

2012

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Recommended Citation

Samantha L. Chetrit, *Surviving an Immigration Marriage Fraud Investigation: All You Need Is Love, Luck, and Tight Privacy Controls*, 77 Brook. L. Rev. (2012).

Available at: <http://brooklynworks.brooklaw.edu/blr/vol77/iss2/6>

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NOTES

Surviving an Immigration Marriage Fraud Investigation

ALL YOU NEED IS LOVE, LUCK, AND TIGHT
PRIVACY CONTROLS

INTRODUCTION

Married couples anxiously awaiting interviews with an immigration officer are assured “all you need is love.”¹ They are told not to worry—a fraud interview should not cause concern if their marriage is bona fide.² But any couple that has blindly walked into an interview that will determine the validity of its marriage soon discovers the stakes are too high to heed such flippant advice. It is becoming clearer that what couples really need is not love, but luck—and a traditionally palatable marriage.

Consider the story of Saïd and Patricia.³ After fourteen years together, two children, and a dog, they made the mistake of assuming that the legitimacy of their marriage would be as obvious to an immigration official as it was to them; they did not see the need to hire an attorney. Patricia, a U.S. citizen, sponsored Saïd’s petition for citizenship. Some months later, much to the couple’s dismay, they received a letter from the federal government that expressed its dissatisfaction with the petition and its need for further information. The distressed couple was subsequently scheduled for an investigatory interview into their marriage. They presumed this initial setback could be attributed to clerical error and once they could

¹ Nina Bernstein, *Do You Take This Immigrant?*, N.Y. TIMES, June 11, 2010, at MB1.

² *Id.*

³ This narrative is illustrative of the spousal-petitioning process conducted without the aid of an attorney. The names and any resemblance to actual persons, living or dead, events, or places are purely coincidental.

present their case in person, all would be resolved. Instead, the interview was a “Kafkaesque version of ‘The Newlywed Game’” with none of the flashy prizes, but all the risks for marital discord.⁴ Indeed, due to discrepancies in their answers to questions such as the color of Patricia’s toothbrush or the amount paid on their last electricity bill, they failed their fraud interview⁵ and their petition was denied. The gravity of their ill-placed faith in the system was soon realized—Saïd was put in removal proceedings.

Ironically, couples like Patricia and Saïd—stalwart believers in the strength of their union—suffer the consequences of their convictions while those couples that have something to hide realize the necessity⁶ of retaining an immigration attorney. An attorney would have coached them on the specific documents to bring to their fraud interview and the questions to expect, ranging from the absurd to the invasive.⁷ Furthermore, an attorney would have conducted mock interviews, questioning the couple separately, as is often done in marriage fraud interviews to assure their answers match.⁸ Yet even a seasoned immigration attorney may not be able to prepare the couple for the newest line of questioning by the United States Citizenship and Immigration Services (USCIS): “Why aren’t you listed as ‘In a relationship’ on *Facebook*?”

⁴ Bernstein, *supra* note 1, at MB1. The *Newlywed Game* is an American game show premised on determining how well newlyweds know each other. *The Newlywed Game*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Newlywed_Game (last visited Sept. 30, 2011). The competition pits recently married couples against each other for the highest number of matching answers to rounds of personal questions about their respective spouses. *Id.* According to some accounts, the show led to many marital arguments and even divorce. *Id.*

⁵ Fraud interview procedures, including the number of rounds conducted, vary across states. See generally *Chapter 15 Interviewing*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449.html> (last visited Sept. 30, 2011).

⁶ Jean Pierre Espinoza, *Ineffective Assistance of Counsel in Removal Proceedings Matter of Compean and the Fundamental Fairness Doctrine*, 22 FLA. J. INT’L L. 65, 66 (2010) (“The complexity of immigration law and the deportation process emphasizes the need for counsel . . .”). Aliens have the right to counsel, but not at the expense of the government. 8 U.S.C. § 1362 (2006); see also Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, at 1, 16-17, available at http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf (concluding that an appointed-counsel system would better serve government interests).

⁷ Immigration lawyers present at fraud interviews have reported questions that address subject matter ranging from the last movie the couple saw together to the last time they had sex. See Nina Bernstein, *Could Your Marriage Pass the Test?*, N.Y. TIMES (June 11, 2010, 8:45 PM), <http://cityroom.blogs.nytimes.com/2010/06/11/marriage-test/?ref=nyregion>; Bernstein, *supra* note 1, at MB1.

⁸ See, e.g., Bernstein, *supra* note 1, at MB1.

The U.S. government is establishing a growing presence on social networking sites,⁹ both through stated public policy and internal law enforcement strategy.¹⁰ Stories of law enforcement officials tracking down wanted criminals through the use of clues left on social networking sites have been well documented by the news media.¹¹ Recently, however, USCIS documents released in a Freedom of Information Act (FOIA) request reveal a much more disturbing reality—the United States government is operating under a presumption of fraud, trolling social networking sites on its own initiative without first having reason to suspect a couple of deception.¹²

The intrusive nature of the inquiry into the marital relationship exposes couples whose relationships fall outside of the societal norm to what is, at best, an invasion of privacy, and, at worst, an erosion of liberty. Part I of this note argues that the congressional call for stricter policies in the marital immigration context was a result of exaggerated estimates of marriage fraud and represented a departure from longstanding policies favoring familial reunification. This divergence produced a piece of legislation, the Immigration Marriage Fraud Amendments of 1986, which unnecessarily burdened newlywed couples with bureaucratic hurdles. Part II assesses the interplay between family law and immigration law, emphasizing the latitude accorded Congress in the latter context at the expense of the autonomy normally granted the former. Part III traces the history of the legal definition of “family,” and its influence on immigration regulation. The legally preferred formulation of the nuclear family is then contrasted with current demographics to illustrate the normative implications resulting from this incongruence.

⁹ For the purposes of this note, “social networking sites” and “social media” will both refer to current top-trafficked “sharing” sites: *Facebook*, *Twitter*, and *Flickr*. See *infra* note 123 and accompanying text.

¹⁰ See Memorandum from U.S. Citizenship & Immigration Servs. on Social Networking Sites (May 2008) (released to Electronic Frontier Foundation in FOIA request) [hereinafter Memorandum].

¹¹ See Julie Masis, *Is This Lawman Your Facebook Friend?*, BOS. GLOBE (Jan. 11, 2009), http://www.boston.com/news/local/articles/2009/01/11/is_this_lawman_your_facebook_friend/?page=1; Colin Moynihan, *Arrest Puts Focus on Protesters' Texting*, N.Y. TIMES, Oct. 5, 2009, at A19; Gene Johnson, *Fraud Fugitive Busted After Unwise Friend Request*, SEATTLE TIMES (Oct. 13, 2009, 2:46 PM), http://seattletimes.nwsour.com/html/localnews/2010056979_webfacebook13m.html; Editorial, *Twitter Tapping*, N.Y. TIMES, Dec. 13, 2009, at WK8.

¹² Jennifer Lynch, *Applying for Citizenship? U.S. Citizenship and Immigration Wants to Be Your “Friend”*, ELECTRONIC FRONTIER FOUND. (Oct. 12, 2010), <http://www.eff.org/deeplinks/2010/10/applying-citizenship-u-s-citizenship-and>.

This note will further explore how the implementation of the federal government's policies against U.S. citizen-spouses of immigrant-hopefuls compromises privacy rights while imposing unrealistic and outdated notions of the traditional American family. Part IV highlights the new brand of investigatory methods the government is using to ferret out "sham" marriages, specifically through social media. This section exposes the ease with which government actors can access personal information by way of deception, but also as a fault of the design of the social networking system. Part V considers and evaluates the ways in which these practices may compromise the constitutionally guaranteed privacy rights of American citizen spouses. Part VI draws parallels to emerging technologies and identifies the consequent privacy concerns that continue to reshape and redefine the scope of Fourth Amendment protection. Finally, the shortcomings of the current system of evaluating and detecting sham marriages are reviewed. Additionally, the conclusion suggests ways in which procedures could be improved in order to preserve citizen spouses' constitutional rights to privacy while increasing government transparency.

I. THE ENACTMENT OF THE IMMIGRATION MARRIAGE FRAUD AMENDMENTS OF 1986

United States immigration policy has long touted the importance of familial, and especially spousal, reunification.¹³ To wit, "immediate relatives" of United States citizens are granted a categorical exemption from numerical limitations on entry.¹⁴ Immediate relatives are statutorily defined as the children, spouses, and parents of United States citizens.¹⁵ Yet at some point in the development of federal immigration policy, the laudable goal of family reunification was abandoned in the effort to combat the perceived growing threat of fraudulent entry through marriage.¹⁶ This shift in policy and attitude was most readily

¹³ See, e.g., Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1638 (2007) ("Immigration law uses marriage as a category for assigning immigration status and does this as part of an explicit policy goal of family unification.").

¹⁴ 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

¹⁵ *Id.*

¹⁶ The report reads,

Historically, U.S. immigration policy has recognized the importance of protecting nuclear families from separation by permitting immediate family

reflected by the passage of the Immigration Marriage Fraud Amendments of 1986 (IMFA or Amendments),¹⁷ a successor to the Immigration and Nationality Act (INA) of 1952.¹⁸

A. *Marriage Fraud Is Everywhere, Yet Nowhere to Be Found: An Irrational Fear of Sham Marriages*

Under the heading “Need for Legislation,” a House Report on the IMFA reported that “[s]urveys conducted by the Immigration and Naturalization Service have revealed that approximately thirty percent of all petitions for immigrant visas involve suspect marital relationships.”¹⁹ Presented with these worrying figures, it is no wonder Congress called for measures to curb the “significant problem in the administration of the immigration laws.”²⁰ Since the passage of the IMFA, however, that figure has been generally regarded as a gross exaggeration.²¹

Congress reasoned that fraudulent schemes to obtain immigration benefits were more likely to occur in marriages celebrated shortly before immigration.²² Thus, as an added precaution, the Amendments impose a two-year conditional-status waiting period on alien spouses of U.S. citizens and permanent residents before they are able to petition for permanent residency.²³ The applicable section defines “alien spouses” eligible for permanent status, yet subject to conditional status, as those who were “lawfully admitted for permanent residence, by virtue of a marriage which was

members of U.S. citizens to immigrate to the United States without numerical limitation. . . . Because of this special status . . . [aliens] frequently find it expedient to engage in a fraudulent marriage in order to side step the immigration law.

