singled out for the "good faith" test, it suggests that motives based on gaining citizenship are deemed worse than the desire to acquire free labor or sex.

Marriage has been used since 1885 as a means of granting or denying American citizenship. Coupled with notions about race, laws surrounding marriage and citizenship were complex and changed often in the early 1900s. In 1965, marriage became an important means through which women could immigrate to the United States and naturalize as American citizens. Thus, assessing the validity of marriages became an extremely important issue for Congress, immigration officials, and courts. Especially after concerns were raised that many marriages were in fact fraudulent, Congress passed the IMFA, which judges marriage based on Western norms. Certain types of marriages between American citizens and foreigners still arouse suspicion, even though such marriages would not be

278. Abrams, *Immigration Law*, *supra* note 4, at 1691.

279. Abrams, *supra* note 6, at 716.

280. Abrams, *Immigration Law*, *supra* note 4, at 1684-85.

281. Anannya Bhattacharjee, *The Public / Private Marriage: Mapping Homes and Undomesticating Violence Work in the South Asian Immigrant Community*, *in* FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES 308, 314-315 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997).

regulated if both spouses were American citizens. Judgments about the legitimacy of certain marriages between American citizens and foreign spouses, along with concerns about potential for abuse in such relationships, ultimately led to the enactment of IMBRA.

IV. INTERNATIONAL MARRIAGE BROKER REGULATION ACT

A. Goals of IMBRA

The International Marriage Broker Regulation Act of 2005 was enacted to protect noncitizens who meet and marry U.S. citizens through marriage brokers and internet dating services. IMBRA provides noncitizens certain information about their U.S. citizen spouse, their rights, and resources for victims of violence.[282] The purported reason for the Act was to prevent violence against women after two widely publicized stories involving citizen men who had murdered their foreign wives whom they met through IMBs.[283]

In effect, though, IMBRA burdens American men who choose to meet women through IMBs, forces couples to conduct their courtship and marriage in ways determined by Congress, and yet does not regulate men who may use other dating services, even though they may be as likely to perpetrate violence. While attempting to protect foreign women, Congress is in fact making it more difficult for them to immigrate to the United States through the added burdens it is placing on the men who would sponsor them.

B. International Marriage Brokers

There are nearly 500 IMBs operating in the United States.[284] According to a 1998 study commissioned by the Immigration and Naturalization Service (INS), the number of mail-order marriages range from 4,000 to 6,000 a year.[285]

The IMB's websites contain the names, contact information,

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282. 8 U.S.C. § 1375a (2006).

283. *See* 149 CONG. REC. S9960, *supra* note 2, (statement of Sen. Cantwell) ("The primary goal of my legislation is to better inform women entering this country as fiancées and prospective spouses about the past history of their prospective spouse and to better inform them of their rights as residents of the United States if they become victims of domestic violence. . . . [it] would give foreign fiancées critical information they need to make an informed decision about the person they are going to marry. It puts these foreign brides on more equal footing with their American grooms.").

284. *Human Trafficking: Mail Order Bride Abuses Hearing Before the Subcomm. on East Asian and Pacific Affairs of the S. Comm. on Foreign Relations*, 108th Cong. 5 (2004) (statement of Sen. Maria Cantwell) (hereinafter *Human Trafficking*).

285. Comm'r of the Immigration and Naturalization Serv. and the Dir. of the Violence Against Women Office at the Dep't of Justice, *International Matchmaking Organizations: A Report to Congress* 19 (1999), http://www.uscis.gov/files/article/Mobrept_full.pdf (hereinafter INS Report).

biographical information, and pictures of the prospective brides.[286] Women undergo an initial screening process and then brokers select the women who will appear on the website.[287] Men must purchase information from the IMB to contact any women whom they want to meet.[288] IMBs may also offer customers guided tours to a foreign country to meet women.[289]

The INS concluded that there was "considerable" potential for abuse in such marriages and that mail-order brides might become victims of international trafficking.[290] Study results showed that immigrant women suffer more severe abuse, at rates that are about three times higher than in the general U.S. population.[291] Tahirih Justice Center, an immigrant women's organization, claims that a foreign woman recruited by IMBs is more susceptive to abuse because she lacks the opportunity to get to know her potential spouse, she may speak limited English, and she may not know about rights in the United States or the resources available.[292] Additional potential for abuse arises because men who use IMBs may have expectations of docile, subservient, or submissive women.[293] While there is no national statistic reflecting prevalence of abuse in brokered marriages, one study showed that in 2005, convicted sex offenders filed 91 fiancée visa petitions.[294] It was as a result of the potential for abuse in these marriages that Congress decided to regulate IMBs.