H.R. REP. NO. 99-906 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978.

¹⁷ Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.); *see also* AUSTIN T. FRAGOMEN, JR. ET AL., IMMGR. L. & BUS. § 3:22 (2010).

¹⁸ Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)).

¹⁹ H.R. REP. NO. 99-906 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978.

²⁰ *Id.* at 5980 (statement of Hon. Peter W. Rodino, Jr.).

²¹ James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 699 (1997) (“[T]he thirty-percent figure was only based upon the number of cases that field investigators in [three] cities suspected were fraudulent; they were not cases where actual fraud has been proven. In fact, the INS had never determined the exact number of cases of known fraud before Congress enacted the IMFA.”).

²² Abrams, *supra* note 13, at 1683.

²³ 8 U.S.C. § 1186a(a)(1); *see also* FRAGOMEN, JR. ET AL., *supra* note 17.

entered into less than 24 months before the date the alien obtains such status by virtue of such marriage.”²⁴ The alien spouse can subsequently remove the conditional limitations on residence by jointly filing a second petition (Form I-751) starting ninety days prior to the second anniversary of the grant of conditional residence status.²⁵ Failure to timely file can result in an automatic termination of the conditional status, as well as the initiation of deportation proceedings.²⁶

B. Sanctions on Marriage for an “Improper Purpose”

Supplemental to the petition, the couple must also provide documentation proving that the marriage was not entered into for the improper purpose of evading U.S. immigration law.²⁷ Termination of the alien spouse’s conditional residence status by the Department of Homeland Security (DHS) can occur at any time during the two-year conditional period provided that the “qualifying marriage” had as its purpose the procurement of an alien’s admission as an immigrant.²⁸ Conditional residence status can also be removed if the marriage had been judicially annulled or terminated—other than through the death of a spouse²⁹—or if a fee or other

²⁴ 8 U.S.C. § 1186a(g)(1)(C).

²⁵ *Id.* § 1186a(d)(2)(A); FRAGOMEN, JR. ET AL., *supra* note 17.

²⁶ 8 U.S.C. § 1186a(c)(2)(A). Regulations require that the USCIS notify alien spouses of the filing of the second petition when they first acquire conditional resident status and at the beginning of the ninety day period in which to file. 8 C.F.R. § 216.2(a)-(b) (2010). However, the next section within the provision specifically places the responsibility of filing with the alien and petitioning spouse and does not relieve them of the burden of filing should the USCIS fail to provide one, or even both, of the notifications. *Id.* § 216.2(c). Therefore, the alien and petitioning spouse would not fulfill their burden of showing “good cause” for failing to jointly file Form I-751 within the required time period due to lack of notice by the USCIS. *Id.*; see also FRAGOMEN, JR. ET AL., *supra* note 17.

²⁷ For the purpose of offering proof that a marriage was not entered into to defraud the United States government, the USCIS asks for paperwork it views as being indicative of the bona fides of a marriage. 8 C.F.R. § 216.4(a)(5).

Documentation [can include] showing joint ownership of property; Lease showing joint tenancy of a common residence; Documentation showing commingling of financial resources; Birth certificates of children born to the marriage; Affidavits of third parties having knowledge of the bona fides of the marital relationship, or Other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.

Id.

²⁸ 8 U.S.C. § 1186a(b)(1)(A)(i).

²⁹ *Id.* § 1186a(b)(1)(A)(ii).

consideration were given.³⁰ The most obvious punishment for evading U.S. immigration laws through marriage fraud is deportation of the alien spouse.³¹ But the increased criminalization of immigration-related activities³²—in conjunction with the increased bureaucratic regulation of immigration benefits—places both parties at risk of criminal sanctions, which can include terms of imprisonment, fines, and forfeiture of property.³³ In practice, however, criminal law has been disproportionately used against aliens instead of citizens and permanent residents.³⁴ Nonetheless, attempting to structure federal criminal sanctions around a concept as amorphous as the American marriage is futile and inefficient.³⁵ That same argument can theoretically apply to all federal immigration regulations that rest on notions of a traditional American marriage—especially when, as the following sections explore, reality is incongruous with the norms Congress imposes.

II. TESTING CONGRESSIONAL REGULATION OF MARRIAGE AT THE INTERSECTION OF FAMILY LAW

While not considered a branch of family law, immigration law heavily influences familial relationships through its regulations.³⁶ Additionally, while marriage and family law have traditionally been matters reserved to the states, the federal government ultimately determines what constitutes a valid marriage “for immigration purposes.”³⁷ Congressional action and Supreme Court jurisprudence have shaped the immigrant relationship in ways that not only diverge from current cultural norms, but also fail to align with

³⁰ *Id.* § 1186a(b)(1)(B).

³¹ *Id.* § 1227(a)(1)(G).

³² See generally Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997) (arguing that “criminal sanctions are inappropriate as a method of deterring United States citizens or permanent residents” from using marriage as a means to evade immigration laws).

³³ *Id.* at 676.

³⁴ *Id.* at 674.

³⁵ *Id.* at 699-700 (“But the nature of the marriage relationship between two consenting adults is too private, too elusive, and too subjective to be defined in the public sphere in a way that obligates the parties to meet certain public expectations defined not by moral, social or religious communities but by a political community—the sovereign, and to act in particular ways under threat of criminal sanctions.”).

³⁶ Abrams, *supra* note 13, at 1629.

³⁷ *Id.* at 1670 (“Immigration law has its own prerequisites for who may enter a valid marriage, which in some ways track state law and in others supersede it.”).

state policies.³⁸ The IMFA is but one example of the federal government's prominence in defining marriage in the immigration setting. Judicial tests developed over the years to parse the bona fides of a marriage often pit family and immigration law against each other; courts are reluctant to allow governmental intrusion into the familial sphere yet are permissive of governmental regulation of immigration matters.³⁹ Thus, a brief overview of the treatment of marriage in the immigration context is necessary to understand the complex dynamic⁴⁰ that exists between immigration and family law.

A. *Congressional Power as Primary*

Matters of naturalization are generally regarded to be legislative functions⁴¹ superseding the role of the judiciary.⁴² Indeed, Congress's plenary power over immigration is so sweeping that the Supreme Court has upheld numerous restrictions of aliens' "rights" that would be untenable if applied to American citizens.⁴³ In the name of immigration regulation, Congress can pass laws that are overtly discriminatory toward nonresident aliens without fear of a successful constitutional challenge—aliens are not a "protected class," so they are not entitled to the same constitutional guarantees as American

³⁸ See, e.g., *id.* at 1634 ("In contrast to state family law, the federal immigration system passes judgment on and influences decision making in marriages involving immigrants throughout the four stages of marriage: courtship, entry, intact marriage, and exit.").

³⁹ Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 348-49; see also Abrams, *supra* note 13, at 1633 ("[Family] law not only suspects that intervention will do harm; it doubts that intervention will do good . . .").

⁴⁰ Abrams, *supra* note 13, at 1646 ("Immigration law thus places Congress and those it regulates in an unusual position. Congress has atypically broad power to regulate in the immigration arena, and even if that regulation happens to regulate marriage, the usual prohibition against congressional involvement in family law does not apply. At the same time, family law . . . is one area that is clearly beyond any of Congress's enumerated powers . . .").

⁴¹ U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power to set uniform naturalization rules).

⁴² Rachel Blitzer, Comment, *The Kiss of Death for "Living in Marital Union": Strict Judicial Scrutiny of Department of Homeland Security Marital Fraud Procedures*, 2004 U. CHI. LEGAL F. 495, 496.

⁴³ Abrams, *supra* note 13, at 1640 (asserting that the plenary power doctrine gives Congress almost complete power to regulate immigration as it sees fit, even if it would constitute an abridgement of rights in a nonimmigration context); Marcel De Armas, Comment, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 743, 747 (2007) (citing *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

citizens.⁴⁴ Courts have declined to apply strict scrutiny to review DHS regulations, instead favoring a semblance of rational basis review, regardless of the degree to which these regulations infringe on the right to marry.⁴⁵

However, this deference is arguably misplaced, and the Supreme Court should not be deterred by Congress's plenary power when adjudicating a matter as fundamental as the right to marry.⁴⁶ Furthermore, the federal government's treatment of potential immigrants is becoming increasingly difficult to accept in light of the inevitable effects on Americans whose alien spouses' rights are abridged. Admittedly Congress has a legitimate concern and a special interest in regulating family-based immigration due to the aforementioned benefits immediate relative status provides. But considering that the actual petitioner in most cases is the American citizen spouse,⁴⁷ it is worthwhile to note the discrepancies in treatment. One is often left to wonder whether citizens sacrifice their own constitutional guarantees in the effort to gain the same for their alien spouses, and whether this may be considered an even exchange.⁴⁸

B. *Legislative and Judicial Interplay*

Recognizing that government intrusion in the marriage relationship is socially unwelcome and historically disfavored,⁴⁹ a quick study of the manner in which courts have interpreted and applied congressional legislation evidences the extent of judicial deference in matters concerning immigration regulation. A review of seminal decisions in this area illustrates the distance between the exercise of immigration law in the marital sphere and classic family law jurisprudence.⁵⁰ Still, as the subsequent

⁴⁴ Abrams, *supra* note 13, at 1641-42.

⁴⁵ For a more in-depth discussion of the standards of review applied in naturalization cases, see Part III.C of Blitzer, *supra* note 42, at 511-16. See generally Jesse I. Santana, *The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986*, 25 CAL. W. L. REV. 1 (1988).