A counter-argument claims that no concrete data exists proving that such unions are more likely to result in domestic violence or homicide than other marriages.[295] According to a 2003 study by the Centers for Disease Control, nearly 1,300 women die as a result of "intimate partner" violence

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286. Holli B. Newsome, *Mail Dominance: A Critical Look at the International Marriage Broker Regulation Act and its Sufficiency in Curtailing Mail-Order Bride Domestic Abuse*, 29 CAMPBELL L. REV. 291, 293-94 (2007).

287. *Id.* at 294.

288. *Id.*

289. *Id.*

290. INS Report, *supra* note 285, at 1, 6.

291. Tahirih Justice Center, Frequently Asked Questions, International Marriage Broker Regulation Act of 2005, http://www.tahirih.org/advocacy/policy-areas/imb-campaign (last visited Apr. 21, 2011).

292. This may also be true for women who meet their husbands through traditional cultural or religious matchmaking organizations, which are exempt from the regulations of IMBRA.

293. 149 CONG. REC. S9960, *supra* note 2 (statement of Sen. Cantwell) ("The men who seek these more traditional wives typically control the household finances and make basic decisions like whether the wife will have a driver's license, get a job or spend time with friends. Because these women often immigrate alone, they have no family or other support network and rely on their husbands for everything. Such dependency can make it difficult for a wife to report abuse without worrying that doing so is a surefire ticket to deportation. Researchers agree that isolation and dependency put these women at greater risk of domestic abuse.").

294. U.S. Gov't Accountability Office, Report to Congressional Committees (2008) GAO-08-862, *International Marriage Broker Regulation Act of 2005: Agencies Have Implemented Some, but Not All of the Act's Requirements*, www.gao.gov/new.items/d08862.pdf at 1 n.1.

295. Pleasant, *supra* note 3, at 319.

each year in the United States.[296] However, since 1993 there were only three reported cases of women married to American citizens through IMBs who died as a result of domestic violence.[297] Those marriages arranged through IMBs each year account for only 0.004 percent of all marriages in the U.S.[298] Some argue that because a very limited amount of data exists on domestic violence in IMB-arranged marriages, the requirements of IMBRA are "unjustified and disproportionate to the actual problem of abuse."[299]

C. Clients of IMBs

An INS survey found that most men who use IMBs are white, educated, economically successful, and politically conservative.[300] The men are usually in their mid- to late thirties and primarily from metropolitan areas.[301] Many seek younger, submissive wives with "traditional values."[302] According to Dr. Gladys Symons of the University of Calgary, men are searching for women who will be dependent on them and submissive.[303]

It is estimated that over 200,000 women use IMBs to find husbands.[304] These women are predominantly under the age of 26.[305] Many are from countries where "women are oppressed, where they have few educational or professional opportunities, and where violence against women is condoned."[306] A majority of the women using IMBs are from Asian countries or from the former Soviet Union.[307] According to a Senate hearing in 2004, the countries with the highest number of mail order brides to immigrate to the United States were Russia, Ukraine, China, the Philippines, Vietnam, Thailand, Brazil, Colombia and Costa Rica.[308]

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296. Nat'l Ctr. for Injury Prevention & Control, Ctr. for Disease Control, *Costs of Intimate Partner Violence Against Women in the United States* 19 (2003), http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf.

297. Pleasant, *supra* note 3, at 319.

298. *Id.* at 313.

299. *Id.* at 320.

300. Robert J. Scholes, *The "Mail-Order Bride" Industry and its Impact on U.S. Immigration*, *in* INS Report, Appendix A at 4.

301. *Id.*

302. *Id.* (explaining that this ideal wife with "traditional values" is someone who is "happy to be the homemaker and asks for nothing more than husband, home, and family").

303. Villapando, *supra* note 122, at 319.

304. Pleasant, *supra* note 3, at 312.

305. Scholes, *supra* note 300, at 3, 6.

306. Pleasant, *supra* note 3, at 312-13; *Human Trafficking*, *supra* note 284, at 7.

307. Scholes, *supra* note 300, at 24; Anderson, *supra* note 161, at 1408 (noting that women who advertise in mail order bride catalogues "generally come from destitute conditions in parts of Asia").

308. *Human Trafficking*, *supra* note 284; Roxanne Sims, *A Comparison of the Laws in the Philippines, the U.S.A., Taiwan, and Belarus to Regulate the Mail-Order Bride Industry*, 42 AKRON L. REV. 607, 608, 615 (2009).

D. Depictions of Women

As discussed above, Orientalist ideology and fears about immigration led anti-Chinese forces to portray Asian women as sexualized and slave-like, and therefore a moral and physical threat to the nation. The statutory emphasis on the exclusion of Chinese prostitutes propagated the stereotype of Asian women as sexual objects and as slaves. These stereotypes persisted into the modern era as a result of U.S. military presence in Asia, which led to military-prostitution and further contributed to the objectification and sexualization of the Asian female body.[309] This image of Asian women has been portrayed and perpetuated in film and other media.[310] These stereotypes of Asian women promote the selling, buying, and possession of the Asian body.[311]

IMBs perpetuate this stereotype by presenting Asian women as sexual and subservient. On the IMB websites, the foreign women are contrasted against American women, who are characterized as career-focused. For example, one IMB advertisement states, "In the Philippines wives are very loyal house wives . . . [a]nd the Filipina believes that men must have regular sexual activity . . . . She is there, among other things, to be a provider of quality sex."[312]

Another website touts its "loving Asian girls."[313] Yet another claims, "women in Asia are brought up to be family-oriented. . . . perfectly happy to be a homemaker than to have a career."[314] The Japanese American Citizens League expressed concerns that the advertising used by mail order bride companies "reinforce[s] negative sexual and racial stereotypes of Asian women."[315]

The IMB industry perpetuates and exploits the stereotype of Asian women as sexual and docile in an effort to entice Western men to meet and marry Asian women. The same characteristics that once made them unfit for immigration to the United States now make Asian women the ideal spouses for American men searching for a "traditional" relationship.

E. Misuse of IMBs

Some IMBs are connected to commercial sex trafficking operations, pornography, prostitution, or domestic servitude. [316] This connection is one

309. KANG, *supra* note 16, at 74.

310. *Id.* at 71.

311. Christine S. Y. Chun, *The Mail Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes*, 17 U. PA. J. INT'L ECON L. 1155, 1179-80 (1996).

312. Newsome, *supra* note 286, at 293.

313. http://www.brides-4u.com (last visited May 11, 2010).

314. http://www.sunshine-international.com/women.html (last visited May 11, 2010).

315. Villapando, *supra* note 122, at 325.

316. *See* 149 CONG. REC. S9961, *supra* note 2, (statement of Sen. Cantwell) (describing the story of Helen, a Filipina woman brought to the United States by an American citizen who continued to live

of the reasons that Congress feared for the abusive potential of relationships formed through IMBs and thus chose to regulate them through IMBRA.

Men sometimes spend thousands of dollars to obtain a wife through an IMB. Because the men "use money and power to secure their brides, the image of . . . wife-as-prostitute" is inevitable, especially when the men themselves declare, "it was cheaper to get an Asian wife than to get an Australian prostitute."[317] Sex tourism, prostitution, and IMBs are interconnected forms of sexual exploitation, where women are for purchase. Men's expectations of servitude are "easily camouflaged as 'traditional' family values" which posit the wife as a mother, caregiver, and homemaker, without a career of her own.[318] This poses a real problem for potential abuse and violence in the relationship, especially if the expectations of the male consumers are not met.

F. Regulations of IMBRA

Concerns over misuse of IMBs, along with the potential for abuse in marriages formed through IMBs, prompted Congress to regulate the industry. While the language of the Act is gender neutral, it is clear from the legislative history and the fact that IMBRA was enacted as part of VAWA that its main intent is to protect foreign women from U.S. men. IMBRA is based on the assumption that once provided with the necessary information, foreign women will be able to make more educated choices about marriage and will be less likely to end up with abusive husbands.[319] IMBRA provides foreign women with information about the criminal history of the American male clients of IMBs, as well as about the rights and resources available to domestic violence victims in the United States.

To protect foreign women, the Act imposes regulations on IMBs and the men who use them. IMBRA regulates IMBs by prohibiting them from profiling women younger than 18 years of age.[320] Furthermore, the Act requires IMBs to search federal and state public sex offender registries for information on each U.S. client.[321] The IMB must also provide the foreign woman with additional criminal and marital background information that

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with his ex-wife and forced Helen to work as their servant).