⁴⁶ Blitzer, *supra* note 42, at 510-11 (arguing for a standard of strict scrutiny in challenges to DHS regulations of marriage).

⁴⁷ In some instances, such as with the Battered Spouse Waiver, the alien spouse may petition for herself. 8 U.S.C. § 1186a(c)(4)(C) (2006); 8 C.F.R. § 216.5(a)(iii) (2010).

⁴⁸ See David Moyce, Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF. L. REV. 1747, 1761 (1986) (arguing that even a constitutional challenge from a U.S. citizen is an "uphill battle because the Court has virtually abdicated its role of judicial review in immigration cases").

⁴⁹ See generally Kris Franklin, Note, *A Family Like Any Other Family: Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027 (1991); Moyce, *supra* note 48, at 1776.

⁵⁰ See *infra* Parts II.B.1-3.

sections indicate, an important role for the judiciary exists to guide the interactions between immigration and family law and to effect substantive and procedural change.

1. A Primer: The War Brides Act of 1945 and *Lutwak v. United States*

Laying the foundation for future evaluative tests and the IMFA generally, the Supreme Court tackled the issue of “good faith” marriages in the 1953 case of *Lutwak v. United States*.⁵¹ *Lutwak* concerned the now-defunct War Brides Act of 1945, which provided for expedited entry for alien spouses of American war veterans.⁵² In the case, three World War II veterans returned home to the United States after making a detour through Paris to marry.⁵³ Their French spouses were legally admitted into the country as beneficiaries of the War Brides Act.⁵⁴ In each instance, there was evidence that the couples either never lived together as husband and wife, or separated within a few months.⁵⁵ The Court also noted that one of the marriages “was never consummated and was never intended to be.”⁵⁶ The petitioners contended that their intentions for getting married were irrelevant and that the performance of the marriage ceremonies was in and of itself sufficient proof of the validity of the marriages.⁵⁷ The Supreme Court declined to follow this logic: “The common understanding of a marriage, which Congress must have had in mind when it made provision for ‘alien spouses’ in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations. Such was not the case here”⁵⁸ While this issue was not part of the direct holding of the case on appeal, the Court’s comments provided the framework for future determinations of a valid marriage.⁵⁹

⁵¹ *Lutwak v. United States*, 344 U.S. 604 (1953).

⁵² War Brides Act, ch. 591, 59 Stat. 659 (1945) (expired Dec. 28, 1948).

⁵³ *Lutwak*, 344 U.S. at 608-09.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 609.

⁵⁷ *Id.* at 610. (There was no dispute at trial as to whether the couples had conducted formal marriage ceremonies.)

⁵⁸ *Id.* at 611.

⁵⁹ See De Armas, *supra* note 43, at 749-50.

2. Pre-IMFA Substantive and Procedural Guidelines

Historically, one standard for detecting and evaluating marriage fraud was “viability,” whereby a couple could be denied immigration benefits if they separated, or if the Immigration and Naturalization Service (INS), now the USCIS,⁶⁰ otherwise discovered that the “marriage was not viable and subsisting at the time the benefit was sought.”⁶¹ The Ninth Circuit Court of Appeals questioned the value of the viability requirement as a guideline in detecting sham marriages, and instead refocused the adjudicator’s evaluation of the union on the parties’ intentions at the time they married.⁶² A seminal case in that line of decisions, *Bark v. INS*, interpreted “intent” as the intent to “establish a life together.”⁶³ The court elaborated, “Conduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married.”⁶⁴ The IMFA subsequently amended the inquiry into sham marriages, though some suggest that the two tests are not one in the same—a couple could fail the *Bark* test but pass the IMFA.⁶⁵ Nevertheless, the Amendments did not obsolete the *Bark* standard entirely; the IMFA solicits evidence that corresponds to both authorities.⁶⁶

Very soon after *Bark*, a Second Circuit Court of Appeals case, *Stokes v. INS*,⁶⁷ also established certain guidelines for

⁶⁰ The USCIS officially assumed responsibility for immigration service functions of the federal government on March 1, 2003, as a result of the Homeland Security Act of 2002. Pub. L. No. 107-296, § 451, 116 Stat. 2135, 2195. The Act dismantled the INS into three components, which were subsumed by the DHS. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD> (last visited Dec. 29, 2010); see also David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 INTERPRETER RELEASES 601, 601 (Apr. 28, 2003).

⁶¹ FRAGOMEN, JR. ET AL., *supra* note 17, § 3:21.

⁶² *Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975) (citing *Lutwak*, 344 U.S. 604); *Whetstone v. INS*, 561 F.2d 1303, 1306 (9th Cir. 1977) (no requirement of duration).

⁶³ *Bark*, 511 F.2d at 1201 (“Petitioner’s marriage was a sham if the bride and groom did not intend to establish a life together at the time they were married.”); see also FRAGOMEN, JR. ET AL., *supra* note 17, § 3:20; *Abrams*, *supra* note 13, at 1682.

⁶⁴ *Bark*, 511 F.2d at 1202.

⁶⁵ *Abrams*, *supra* note 13, at 1685 (“Notice that [the *Bark*] standard is different from the IMFA standard: a couple could fail the *Bark* test (because the spouses did not ‘intend to establish a life together’) yet pass the IMFA test because they did not enter into marriage ‘for the purpose of evading the immigration laws.’”).

⁶⁶ Petitioners are encouraged to provide documentation showing proof of cohabitation, reproduction, and commingling of finances. *Abrams*, *supra* note 13, at 1683.

⁶⁷ *Stokes v. INS*, No. 74 Civ. 1022 (S.D.N.Y. Dec. 1, 1976) (consent judgment).

adjudicating suspect I-130 spousal petitions.⁶⁸ While the former case was significant for its substantive implications,⁶⁹ the latter was hailed as a procedural milestone in this area of law.⁷⁰ As a result of this New York case, the “Stokes Unit” was formed as a division of the USCIS, unique to the New York District Office.⁷¹ Petitioners are referred to the Stokes Unit if they fail their first fraud interview or if they are currently in removal proceedings.⁷² The Unit’s enumerated procedures include a written notice detailing the petitioner’s rights, a list of rights mailed as a separate attachment to the appointment letter, and a list of requested documents to be submitted at the interview appointment.⁷³ Officers also record the interviews as an added procedural safeguard⁷⁴ and are not to inquire into the sexual practices or contraceptive use of the petitioning couple.⁷⁵ Unlike other parts of the country where authorities may stage dawn

⁶⁸ See Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1252 (1986) [hereinafter *Sham Marriage*]; Moyce, *supra* note 48, at 1757 n.74.

⁶⁹ See Abrams, *supra* note 13, at 1685.

⁷⁰ The USCIS’s practice manual for adjudicators contains a separate section on “Stokes” interviews, deeming them “of interest” to adjudicators throughout the Service as an exemplar of an effective fraud interview program. *15.5 New York City District Office (“Stokes”) Interviews*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449/0-0-0-2716.html> (last visited Sept. 30, 2011); see also Jan H. Brown, *Family Immigration Issues—Love Conquers All?*, 1514 PRACTISING LAW INST.: CORP. LAW & PRAC. COURSE HANDBOOK SERIES 247, 256 (2005) (“In the second circuit, if an interviewer is not satisfied with the bona fides of a marriage, the case is referred for a secondary interview In the other circuits, the parties are not protected by [the *Stokes*] decision and interviewers can separate the parties at the initial (and often only) interview, an understanding in the quest for bona fides of the marriage.”).

⁷¹ *15.5 New York City District Office (“Stokes”) Interviews*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449.html> (last visited Sept. 30, 2011); Moyce, *supra* note 48, at 1757 n.74; see also Brown, *supra* note 70, at 256.

⁷² See Brown, *supra* note 70, at 256; *15.5 New York City District Office (“Stokes”) Interviews*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449.html> (last visited Sept. 30, 2011) (“The unit receives the bulk of its work from the regular adjustment of status unit (75%) with the remainder of cases referred from the Litigation Unit. . . . Without such a remand the Stokes Unit adjudicates only the I-130 petition.”).

⁷³ *15.5 New York City District Office (“Stokes”) Interviews*, U.S. CITIZENSHIP & IMMIGR. SERVICES, available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449.html> (last visited Sept. 30, 2011).

⁷⁴ See Nina Bernstein, *Wed in 1993, but Stuck in Immigration Limbo*, N.Y. TIMES, June 13, 2010, at A16.

⁷⁵ Bernstein, *supra* note 1, at MB1; see also Moyce, *supra* note 48, at 1757 n.74 (discussing procedural standards resulting from the *Stokes* consent judgment, including the proscription against sexually intimate questions, and the prohibition against petition denial solely based on a petitioner’s exercise of the Fifth Amendment privilege against self-incrimination).

“bed checks,” New York forbids the practice.⁷⁶ This difference is significant; as one Denver-based immigration attorney recounted to the *New York Times*, “Someone shows up at your house with a badge and a gun, unannounced . . . ‘Hi, we’re here from immigration. Do you mind if we come in to look and see if two towels are wet?’”⁷⁷ Comparatively, *Stokes* seemed a landmark win for marital privacy in immigrant homes. But the case’s effect has been more theoretical than practical. More than three decades since the decisions in *Bark* and *Stokes*, and over two decades since the promulgation of the IMFA, the federal government still refuses to respect the guidelines that do exist and is reluctant to acknowledge the need for modern normative standards.⁷⁸

3. Balancing Theory Against Practice

Regardless of *Bark*’s interpretation of “intent,” *Lutwak*’s focus on the petitioning couple *at the time* they were married, and *Stokes*’s concerns with procedural safeguards, administrators’ decisions are largely discretionary and rarely questioned.⁷⁹ Great importance is still given to behavior that takes place *after* the marriage ceremony.⁸⁰ Moreover, officers have been known to violate protocol in a variety of ways, including asking about interviewees’ sexual lives and contraceptive use.⁸¹ Thus, even though practice manuals directed at adjudicators exist,⁸² it is still unclear exactly what

⁷⁶ Bernstein, *supra* note 1, at MB1.

⁷⁷ *Id.* (quoting Laura Lichter, Esq.).

⁷⁸ See *infra* Part III.

⁷⁹ See Moyce, *supra* note 48, at 1752 (claiming that adjudicators “operate with a relatively free hand”).

⁸⁰ One justification is that these behaviors shed light on the intentions of the couple at the time they were married. Abrams, *supra* note 13, at 1685.

Cohabitation, commingling of finances, and reproduction are the three primary ways of proving the bona fides of a marriage. All three of these factors, though, involve events that happen *after* the marriage takes place, and courts use these events to try to determine what the couple intended at the moment of marrying.

Id. (citation omitted).

⁸¹ See Bernstein, *supra* note 7; Moyce, *supra* note 48, at 1757 n.74 (“There is evidence, however, that those standards that have been established are frequently ignored by the officials who actually pass upon the petitions.”); see also *Sham Marriage*, *supra* note 68, at 1243.

⁸² See generally *Adjudicator’s Field Manual—Redacted Public Version*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm> (last visited Sept. 30, 2011).

the DHS and USCIS are looking for—beyond documentation—in order to make their determinations. Couples could be happily married for years and still fail to present a satisfactory marriage for the purposes of the USCIS.⁸³

Consider the plight of one couple chronicled in the *New York Times*, the citizen spouse joking, “our marriage certificate is so old, it’s yellow.”⁸⁴ If the consequences were not so grave, their story would be comical. The New York couple has been married seventeen years; yet after three petitions and five marriage interviews, federal immigration officials were still not satisfied that the couple’s union was not a ruse to obtain status.⁸⁵ The couple even presented authorities with documentation normally indicative of the bona fides of a marriage,⁸⁶ such as a joint apartment lease, tax filings, bank statements, and photo albums.⁸⁷ According to the article, conflicting answers they gave four years prior—to questions such as whether the husband had taken his wife out to eat on her last birthday—overshadowed the probative value of their documentation.⁸⁸ Their last denial letter also attacked the insufficiency of funds in their joint bank account.⁸⁹ Interestingly, for all the procedural benefits the Stokes Unit purportedly offers over other states, the couple lamented that they would have preferred a home visit.⁹⁰ Any attempt to reconcile their experience with present attitudes toward the nebulous nature of relationships today must remember to take into account the qualities an adjudicator will be looking for—characteristics of a prototypical marriage.⁹¹ As the next part argues, Congress is

⁸³ Bernstein, *supra* note 74, at A16.

⁸⁴ *Id.*

⁸⁵ *Id.* (quoting the petitioner, “If I was, in fact, fraudulently married to my husband for the purposes of obtaining a green card for him, would I have continued to file over and over and over again?”).

⁸⁶ *See supra* text accompanying note 27.

⁸⁷ Bernstein, *supra* note 74, at A16.

⁸⁸ *Id.*

⁸⁹ In its last denial letter, the immigration agency dismissed documents normally indicative of the bona fides of marriage, noting, for example,

that the joint account they opened in 1997 showed low balances of \$8.11 and \$62.15 in two 2008 statements. The letter concluded that their documents did not outweigh the discrepancies in answers the couple gave at their 2006 interview—like her statement that their rent was \$677.17, while he said, “About \$700.”

Id.

⁹⁰ *Id.* (“The couple say they wish that federal officials would just go up to their fifth-floor apartment to see how they manage on her Supplemental Security Income disability payments and his meager wages.”).

⁹¹ *See infra* Part III.

effectively holding cross-cultural couples to an antiquated standard that even most Americans today would not meet.

III. DEFINING “FAMILY” IN UNITED STATES IMMIGRATION POLICY: AN AMERICAN ANACHRONISM

While congressional attitude toward the convention of marriage is out of line with prevailing cultural norms, it is not an anomaly—the notion of “family” preferred and recognized by American law is rooted in centuries-old history and values.⁹² The passage of time has not much altered this concept, an embodiment of the traditional patriarchal household.⁹³ This stagnation in American jurisprudence has effectively “enshrined the mythological nuclear family as its ideal model.”⁹⁴ As a result, current laws favor an ideal that amounts to a fallacy in the majority of American households.⁹⁵ The law’s insistence on adhering to a family archetype based on antiquated norms severely prejudices and disadvantages all who fall outside of the traditional structure.⁹⁶

A. *Evolving Society, Antiquated Definitions*

Nowhere is the impracticality of this preference for a conventional standard more obvious than in the immigration context; requiring international couples to conform to the mold of an old-fashioned American marriage is illogical since, by definition, international marriages “blend two cultures, at least one of which is not American.”⁹⁷ Moreover, the definition of what constitutes a traditional American marriage has changed and expanded.⁹⁸ Due to rising rates of divorce, single parenting, step-parenting, polyparenting, and unmarried cohabitation, only a minority of families today fit the nuclear model.⁹⁹

⁹² Jennifer R. Johnson, *Preferred by Law: The Disappearance of the Traditional Family and Law’s Refusal to Let It Go*, 25 WOMEN’S RTS. L. REP. 125, 125 (2004).

⁹³ *Id.* at 126.

⁹⁴ Franklin, *supra* note 49, at 1052.

⁹⁵ See generally Johnson, *supra* note 92.

⁹⁶ *Id.* at 125.

⁹⁷ Blitzer, *supra* note 42, at 498.

⁹⁸ See Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991) [hereinafter *Family Resemblance*].

⁹⁹ See Johnson, *supra* note 92, at 128-29 (“[A]s of 2000, [nuclear] families comprised just 23.5% of the American population. This statistic means that almost four out of five American families do not fit this model.”); see also *Family Resemblance*, *supra* note 98, at 1640.

Further, evidence indicates that alternative familial models are on the rise while the conventional archetype continues to decline.¹⁰⁰ For example, some “traditionally married couples” choose not to combine their “legal and financial affairs.”¹⁰¹ Others, especially elderly couples, may not consummate the marriage.¹⁰² Thus, it makes little sense to hold anyone to this “mythological nuclear model” of two heterosexual adult partners who are married with two children, much less a multicultural family.¹⁰³

Interestingly, it has been suggested that immigration policy that attempts to conform marriages to the conventional cast may have it backward since immigrants often espouse the very ideals considered to be traditional, and do so better than American-born citizens.¹⁰⁴ Additionally, if anything, “marriages of convenience” are an accepted and established institution in American culture; it is certainly not novel to hear of someone marrying for riches, celebrity, or social status, so why should marrying for immigration status be regarded so harshly? And yet the validity of American marriages is not questioned, while multicultural couples are forced to rebut the presumption of a fraudulent marriage.

B. *Practical Consequences of Promoting a Stereotypical Marriage*

The judiciary has recognized that it is not appropriate for courts to require alien spouses “to have more conventional or more successful marriages than citizens.”¹⁰⁵ Courts have also acknowledged that regulating a couple’s behavior and conduct raises constitutional issues.¹⁰⁶ Yet, practically speaking,

¹⁰⁰ Johnson, *supra* note 92, at 129

¹⁰¹ *Family Resemblance*, *supra* note 98, at 1654.

¹⁰² *See id.*

¹⁰³ *See, e.g.*, Johnson, *supra* note 92, at 128 (“Today’s families, whether once-nuclear Families now divorced or families that never took the traditional form, do not in fact follow the model of two Married Parents with dependent children.”).

¹⁰⁴ David Brooks, *Immigrants to Be Proud Of*, N.Y. TIMES, Mar. 30, 2006, at A25; Chacón, *supra* note 39, at 374 (“Ironically, the families of noncitizens may better exemplify traditional ‘family values’ than nonimmigrant families. Children in immigrant households are more likely to live in two-parent households than children in entirely native families.”).

¹⁰⁵ *Bark v. INS*, 511 F.2d 1200, 1201-02 (1975); Blitzer, *supra* note 42, at 499.

¹⁰⁶ *Bark*, 511 F.2d at 1201 (“Any attempt to regulate their life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage would raise serious constitutional questions.”); *see also* Blitzer, *supra* note 42, at 499.

citizenship hopefuls are being held to a higher standard than their citizen counterparts. A USCIS agency worksheet recently leaked on the Internet lists “red flags” for officers to check off when evaluating I-130 petitions for marriage fraud.¹⁰⁷ Suspect characteristics include “unusual” or large discrepancies in age, an “unusual” number of children or large gaps in age between children, “unusual” cultural differences, and “unusual” associations between family members.¹⁰⁸ As an immigration lawyer commented to the *New York Times*, “[T]he boxes on the worksheet ‘pretty much invite racial profiling and other stereotypes.’”¹⁰⁹ The worksheet fails to define what would constitute, for example, an “unusual” cultural difference; at least, not beyond soliciting officers to make personal value judgments based on which cultural phenomena qualify as abnormal. Also unclear is against whose cultural benchmark petitioners are measured—almost 25 percent of married couples accounted for in the 2000 census list an age difference of six or more years.¹¹⁰

When does a May-December pairing cease to be a romantic notion and begin to arouse suspicion? The criteria listed on the “Fraud Referral Worksheet” may not act as a direct mandate for a determination of fraud; however, they do provide insight into the highly discretionary, arbitrary, and culturally insensitive message the USCIS communicates to its officers. An unfortunate consequence of the U.S. government’s approach to evaluating the bona fides of a marriage is that petitioners may further arouse the suspicions of officers by attempting to conform to the ideal of a picture-perfect couple.¹¹¹ Clearly officers will be sensitive to any indications of unnatural behavior in an interview setting.¹¹² One author tells the story of an alien spouse who failed to state that he was living separately from his wife—presumably because he believed this fact would provoke suspicion.¹¹³ DHS

¹⁰⁷ *Fraud Referral Worksheet*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Sept. 30, 2004), available at http://graphics8.nytimes.com/packages/pdf/nyregion/USCIS_Fraud_Referral_Sheet.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ Bernstein, *supra* note 1, at MB1 (quoting Daniel Lundy, Esq.).