317. Daniel Epstein, *Romance is Dead: Mail Order Brides as Surrogate Corpses*, 17 BUFF. J. GEN., L. & SOC. POL'Y 61, 83 (2009) (quoting Eddy Meng, *Mail-Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REFORM 197, 223 (1994) ("For instance, several Australian consumer-husbands have boasted that they decided to purchase mail-order brides because "it was cheaper to get an Asian wife than to get an Australian prostitute")).

318. *Id.* at 89; Scholes, *supra* note 300, at 8.

319. Abrams, *Immigration Law*, *supra* note 4, at 1656.

320. 8 U.S.C. § 1375a(d)(1) (2006).

321. § 1375a(d)(3)(A)(i).

the IMB has collected from the U.S. client.[322] Lastly, the IMB must advise the foreign woman in her language of rights and resources available to victims of domestic violence and obtain written consent to release her contact information to specific U.S. clients.[323]

In order to advise women of their rights and resources, the Act requires the Department of Homeland Security to create pamphlets, to be distributed by IMBs to the female in her native language.[324] The pamphlet must include information about the visa application process; the illegality of domestic violence and sexual assault; services for domestic violence survivors; the legal rights of immigrants subject to abuse; the obligations of parents to provide child support; the definition of marriage fraud and the penalties for such fraud; and a warning about potential abuse by the American spouse.[325]

IMBRA imposes regulations not just on the IMBs, but also on the American clients of IMBs. The American client must provide documentation of criminal history, including arrests related to substances or alcohol; any court orders restricting physical contact with another person; any arrests or convictions of homicide, murder, manslaughter, assault, battery, domestic violence, rape, sexual assault, child abuse, and stalking; and any arrests or convictions for prostitution or attempting to procure prostitutes.[326] The U.S. citizen must also provide a personal history including a record of any previous marriages, whether he has previously sponsored fiancé(e)s or spouses, the ages of all minor children, and a list of previous states of residence since the age of 18.[327] IMBRA further restricts U.S. citizens from simultaneously seeking visas for multiple fiancé(e)s and provides a lifetime cap of two fiancé(e) visas per U.S. petitioner (subject to waiver), with no less than two years between the filing of petitions.[328]

G. Exceptions to IMBRA

The regulations imposed by IMBRA do not apply to all dating services. There are two exceptions to IMBRA. The first exemption applies to dating services that do not provide international dating services between U.S. citizens and foreign nationals as their primary business.[329] To qualify for the exemption, the dating service must charge comparable rates for men and women and offer comparable services to all individuals.[330] The second

322. § 1375a(d)(3)(A)(iii)(I)-(II).
323. § 1375a(d)(3)(A)(iii)-(iv).
324. § 1375a(a).
325. § 1375a(a)(2)(A)-(H).
326. § 1375a(d)(2)(B)(i)-(iv).
327. § 1375a(d)(2)(B)(v)-(vii).
328. 8 U.S.C. § 1184(d)(2)(A) (2009).
329. 8 U.S.C. § 1375a(e)(4)(A)-(B).
330. Examples of such organizations include Match.com, Yahoo! Personals, e-harmony, J-Date,

exemption is for traditional cultural or religious matchmaking organizations that operate on a non-profit basis. While these two types of organizations are exempt from IMBRA's coverage, any foreign women who use these services and decide to marry an American citizen still receive criminal background information on U.S. citizen sponsors during the visa process and also receive information about their legal rights and resources in the United States.

Congress may have differentiated IMBs from other dating services because the IMBs' model, which establishes the male as a consumer and female as a commodity, places women at greater risk for abuse.[331] However, upon closer examination, exempted organizations may put women at just as great a risk for abuse as IMBs.

Thus, these exemptions are problematic. For example, why might a South Asian man looking for a "traditional" South Asian wife be any less violent than a white American who wants the same thing?[332] The exemption may exist because lawmakers and immigration officials may be more likely to suspect marriage fraud if "members of a couple are racially or ethnically distinct from each other."[333] Therefore, IMB marriages are perceived as more suspect than marriages arranged through cultural or religious services, because the spouses are usually of different races or ethnicity.