¹¹⁰ *Table FG3: Married Couple Family Groups*, U.S. CENSUS BUREAU (Mar. 2001), <http://www.census.gov/population/socdemo/hh-fam/cps2001/tabFG3.pdf>.

¹¹¹ Abrams, *supra* note 13, at 1691 (“One inevitable result of an immigration policy that uses marriage as a category for admission is that immigrants are required to self-police their marriages, crafting the kind of marriages that they think will pass muster in immigration service interviews even where the marriages they had anticipated having would have looked much different.”).

¹¹² *Fraud Referral Worksheet*, *supra* note 107, at 1.

¹¹³ Abrams, *supra* note 13, at 1687-92 (recounting anecdotal evidence from several couples falsely accused of fraud).

subsequently learned the truth, deemed it a material misrepresentation, and denied his petition.¹¹⁴

A section of the Fraud Referral worksheet applicable to all evaluations, entitled “General Behavioral Fraud Indicators Guide,” identifies specific potentially suspect behaviors such as “extreme nervousness” and devotes three of the ten checklist boxes to attorney presence in the interview.¹¹⁵ The three boxes correspond to any answers that may be prompted or interrupted by an attorney, or any attempts by the attorney to distract or mislead.¹¹⁶ Two issues immediately become apparent. First, it would appear unnatural not to be considerably nervous in a setting where the outcome could mean the deportation of your spouse. Second, devoting so much attention to attorneys’ behavior undermines the principle of attorney presence as a procedural safeguard.¹¹⁷ Furthermore, distrust of attorneys is unwarranted since it has been suggested that attorneys actually aid in the policing of sham marriages by acting as a preliminary barrier to vet clients for fraud.¹¹⁸ In any event, the question persists: what evidence suffices to show a valid marriage? Based on sample USCIS administrative officers’ questions, it would seem that knowledge of the intricacies of one’s microwave oven is indicative of a bona fide marriage.¹¹⁹ But if this were sufficient, then why has the USCIS taken to social networking sites as a measure to investigate fraud?

IV. UPGRADING INVESTIGATIVE METHODS, DOWNGRADING CONSTITUTIONAL PROTECTIONS

Facebook,¹²⁰ *Twitter*,¹²¹ and *Flickr*¹²² are social networking and media-sharing sites, and they all fall, in that order, within

¹¹⁴ *Id.*

¹¹⁵ *Fraud Referral Worksheet*, *supra* note 107.

¹¹⁶ *Id.*

¹¹⁷ See Harvey Kaplan, *Stokes Revisited*, 9 IMMIGR. J., July-Sept. 1986, at 4.

¹¹⁸ Abrams, *supra* note 13, at 1692.

¹¹⁹ Sample questions provided by lawyers present at *Stokes* interviews include: “Is your microwave stationary or does it have a revolving plate? If you are standing at and facing your kitchen sink, where is the microwave oven?” Bernstein, *supra* note 7.

¹²⁰ According to the company’s factsheet, “Facebook is a social utility that helps people communicate more efficiently with their friends, family and coworkers. . . . Anyone can sign up for Facebook and interact with the people they know in a trusted environment.” *Factsheet*, FACEBOOK, <http://www.facebook.com/press/info.php?factsheet> (last visited Nov. 3, 2011).

¹²¹ Twitter is a “real-time information network” that is primarily a way of sharing 140 character messages called “Tweets.” *About*, TWITTER, <http://twitter.com/about> (last visited Nov. 3, 2011).

the top twenty-six most visited websites in the United States.¹²³ *Facebook*, the second most visited site, has more than 800 million active users, and the average user has 130 friends and is connected to 80 community pages, groups, and events.¹²⁴ The site's founder, Mark Zuckerberg, envisions a utopian world fueled by openness and connectedness—simply put, a world of seamless sharing.¹²⁵ This strong preference for visibility in online communications translates to a privacy model that defaults to maximum exposure, placing the onus on users to scale back access.¹²⁶ Unfortunately for citizenship petitioners, just as social media is a useful and attractive tool for individuals looking to network or connect with distant friends, family, or even fans, it is also a beacon for anyone looking for a centralized database of personal information, including the U.S. government. As Internet services that encourage people to store an abundance of personal information—including photographs, e-mails, and contact lists—rise in popularity, so does the temptation for law enforcement to tap into the trove of personally identifiable information.¹²⁷

A. *Placing Social Media on USCIS' Radar and Agents' Agendas*

The federal government has taken active measures to ensure that its agents are aware of the popularity of social

¹²² Flickr is an online photo management and sharing application that aims “to get photos and video into and out of the system in as many ways as [possible],” including on the Flickr website, RSS feeds, e-mail, posts to outside blogs, etc. *About Flickr*, FLICKR, <http://www.flickr.com/about/> (last visited Nov. 3, 2011).

¹²³ *Top Sites in United States*, ALEXA, <http://www.alexa.com/topsites/countries/0/US> (last visited Oct. 6, 2011) (Facebook #2, Twitter #7, Flickr #26). Globally, Facebook is #2, Twitter #9, and Flickr #35. *Top 500 Global Sites*, ALEXA, <http://www.alexa.com/topsites/global/0> (last visited Oct. 6, 2011).

¹²⁴ *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Oct. 26, 2011). “Active” users are defined as those who have returned to the site in the previous thirty days. *Factsheet*, FACEBOOK, <http://www.facebook.com/press/info.php?factsheet> (last visited Oct. 26, 2011).

¹²⁵ Michiko Kakutani, *Company on the Verge of a Social Breakthrough*, N.Y. TIMES, June 8, 2010, at C1 (describing Zuckerberg as “a chief executive with an almost missionary zeal when it comes to getting people to share information” in a review of David Kirkpatrick’s book, *The Facebook Effect*).

¹²⁶ *Id.*

¹²⁷ Apparently law enforcement officials are succumbing to the temptation—Google counted more than 4200 requests for consumer data by United States law enforcement agencies in the first half of 2010 alone. Miguel Helft & Claire Cain Miller, *Web Outruns Privacy Law*, N.Y. TIMES, Jan. 10, 2011, at A1. Verizon made a similar calculation before Congress in 2007, reporting that it received an average of 90,000 such requests each year. *Id.* In 2009, Facebook reported that ten to twenty subpoenas and other orders were arriving daily. *Id.*

networking sites, as well as the degree to which these sites are willing to cooperate with law enforcement.¹²⁸ In a PowerPoint presentation by the Computer Crime and Intellectual Property Section (CCIPS) of the Department of Justice (DOJ) on the legal and practical implications of obtaining evidence from social networking sites, agents are shown the benefits of going undercover on these sites—namely, that they will be able to gain access to nonpublic information, communicate with suspects and targets, and map social relationships.¹²⁹ In fact, law enforcement officials have already had success in criminal investigations with the help of Twitter¹³⁰ and Facebook,¹³¹ among others. Naturally, the government has a legitimate and vested interest in tracking crime suspects; instructing agents to infiltrate the social networks of citizenship petitioners, however, presumes guilt and fails to confine the inquiry to ongoing criminal investigations.¹³² This gray area opens the back door to using social networking sites to troll profiles for potential targets.

A May 2008 memorandum from the Office of Fraud Detection and National Security (FDNS) entitled “Social Networking Sites and Their Importance to FDNS” elaborates on the utility of social media, specifically in immigration marriage fraud investigations.¹³³

Narcissistic tendencies in many people fuels [sic] a need to have a large group of “friends” link to their pages and many of these people accept cyber-friends that they don’t even know. This provides an excellent vantage point for FDNS to observe the daily life of beneficiaries and petitioners . . . [and] gives FDNS an opportunity to reveal fraud by browsing these sites to see if petitioners and beneficiaries are in a valid relationship or are attempting to deceive [US]CIS about their relationship.¹³⁴

¹²⁸ JOHN LYNCH & JENNY ELICKSON, OBTAINING AND USING EVIDENCE FROM SOCIAL NETWORKING SITES: FACEBOOK, MYSPACE, LINKEDIN, AND MORE, *available at* http://www.eff.org/files/filenode/social_network/20100303_crim_socialnetworking.pdf.

¹²⁹ *Id.*

¹³⁰ *See, e.g.,* Moynihan, *supra* note 11, at A19 (man spreading information about police movements on Twitter arrested on charges of hindering apprehension or prosecution, criminal use of a communication facility, and possession of instruments of a crime).

¹³¹ *See, e.g.,* Johnson, *supra* note 11. A bank fraud fugitive was captured in Cancún after U.S. authorities tracked him down through Facebook. *Id.* While his profile was set to private, his list of friends was not. *Id.* The Secret Service discovered one of his “friends” had an affiliation with the Justice Department and used this connection to access information about the fugitive’s whereabouts. *Id.*; *see also* Masis, *supra* note 11.

¹³² *See supra* text accompanying note 127.

¹³³ *See* Memorandum, *supra* note 10.

¹³⁴ *Id.*

It is clear from this memorandum that the USCIS, in recognition of the false sense of security fostered on social networking sites, is recommending its agents befriend citizenship petitioners in order to view information to which they would not otherwise have access. As the Electronic Frontier Foundation (EFF) highlighted, the memo does not specify any threshold of suspicion that must be triggered before the agency deploys these covert tactics.¹³⁵ The lack of guidance or boundaries effectively gives DHS agents the message that any petitioner is an acceptable target for monitoring in this fashion. Additionally, the memo fails to address whether DHS agents are obligated to reveal their government affiliation, an omission that seems to openly encourage deception. If a user unknowingly accepts a friend request from an agent using an alias, the user may not only expose himself to DHS monitoring, but also all of his contacts.¹³⁶ While petitioners and beneficiaries may have the wisdom to reject or ignore friend requests from perfect strangers, they cannot prevent their contacts from falling into a trap.

And yet, the underhandedness of DHS operations is not the most frightening part of the released FDNS memo; it dangerously assumes that individuals speak truthfully when posting on social networking sites.¹³⁷ The federal memorandum parallels patrolling social networking sites to making an “unannounced cyber ‘site-visit’ on a [sic] petitioners and beneficiaries.”¹³⁸ Again, this analogy incorrectly assumes that people behave in the same way, or put forth the same impressions, online as they do in everyday life. The federal government, as a result of this faulty logic, is not accounting for any discrepancies that may exist between the two when instructing its agents to browse social networking sites to investigate petitioners’ and beneficiaries’ purported relationships.¹³⁹ Consequently, as EFF warns, “this memo suggests there’s nothing to prevent an exaggerated, harmless or even out-of-date off-hand comment in a status update from quickly becoming the subject of a full citizenship investigation.”¹⁴⁰

¹³⁵ Lynch, *supra* note 12.

¹³⁶ See *supra* text accompanying note 131.

¹³⁷ Memorandum, *supra* note 10.

¹³⁸ *Id.*

¹³⁹ See *id.*

¹⁴⁰ Lynch, *supra* note 12.

B. *Studies Reveal Availability and Accessibility of Private Information on Social Media*

Two recent studies conducted by a security software company explore the ease with which individuals in cyberspace expose their own personal information, as well as that of their contacts.¹⁴¹ The studies illustrate the risks posed to citizenship petitioners and beneficiaries in the event federal agents—especially those using an alias—target their marriage. In the first experiment, conducted in 2007, researchers created a profile on *Facebook* for “Freddi Staur,” an anagram of “ID Fraudster,” represented by a small green plastic frog.¹⁴² In the next phase, two hundred random friend requests were sent to *Facebook* users across the globe.¹⁴³ The aim was to see how many people would accept Freddi into their network, thus revealing personal information about themselves and exposing everyone in their networks to infiltration.¹⁴⁴ The results were less than comforting: 41 percent of people approached responded to the friend request.¹⁴⁵ Of these responders, the majority leaked personal data, including photos of family and friends as well as information about their likes, dislikes, hobbies, and employers.¹⁴⁶

Apparently, the situation has not improved with time; in fact, a follow-up study two years later suggests that *Facebook* users have become even more cavalier with their personal information.¹⁴⁷ The 2009 study featured two fabricated profiles: “Daisy Felettin” (an anagram of “false identity”), a twenty-one-year-old female represented by a picture of a toy rubber duck, and, “Dinette Stonily” (an anagram of “stolen identity”), a fifty-six-year-old female with a profile picture of

¹⁴¹ *Facebook: The Privacy Challenge*, SOPHOS, <http://www.sophos.com/en-us/security-news-trends/security-trends/facebook.aspx> (last visited Oct. 8, 2011).

¹⁴² *Sophos Facebook ID Probe Shows 41% of Users Happy to Reveal All to Potential Identity Thieves*, SOPHOS (Aug. 14, 2007), <http://www.sophos.com/en-us/press-office/press-releases/2007/08/facebook.aspx>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* Specifically, 87 of the 200 users contacted responded to Freddi. *Id.* Of those respondents, 72% revealed one or more e-mail addresses, 84% detailed their full date of birth, 87% provided details about their education and work experience, 78% listed their current address or location, 23% listed their current phone number, and 26% provided their instant messaging screenname. *Id.*

¹⁴⁷ *See Facebook Users at Risk of “Rubber Duck” Identity Attack*, SOPHOS (Dec. 7, 2009), <http://www.sophos.com/en-us/press-office/press-releases/2009/12/facebook.aspx>.

two cats lying on a rug.¹⁴⁸ Each profile submitted one hundred friend requests to randomly chosen users in their age group.¹⁴⁹ Within a mere two weeks, Daisy and Dinette had managed to amass ninety-five friends, 46 percent of those requested.¹⁵⁰

Commentators have developed many theories in the search to understand why individuals would carelessly turn over personal information; some speculate that users of social networking sites still do not appreciate the extent to which third parties can access their information,¹⁵¹ while others credit the sense of anonymity users feel amidst the hundreds of millions of social network profiles.¹⁵² Whichever theory is correct is beside the point; the frightening reality is that individuals are unknowingly surrendering their private information at alarming rates, which poses potentially grave problems for citizenship candidates. One can imagine information gathered from user-generated content is ripe for misunderstandings and there are no guarantees that citizenship petitioners and beneficiaries will be given the opportunity to explain themselves, especially if they are unaware of the “suspicious” content in the first place. It is now evident that the government will not give petitioners the benefit of the doubt, much less a warning before invading their privacy.

V. GOVERNMENTAL INTRUSIONS INTO THE MARITAL RELATIONSHIP: COMPROMISING MARITAL PRIVACY IN THE INTEREST OF SPOUSAL PETITION DETERMINATIONS

As previously noted, DHS investigations of American citizen petitioners’ marriages raise a number of privacy issues, which are further compounded by agents’ surreptitious presence on social networking sites. The following sections explore the major privacy issues facing citizenship petitioners and beneficiaries, as well as evaluate the struggle between the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Eight users befriended Dinette of their own initiative. *Id.* Further statistics for Daisy and Dinette include, respectively: 89% and 57% of respondents gave their full date of birth; 100% and 88% provided their e-mail address; 74% and 22% listed their college or workplace; 46% and 31% divulged family and friend data. *Id.*

¹⁵¹ Samantha L. Millier, Note, *The Facebook Frontier: Responding to the Changing Face of Privacy on the Internet*, 97 KY. L.J. 541, 542 (2009).

¹⁵² Danielle Keats Citron, *Fulfilling Government 2.0's Promise with Robust Privacy Protections*, 78 GEO. WASH. L. REV. 822, 835 (2010) (quoting social media researcher danah boyd, “social network participants ‘live by security through obscurity, where they assume that as long as no one cares about them, no one will come knocking’” (faithful to researcher’s preferred orthography for her name written in lowercase)).

protection of governmental interests and the importance of marital privacy. In particular, the role that the Internet and social networking sites play in exacerbating the already existing tensions will be examined.

A. *The Elusive “Zone of Privacy” in Cross-Cultural Marriages*

The marital bond has long occupied an elevated status in constitutional due process jurisprudence.¹⁵³ As established through Supreme Court precedent, it is “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”¹⁵⁴ Nonetheless, federal immigration procedures threaten the rights of citizen spouses in myriad ways. Consequently, when an American marries a noncitizen, their union is relegated to the outermost levels of that protected “zone.” One such example is the act of placing couples under surveillance and subjecting them to a fraud interview where they are asked questions that reflect antiquated notions of what an American marriage should look like.¹⁵⁵ In this manner, the DHS exerts undue pressure on couples to conform to outdated norms, thereby excepting other cultural values and marital customs.¹⁵⁶ The marital bond is then burdened by attempts to force conformity with USCIS conceptions of a valid marriage, including the amount of time spent together, level of intimacy, and decision to procreate.¹⁵⁷

As one commentator highlighted, while legislation since 1986 has changed the procedure for applying for permanent resident status, the IMFA did not alter the standard for defining or identifying a bona fide marriage.¹⁵⁸ More specifically, concrete definitions or standards were not communicated sufficiently in order to avoid the confusion that has resulted since its passage. The broad discretion afforded USCIS officers

¹⁵³ See generally Moyce, *supra* note 48, at 1754-57.

¹⁵⁴ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); see also Moyce, *supra* note 48, at 1776 (discussing the establishment of a protected interest in marital privacy through Supreme Court precedent); *Sham Marriage*, *supra* note 68, at 1244 (“Because of the intensely personal nature of the marital relationship, the Court has established a constitutionally protected zone of marital and familial privacy that the state cannot enter without a compelling justification.”).

¹⁵⁵ See *Sham Marriage*, *supra* note 68, at 1246.

¹⁵⁶ See *id.*

¹⁵⁷ *Id.*

¹⁵⁸ Kikuyo Matsumoto-Power, Comment, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act*, 15 U. HAW. L. REV. 61, 69 (1993).

combined with a lack of guidance has led to “ad hoc determinations based on their own subjective views of a valid marriage.”¹⁵⁹ When such a significant part of each marital fraud determination relies on the discretion of administrative officers,¹⁶⁰ and that broad discretion is compounded by a dearth of reviewable standards, it invites arbitrary and possibly discriminatory decisions,¹⁶¹ encouraging further attacks on the rights of the international couple. Plus, whatever grounds may exist for the maltreatment of nonresident aliens, no parallel justification exists for subjecting American citizens, who are one half of the equation, to possibly arbitrary infringements of their recognized rights.¹⁶² Nevertheless, “courts almost never discuss the issue of a U.S. citizen’s fundamental rights of marriage and marital privacy when they justify [DHS] restrictions.”¹⁶³

¹⁵⁹ *Id.*

¹⁶⁰ For an instructive discussion of the discretionary nature and subjective considerations involved in the adjudication process, see *10.15 Exercise of Discretion; Uniformity of Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm> (last visited Sept. 30, 2011).

¹⁶¹ The potential for arbitrariness is further exposed in instances where the Board of Immigration Appeals (BIA) acknowledges fault in a district’s denial of an I-130 petition. See generally *BIA Addresses Timeliness of Appeal and Discrepancies in Stokes Interview in Unpublished Decision*, 84 No. 43 INTERPRETER RELEASES 2615, 2615 (Nov. 5, 2007) (discussing *In re Chen*, A79 717 355 (BIA Oct. 9, 2007)). For instance, in the unpublished opinion, the BIA found, after listening to the interview transcript, that a New York district director improperly denied an I-130 petition on the grounds of discrepant answers during the *Stokes* interview. *Id.* Specifically, the BIA noted that some of the so-called “discrepancies” were actually consistent answers and others were relatively minor differences. *Id.* The BIA further found that the petitioner proffered reasonable explanations for the answers that were divergent, many of which only required a little cultural sensitivity and understanding. *Id.*

[T]he Board found that the interview transcript revealed that, in the case of two of the cited discrepancies, the parties’ responses were actually consistent in that in response to a question about their bank account balance, the petitioner stated that it was “\$1,000 something” and the beneficiary said initially that it was “\$1,000 something” and then added that it was “like \$1500,” and, concerning the petitioner’s children from his first marriage, the transcript reflected that both parties indicated that the beneficiary and the children had not met because they did not wish to do so. . . . Other discrepancies . . . related to Chinese cultural differences By way of example, the Board noted that the petitioner explained that the beneficiary did not know the name of his father who was living in China because she referred to him only by the traditional honorific “Father.”