The exemption for cultural and religious organizations highlights that deference is given to unions of persons of the same cultural background, regardless of the motives of the sponsoring spouse. If two people meet through a cultural or religious service or through a service that caters domestically, they are less regulated than two people who meet through an IMB. This proves that couples are more suspect when they are from different racial or ethnic backgrounds, one is not a U.S. citizen, and they are not paying equally for the dating service. This suspicion is based on historical fears of foreign women as a corrupting and diseased force, the association of prostitution as coerced sexual slavery, the disdain for marriage to a noncitizen, and Western notions of marriage premised on free choice and consent.

H. Implementation of IMBRA

One problematic aspect of IMBRA's implementation is the government's failure to implement its provisions for at least two years after it was enacted. While the burdens on American citizens and IMBs were in place, the government agencies responsible for implementing IMBRA failed to ensure that information being collected from the IMBs and their

and Shaadi.com, among others.

331. Tahirih Justice Center, *supra* note 291.

332. Abrams, *Immigration Law*, *supra* note 4, at 1658.

333. *Id.* at 1688.

American clients was being properly analyzed and distributed to foreign women in such a way as to protect them from potential abuse.

In a 2008 study, the Government Accountability Office found that agencies had only implemented some of the Act's requirements.[334] The Department of State had failed to mail a copy of approved petitions to each beneficiary, increasing the chances that beneficiaries were deprived of relevant information about the American citizen.[335] U.S. Citizenship and Immigration Services (USCIS) had not been checking all petitions to determine if an American petitioner had previously filed a fiancé(e) petition.[336] USCIS had also not been notifying beneficiaries if the petitioner was filing a third petition within 10 years of the first petition.[337] In addition, the government had not provided beneficiaries with pamphlets discussing the visa application process and the available resources for victims of domestic violence.[338] The pamphlet had not been finalized, translated, or distributed.[339] As a result, beneficiaries were left without all the information required by IMBRA and were therefore unable to protect themselves from potential abuse.

It is disheartening that after more than two years, the one component of the Act that would provide the most important protection for foreign women—information about their rights and domestic violence resources in the United States—had not been implemented. If the government aimed to help women, rather than regulate men, it should have focused immediately on implementing these requirements.

I. Problems

There are a number of problems concerning who and how IMBRA regulates. The means and methods that Congress chose in order to presumably protect foreign women were influenced by over 100 years of immigration regulations premised on moral judgments about race, gender, and marriage in American society.

To begin, immigration law usually regulates the immigrant, not the U.S. sponsor. IMBRA reverses that structure by regulating the U.S. citizen, under the guise of immigration law.[340] There may be more effective ways to protect women from domestic violence than using immigration law to regulate U.S. citizens and their marriages. The focus might be on better informing women of their rights and resources, as well as on enforcement

334. U.S. Gov't Accountability Office, *supra* note 294, at 12.
335. *Id.* at 4-5.
336. *Id.* at 5.
337. *Id.*
338. *Id.* at 6.
339. *Id.*
340. Abrams, *Immigration Law*, *supra* note 4, at 1659.

to combat domestic violence and trafficking.

One argument presented in a paper by Erin Pleasant is that several requirements of IMBRA might infringe upon constitutional rights of U.S. citizen males as well as the rights of IMBs.[341] Pleasant argues that IMBRA is underinclusive, disproportionate, and violates the Constitutional rights of American men and IMBs.[342] In addition, IMBRA was challenged for infringing on protected speech of IMBs and the free speech rights of men seeking partners.[343] However, this argument was ultimately struck down in court.[344]

IMBRA's extensive regulation of the U.S. citizen acts as a punishment or disincentive to marrying foreign women, especially if they are found through an IMB. This appears to be an extension of punishments levied against American women who married foreign men in the late 1800s. Congress may still be holding on to the notion that U.S. citizens have only themselves to blame for the extensive regulation "when there are enough Americans for them to select from" and is still punishing those citizens who choose to look beyond the national borders for a spouse.[345] If the aim is to protect, rather than punish, then all women, regardless of whether they are foreign, should receive the same information about their rights and available resources in the event that they experience domestic violence.

These marriages may be judged as being outside the norm due to suspicion of inter-cultural marriages. The issue might not be so much that one spouse is not a U.S. citizen, but rather that, for the most part, white men are looking to marry women of a different cultural and racial background. Considering the history of antimiscegenation laws in the United States, and the fear of Asian women corrupting white American society through interracial relationships and mixed-race children, it is possible that there remains some discomfort with inter-cultural marriages. This is evident because IMBRA carves out exemptions precisely for couples that meet through cultural and religious organizations.