Id.

¹⁶² See Moyce, *supra* note 48, at 1776.

¹⁶³ Matsumoto-Power, *supra* note 158, at 76.

B. A “Trilemma” for Citizen Spouses

Of course, realistically speaking, not every couple investigated is engaged in a bona fide marriage, and those who are embroiled in a conspiratorial attempt to defraud the United States by way of immediate-relative preferential status have forfeited some of their rights. But those who find DHS protocol permissible on this basis assume too much. Their reverse logic has been countered by constitutional rationalizations that caution “even in the case of actual sham marriages, the [DHS] must apply its procedures before it can determine fraud. The [DHS] should not be permitted to bootstrap otherwise unconstitutional investigations through the results of those same investigations.”¹⁶⁴

Invasive investigatory procedures effectively leave American citizen spouses of nonresident aliens with three constitutionally inadequate options.¹⁶⁵ In the first scenario, the citizen spouse is forced to submit to an intrusive DHS investigation, which comprises his right to marital privacy.¹⁶⁶ The second option envisions a petitioner who refuses to comply with DHS protocol, thereby preserving his right to privacy, but at the expense of his right to marry an individual of his choosing¹⁶⁷ since she¹⁶⁸ is likely to be placed into removal proceedings.¹⁶⁹ The third course of action available to the American spouse avoids the forfeiture of marital and privacy rights, but requires him to leave the country with his bride.¹⁷⁰ If this were a constitutionally viable option, it would justify practically any abridgement of rights since individuals can almost always escape a violation of their rights by emigrating.¹⁷¹ Somewhat analogously, citizenship petitioners and beneficiaries could choose not to open a Facebook account, or post a family

¹⁶⁴ *Sham Marriage*, *supra* note 68, at 1248 (“The fact that some marriages scrutinized by the [DHS] are fraudulent does not license the [DHS] to infringe upon the constitutional rights of all couples seeking adjustment of status.”).

¹⁶⁵ *Id.* at 1247-48.

¹⁶⁶ *Id.* at 1247.

¹⁶⁷ *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 12 (1966) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

¹⁶⁸ Male and female pronouns are used as a reflection of current federal law, which precludes recognition for same-sex unions, regardless of state policy on the matter. *See* Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006).

¹⁶⁹ *Sham Marriage*, *supra* note 68, at 1247.

¹⁷⁰ *Id.* at 1248.

¹⁷¹ *Id.* (“Thus, the [DHS] places legitimately married citizens and residents in a trilemma that is *prima facie* unconstitutional.”).

photo album on Flickr—though that would not prevent the presence of personal information by way of third parties, known or unknown. Still, the preferable solution would be to find a way in which the government could have access to petitioners' information without invading the bounds of privacy.

VI. TESTING THE APPLICABILITY OF FOURTH AMENDMENT JURISPRUDENCE TO USCIS INVESTIGATIONS ON SOCIAL NETWORKING SITES

Throughout history, the development of emerging technologies has posed novel questions for the Supreme Court, requiring doctrinal and factual parallels to be made, and at times even leading to the creation of new fields of study.¹⁷² This technology-fueled legal evolution is particularly true of Fourth Amendment law.¹⁷³ Concerns raised earlier about governmental invasions of privacy echo current debates on the scope of Fourth Amendment protection on the Internet. This part reviews the development of Fourth Amendment law from its British roots to its current penumbral iteration. Based on the expansion of Fourth Amendment interpretation, the following subsection superimposes the current legal framework onto the immigration marriage fraud investigatory process. While nevertheless concluding that a constitutional challenge to USCIS tactics would likely not succeed, this part seeks to illustrate that these governmental measures, even if they do not outright violate, at the very least offend the spirit of Fourth Amendment protection.

A. *A History Grounded in Tangible Property*

The Fourth Amendment's roots can be traced to Great Britain under the regime of King George II.¹⁷⁴ Through the issuance of a "general warrant," the King would authorize officers to search private homes for evidence of a crime; no level of suspicion was needed to conduct a search.¹⁷⁵ This unjustified invasion by the government into citizens' private homes is the

¹⁷² See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (contending that a law of cyberspace does exist and is of value to the study of law, in response to Hon. Frank H. Easterbrook's *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207).

¹⁷³ See, e.g., Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 802 (2004).

¹⁷⁴ LAWRENCE LESSIG, CODE VERSION 2.0, at 21 (2006).

¹⁷⁵ *Id.*

exact abuse the Fourth Amendment was designed to prevent.¹⁷⁶ Therefore, it is the Fourth Amendment that provides the basis for an individual right of security from governmental intrusion.¹⁷⁷ Yet, that right is not absolute, requiring courts to continually redefine its borders because “[a]s technology advances, legal rules designed for one state of technology begin to take on unintended consequences. . . . [and] the old rules no longer serve the same function. New rules may be needed to reestablish the function of the old rules in the new technological environment.”¹⁷⁸

Where technology has been the impetus for testing the limits of Fourth Amendment protection, the Supreme Court has been forced to reinterpret the language of the Amendment, while remaining faithful to its spirit.¹⁷⁹ As Justice Brandeis famously dissented in *Olmstead v. United States*,

The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹⁸⁰

Justice Brandeis’s dissenting opinion ultimately persevered: *Olmstead* was overturned by *Katz v. United States*.¹⁸¹

¹⁷⁶ *Id.* The text of the Fourth Amendment reads as two commands; the first secures a certain right from being violated, while the second limits the conditions under which a warrant is issued. *Id.* at 158.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

¹⁷⁷ See, e.g., Kerr, *supra* note 173, at 802-04.

¹⁷⁸ Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1009 (2010).

¹⁷⁹ See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2635 (2010) (Scalia, J., concurring) (“Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court’s implication . . . that where electronic privacy is concerned we should decide less than we otherwise would . . . or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.”). But see Kerr, *supra* note 173, at 805 (“challeng[ing] the popular view of the Fourth Amendment[’s]” role in new technologies as “romantic but somewhat inaccurate” and arguing against an “aggressive” judiciary).

¹⁸⁰ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹⁸¹ *Katz v. United States*, 389 U.S. 347, 353 (1967) (“Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and

Accordingly, the Supreme Court expanded the interpretation of Fourth Amendment rights to “protect[] people, not places.”¹⁸²

The Fourth Amendment, before *Katz*, was connected to real property law and was generally understood to protect those rights.¹⁸³ This literal interpretation did not recognize a violation “unless there ha[d] been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”¹⁸⁴ In the physical world, concrete distinctions exist that facilitate and guide Fourth Amendment analysis.¹⁸⁵ The physical sphere creates logical barriers that divide activity and objects in the open from those behind closed doors.¹⁸⁶ This foundational distinction¹⁸⁷ between inside and outside naturally draws the line distinguishing permissible police conduct from impermissible surveillance.

B. *Parsing Fourth Amendment Application*

Despite the criticism of *Katz* since it was decided over four decades ago, it remains the dominant view in Fourth Amendment jurisprudence.¹⁸⁸ The “reasonable expectation of privacy” test derived from Justice Harlan’s concurring opinion has been described as “the touchstone of the modern Fourth

without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested.”)

¹⁸² *Id.* at 351.

¹⁸³ Joshua L. Simmons, Note, *Buying You: The Government’s Use of Fourth-Parties to Launder Data About “The People,”* 2009 COLUM. BUS. L. REV. 950, 961; Kerr, *supra* note 173, at 809-10 (offering the relationship between the concepts, “reasonable expectation of privacy” and “the right to exclude,” as proof that “a strong and underappreciated connection exists between the modern Fourth Amendment and real property law”).

¹⁸⁴ *Olmstead*, 277 U.S. at 466.

¹⁸⁵ Kerr, *supra* note 178, at 1009.

¹⁸⁶ A practical example of this theory contains the following reasoning,

The inside/outside distinction operates sensibly in a physical investigation governed by human eyesight. . . . The officer can use the surveillance tool of his eyes to see what is there. In contrast, closed spaces are closed from visual observation. . . . To see what is behind the barrier, the officer needs to break into the house, jimmy open the car trunk, unseal the letter, or otherwise break through the physical barrier that blocks his eyes from being able to see evidence inside.

Id. at 1011.

¹⁸⁷ *Id.* (declaring the distinction between government surveillance outside versus inside as the foundational distinction in Fourth Amendment law).

¹⁸⁸ For an expanded discussion of the criticism that the *Katz* standard is either “too protective or not protective enough,” see Simmons, *supra* note 183, at 961-62.

Amendment.”¹⁸⁹ Courts apply the test to new technologies in an effort to ascertain the reach of Fourth Amendment protection.¹⁹⁰ However, there is still relatively scarce case law on how the Fourth Amendment definitively “applies to government surveillance of Internet communications,” and whatever case law does exist “is presently highly unsettled.”¹⁹¹ Lawrence Lessig challenges, “When the ability to search without burden increases, does the government’s power to search increase as well? Or, more darkly, as James Boyle puts it: ‘Is freedom inversely related to the efficiency of the available means of surveillance?’ For if it is . . . then ‘we have much to fear.’”¹⁹² Lessig’s query provides an apt segue to discuss the USCIS’s presence on social media; to that end, Fourth Amendment analysis serves as a useful framework for determining what privacy interests are at stake, if any.

1. The Two-Fold Requirement for Privacy Recognition

Justice Harlan’s concurring opinion in *Katz* accepted the majority’s proposition that Fourth Amendment protection is aimed at individuals, but questioned “what protection it affords to those [individuals].”¹⁹³ Harlan stated, “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁹⁴ For a violation of Fourth Amendment rights to result, both inquiries in the two-step analysis “must be answered in the affirmative.”¹⁹⁵

2. Creating Parallels to Justice Harlan’s Framework

The first prong of Harlan’s reasonableness test, whether a person had an actual subjective expectation of privacy, has been expressed as “whether the individual has shown that ‘he

¹⁸⁹ Kerr, *supra* note 173, at 808 (internal quotation marks omitted).

¹⁹⁰ *See id.* A problem with the “reasonable expectation of privacy” test is its circular nature. *Id.* Only when a court rules to extend Fourth Amendment protection does an individual’s expectation of privacy then become reasonable. *Id.*

¹⁹¹ WAYNE R. LAFAVE ET AL., 2 CRIM. PROC. § 4.4(a) (2010).

¹⁹² LESSIG, *supra* note 174, at 22.

¹⁹³ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹⁹⁴ *Id.*

¹⁹⁵ Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the “New” Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 100 (2006).

seeks to preserve [something] as private.”¹⁹⁶ In attempting to apply these principles to a social network user’s profile,¹⁹⁷ it has been cautioned that the mere action of joining a social network and creating a member profile inherently runs contrary to any expectation of privacy.¹⁹⁸ An individual does not have any obligation to post information, pictures, or even sign up in the first place.¹⁹⁹ Furthermore, popular social networks such as Facebook and Twitter make certain identifying information publicly available and require subscriber action to limit automatic, unrestricted accessibility to the rest.²⁰⁰ Also, unlike other correspondence, the aforementioned sites are intended to convey information to more than one person, which separates them from analyses of other forms of online correspondence, such as e-mail.²⁰¹ Thus, in order for a user to prove a subjective expectation of privacy, he must first rebut the overwhelming presumption that he intended to make his information public.²⁰²

a. Limited Profiles

The case for a subjective expectation of privacy, if one exists, is strengthened when a user has taken active measures to restrict who may see his profile, arguably taking his profile out of plain sight of law enforcement.²⁰³ By having the forethought to place privacy controls on his profile, a user can communicate, to some extent, his intentions to keep the

¹⁹⁶ *Id.* at 106 (quoting *Katz*, 389 U.S. at 351 (majority opinion)).

¹⁹⁷ For example, a determination of whether an individual retains a subjective expectation of privacy in a photograph posted to a social networking site would necessarily incorporate multiple factors. Daniel Findlay, *Tag! Now You’re Really “It”: What Photographs on Social Networking Sites Mean for the Fourth Amendment*, 10 N.C. J.L. & TECH. 171, 188 (2008). Such factors include:

whether the photograph’s subject even has knowledge of the photograph’s existence, where the photograph was taken, who took the photograph, who posted the photograph, what device was used, what activities are documented in the photograph, why was the photograph taken, and the online privacy settings of both the uploader and the subject.

Id.

¹⁹⁸ Hodge, *supra* note 195, at 106.

¹⁹⁹ *Id.* at 106-07.

²⁰⁰ See, e.g., *Data Use Policy*, FACEBOOK, http://www.facebook.com/full_data_use_policy (last visited Nov. 3, 2011); *Twitter Privacy Policy*, TWITTER, <https://twitter.com/privacy> (last visited Nov. 3, 2011) (“What you say on Twitter may be viewed all around the world instantly.”).

²⁰¹ Hodge, *supra* note 195, at 107.

²⁰² *Id.*

²⁰³ See discussion of “plain view” doctrine, *infra* Part VI.B.2.b.

information he posts private.²⁰⁴ It has been suggested that this phenomenon of the limited profile creates a unique quandary in that a user is taking steps to share information with select people that he could convey by more private means—such as e-mail—but he is also deliberately choosing not to share that information with everyone.²⁰⁵

b. Possible Pitfalls for Citizenship Applicants: The Exceptions

In the development of Fourth Amendment legal theory, an exception to Fourth Amendment privacy rights was carved out for items “in plain view.”²⁰⁶ As Justice Harlan explained in his *Katz* concurrence, “objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.”²⁰⁷ In the context of social networking sites, law enforcement officials need only provide an e-mail address to register and have access to all public profiles and whatever information on limited profiles the user has not restricted.²⁰⁸ Consequently, even if an individual were able to demonstrate a subjective expectation of privacy in a user profile, the plain view doctrine would seem to undermine any potential defense.²⁰⁹

In addition to the plain view doctrine, another Fourth Amendment exception occurs when a person has voluntarily divulged information or consented to a search by the police.²¹⁰ Even if the police officer is undercover, Fourth Amendment protection will no longer apply.²¹¹ Furthermore, an individual also assumes the risk that information shared with third parties could be conveyed to the police.²¹² The consent exception,

²⁰⁴ See Hodge, *supra* note 195, at 110.

²⁰⁵ See *id.* at 110.

²⁰⁶ *Id.* at 108 (“However, even if a person could show an actual expectation of privacy, an exception to the warrant requirement of the Fourth Amendment applies when an object is in ‘plain view.’”); Findlay, *supra* note 197, at 196.

²⁰⁷ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁰⁸ For an in-depth explanation of the mechanics of social networking sites and privacy policies, see generally Findlay, *supra* note 197.

²⁰⁹ Hodge, *supra* note 195, at 109.

²¹⁰ See Findlay, *supra* note 197, at 195.

²¹¹ Hodge, *supra* note 195, at 111 (citing *Hoffa v. United States*, 385 U.S. 293 (1966)).

²¹² *Id.* at 111-12 (citing *United States v. Matlock*, 415 U.S. 164 (1974)). A spreadsheet compiled by the EFF helpfully aggregates popular websites’ policies on releasing information to law enforcement. Spreadsheet, *Social Media—A Guide to the Law Enforcement Guides*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/files/EFF_Social_Network_Law_Enforcement_Guides-sprdshst.pdf.

therefore, further erodes the Fourth Amendment analysis, especially when combined with the plain view doctrine.

c. The Objective Prong as a Societal Barometer

Assuming the first prong of the reasonableness test were viable, a second hurdle must still be overcome with the objective prong of the test. Not everything that transpires online should be vulnerable to government intrusion; “[t]he government may not simply throw up its hands and err on the side of liberally granting its employees access to a wide range of data with the effect of losing the Fourth Amendment somewhere in cyberspace.”²¹³ The objective expectation of privacy translates to a determination of what society is prepared to honor as private from government surveillance.²¹⁴ Considering the current attitudes toward²¹⁵—and relevant case law concerning—communications over the Internet, this finding would be unlikely.²¹⁶ In conclusion, even if there is no privacy interest in social networking data that society is prepared to accept as reasonable, and no subjective privacy interest that courts are willing to give legal relevance, the federal government should still be faithful to the spirit of the Fourth Amendment and the goals of transparency and be more forthcoming about its practices.

CONCLUSION

Based on overblown estimates of attempts to defraud the United States government through sham marriages, Congress used its expansive power over immigration matters to correct what was presented as a grave problem in the administration of existing regulations. The product of irrational fears of marriage fraud schemes, the Immigration Marriage Fraud Amendments of 1986 caused more problems than they solved. This note argued that the IMFA amounted to a devaluation of the family unit, casting a distrustful and cynical eye where familial unification had once been a main policy goal of immediate relative

²¹³ Hodge, *supra* note 195, at 101 (quoting Nat’l Treasury Emps. Union v. U.S. Customs Serv., 307 U.S. App. D.C. 173, 184 (D.C. Cir. 1994)).

²¹⁴ See, e.g., Findlay, *supra* note 197, at 191.

²¹⁵ See *id.* at 198 (suggesting that as the number and relative sophistication of Internet users increase, user generated content, such as photographs posted on social networking sites, will be considered wholly public communications).

²¹⁶ *Id.* at 192 (suggesting an upheaval of current “awkward analogies to 20th Century objects and communications” if an objective expectation of privacy is ever to be found in the social networking context).

immigration. Where state law respected the sanctity of the marital relationship, immigration law intruded and imposed antiquated American mores. Consequently, this note explored the historical definition of “family” and its relation, or lack thereof, to current demographics. This note also discussed the normative repercussions of the disunity between American society in reality versus the ideal imposed upon citizen-spouse petitioners.

The second half of this note focused on USCIS documents disclosed in response to a FOIA request that detail the agency’s surveillance of social networking sites. The ease with which government officials are able to access personal information on the Internet served as a precautionary tale for citizenship petitioners. The ramifications for marital privacy rights of the citizen spouse were subsequently evaluated. Finally, it was theorized that the privacy concerns raised by government intrusion into areas petitioners may expect to be private echoed debates over Fourth Amendment treatment of emergent technologies.

Let us return to the story of Patricia and Saïd. The system, as it currently operates, has failed them; there are a few proposals, however, that could allow them a happier ending. First, if the USCIS publicly stated its policies on Internet surveillance, including those pertaining to social media, it would diminish much of the privacy invasion Patricia felt at being asked about her Facebook profile. Government transparency would also remove much of the debate from the constitutional privacy arena. Further, perhaps the visibility of these policies would give rise to a discourse on online versus physical world identities and the possible misinterpretations that can result from disharmonies therein. Patricia was not trying to assert on *Facebook* that she was not in a relationship; rather, Saïd is not a member of the site and anyone she cares about would already know she is in a loving marriage—there is no need to broadcast that fact on her profile.

Also, if the government is pursuing efforts to modernize its investigations, then it should update the definition of “family” imposed on cross-cultural couples. Not only is it illogical to require Patricia and Saïd to conform to an ideal that does not match any of the American couples around them, but it also communicates value judgments that have no place in the marital context. Many American couples today do not comingle their finances or assets; thus, outdated and nearsighted requests for documents such as joint bank statements should not be accorded the significance they currently import.

Although these suggestions are not exhaustive, they do propose minor remedies that in combination can have a remarkable effect on attitudes about government treatment of immigrants and their place in the American family.

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