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341. Pleasant, *supra* note 3, at 318-30 (claiming that IMBRA might infringe protected speech of IMBs. The Act might also infringe on protected free speech rights by scaring citizens who "do not know to whom they are disclosing information or how it will be used" and thus chilling their speech. IMBRA also might violate the Equal Protection clause because it treats American citizens differently than noncitizens and it discriminates on the basis of sex because the purpose of the act is to protect foreign women from abusive men. IMBRA may also infringe on the fundamental right to marry).

342. *Id.* at 317-18.

343. Sims, *supra* note 308, at 623-24.

344. European Connections & Tours, Inc. v. Gonzales, 480 F. Supp. 2d 1355 (N.D. Ga. 2007) (holding that IMBRA did not regulate or suppress commercial speech rights of IMBs by mandating background disclosures under the First Amendment and that Congress had a rational basis for distinguishing IMBs from other types of matchmaking services, so the Equal Protection challenge failed. The IMB claimed that the disclosures violated their right to free speech and that the definition of IMB violated the equal protection clause).

345. *See* Part III, above.

IMBRA's presumption may be that certain men using IMBs seek domination and control over women. As expressed in the Congressional hearings, there is a fear that men using IMBs are buying women for domestic and sexual labor. The use of marriage as a cover for sex trafficking and violence is especially troubling because it undermines the institution of marriage. The law is creating a dichotomy: a relationship that resembles prostitution or slavery (men buying women) is more regulated than a relationship that looks like marriage (a couple is of same the culture, no money is exchanged, and the marriage is entered into in good faith). Early immigration laws drew the same distinction between prostitution and marriage. Chinese women were excluded from the United States as prostitutes, even when they were a second wife or concubine. So too certain noncitizens are excluded today because their marriage deviates from Western norms of marriages premised on free choice and consent.

IMBRA also judges the way in which U.S. citizens meet a foreign spouse. While marriages facilitated by cultural and religious organizations are legitimate (even though problems inherent with IMBs can also be found in these dating services), the use of an IMB is scrutinized and judged as inherently suspect.

The problem may not be where or how American men search for wives, but that the women who use IMBs are depicted as sexual commodities, making them look too much like prostitutes, and are therefore inadmissible aliens.[346] The association of Asian women (who make up a large portion of women using IMBs) with prostitution is still deeply entrenched as a relic of the early perception of Asian immigrants and due to U.S. military involvement in Asia. The association of IMBs with prostitution makes the female clients an affront to the American system of immigration regulation. The frameworks of "good moral character" and "good faith marriage" exclude women engaging in prostitution or women selling themselves online simply to attain American citizenship. Thus, IMBRA may regulate the IMB industry because women who use IMBs are perceived as prostitutes, sexual slaves, or engaging in marriage fraud.

These concerns about the methods of IMBRA's regulation relate to the moral judgments about gender, sexuality, and marriage that have informed immigration and naturalization laws in the United States for years and ultimately influenced the legislators who enacted IMBRA.

CONCLUSION

The International Marriage Broker Regulation Act marks a shift in the

346. INA, 8 U.S.C. § 1182(a)(2)(D) (2006) (making inadmissible to the United States any alien who is coming "to engage in prostitution, or has engaged in prostitution within 10 years" before applying for admission or "to engage in any other unlawful commercialized vice, whether or not related to prostitution").

law by recognizing gender subordination and it is an important means of protecting women from abuse. However, IMBRA remains rooted in the larger scheme of immigration and citizenship laws that have determined the inclusion or exclusion of women from the national polity.

While regulating IMBs and American citizens to protect noncitizen women from abuse, the Act is influenced by a long history of immigration regulation based on moral judgments about race, gender, sexuality, and marriage. No reading of the laws regulating immigration is complete without taking into account broader historical, cultural, and political trends. The regulations have been influenced by historic notions of foreign women as prostitutes and morally suspect; laws that punished U.S. citizens who married noncitizens; and judgments about the legitimacy of certain types of marriage. The Act privileges relationships between people who are of the same cultural background, both American citizens, and who pay equally for dating services. Thus, the regulations privilege certain relationships, while discouraging others that do not comport with Western norms. Examining the "unconscious" of IMBRA allows us to situate the Act as part of a larger historical discourse and thus better understand the Act's means and method of regulation.