

LOVE, HONOR, OR CONTROL: DOMESTIC VIOLENCE, TRAFFICKING, AND THE QUESTION OF HOW TO REGULATE THE MAIL-ORDER BRIDE INDUSTRY

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*Total cost for services: \$10,500.00 U.S. A beautiful woman to
sleep with at night, kiss in the morning, and love all day long,
for so little—less than an economy car.¹*

In recent years, with the development and widespread use of the Internet, the international marriage brokerage (IMB)² industry has grown

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¹ Arm Candy International, <http://www.armcandyinternational.com/services/htm> (last visited May 9, 2006). See also Tahirih Justice Center, Campaign to Stop Exploitation by International Marriage Brokers, http://tahirih.org/?template=imb-legal_policy (last visited Jan. 30, 2007) (quoting the above from the Arm Candy International website).

² The International Marriage Broker Regulation Act of 2005 (IMBRA), 8 U.S.C. § 1375a (2006), defines IMBs to include:

[A] corporation, partnership, business, individual, or other legal entity, whether or not organized under any law of the United States, that charges fees for providing dating, matrimonial, matchmaking services, or social referrals between United States citizens or nationals or aliens lawfully admitted to the United States as permanent residents and foreign national clients by providing personal contact information or otherwise facilitating communication between individuals.

Id. § 1375a(e)(4)(A). Notably, IMBRA excludes from its definition of IMBs “a traditional matchmaking organization of a cultural or religious nature that operates on a nonprofit basis and otherwise operates in compliance with the laws of the countries in which it operates,” or

exponentially. In 1997, the Global Survival Network reported that more than 200 IMB companies annually paired between 2,000 and 5,000 American men with foreign “mail-order brides,” and in 1998, the Immigration and Naturalization Service (INS)³ reported that IMBs made between 4,000 and 6,000 such matches.⁴ By 2004, those numbers had nearly doubled—recent studies estimate that more than 500 IMB companies annually match between 9,500 and 14,000 foreign women with American men.⁵ Should this rapid growth in the “mail-order bride industry” cause concern?

Proponents of the IMB industry emphasize that it helps “American men . . . find happiness through inter-cultural relationships leading to marriage.”⁶ But while extolling such inter-culturalism, proponents also appeal to an inherently traditional and American conception of the family.

[any] entity that provides dating services if its principal business is not to provide international dating services between United States citizens or United States residents and foreign nationals and it charges comparable rates and offers comparable services to all individuals it serves regardless of the individual’s gender or country of citizenship.

Id. §§ 1375a(e)(4)(B)(i)-(ii). Further, some IMBs describe themselves as being in the “International Romance Industry.” See, e.g., TLC Worldwide, Inc., <http://www.tlcworldwide.com/newlaw/home.php> (last visited May 9, 2006).

³ In March 2003, the INS was restructured to become part of the Department of Homeland Security. Many of the INS’s traditional functions are now contained within the U.S. Citizenship and Immigration Services (USCIS).

⁴ IMMIGRATION & NATURALIZATION SERVS., INTERNATIONAL MATCHMAKING: A REPORT TO CONGRESS 4, 19 (1999), available at http://www.uscis.gov/files/article/Mobrept_full.pdf [hereinafter INS REPORT]. Although the vast majority of mail-order spouses are brides, mail-order husbands do exist. However, finding an IMB that actually markets mail-order husbands is difficult, and most mail-order husband IMB websites are parodies. See Jane Ganahl, *Turning the Tables on the Male Order*, S.F. CHRON., Mar. 6, 2005, at M2. For an example of a parody website, see MailOrderHusbands.Net, <http://www.mailorderhusbands.net> (last visited Jan. 30, 2007). For an example of an IMB website that actually markets mail-order husbands, see ALovingHusband.com, <http://www.alovinghusband.com> (last visited Jan. 30, 2007).

⁵ Press Release, Tahirih Justice Center, Historic Law Signed by President Bush to Prevent the Abuse of Foreign Women Through International Marriage Brokers (Jan. 5, 2006), available at <http://tahirih.org/legal/docs/IMBRAPressReleaseJan52006.pdf>; *Proposed Law Would Regulate International Marriage Brokers: Senator Calls for Oversight to Protect “Mail-Order Brides,”* STATE DEP’T: INTERNATIONAL INFORMATION PROGRAMS, July 14, 2004, <http://usinfo.state.gov/gi/Archive/2004/Jul/15-596569.html>.

⁶ TLC Worldwide, *supra* note 2.

As one Houston-based IMB advertises, foreign fiancées are not tainted by the perversions that feminism has wreaked on the American family.⁷ Unlike American women, who are “so belligerent, angry, selfish, and confused,” these foreign women retain traditional (and somehow American) family values:

Her life is centered around her family, her husband and children, [sic] (similar to American women from generations past). These women would rather complement her man, than compete with him. They offer us faithfulness, understanding, religious values, motherly instincts, and most importantly, beliefs. Beliefs that marriages are onetime and perpetual, and that a man should not be judged by material possessions, physical appearance, or age, but by his heart, mind and soul.⁸

For IMB companies and clients, therefore, the purpose of international romantic matches appears not so much as the opportunity to experience an inter-cultural relationship, but rather as the opportunity to experience a conception of marriage and gender roles that many believe has become increasingly rare post second wave feminism.

In appealing to these conceptions of marriage and gender, IMBs create and foster an image of “mail-order brides” as submissive, dependent, and deferential. At the same time, by advertising them online and in glossy catalogues, IMBs commodify these women, who can be purchased for less than the price of an economy car.⁹ As Layli Miller-Muro, the executive director of the Tahiri Justice Center, has stated, “[t]his industry predominantly places women at a disadvantage where the man is the paying client and the woman advertised as a product, a commodity,” thus creating a “presumption of power and a potentially very dangerous recipe for abuse.”¹⁰

⁷ *Id.*

⁸ *Id.* For a similar characterization of mail-order brides, see also Chance for Love Dating Network, <http://www.chanceforlove.com> (last visited Jan. 30, 2007) (“In Russia, she doesn’t have a choice to stay home to take care of her husband, house, and children—for her, it is a dream. . . . The Russian woman’s attitude about herself is feminine. She expects to be treated as a lady, she is the weaker gender and knows it. The Russian woman has not been exposed to the world of rampant feminism that asserts its rights in America.”).

⁹ Arm Candy International, *supra* note 1; Campaign to Stop Exploitation by International Marriage Brokers, *supra* note 1. To order one of these IMB catalogues, simply call TLC Worldwide at 1-713-896-9993. TLC Worldwide, Inc., http://www.tlcworldwide.com/tlc_site/magazines.htm (last visited Mar. 24, 2007).

Indeed, as a 1999 Immigration and Naturalization Services (INS) report on the IMB industry explained:

While no national figures exist on abuse of alien wives, there is every reason to believe that the incidence is higher in this population than for the nation as a whole. Authorities agree that abuse in these marriages can be expected based on the men's desire for a submissive wife and the women's desire for a better life.¹¹

However, available information suggests not only that mail-order brides may become trafficking victims, forced into sex work or domestic service, but also that the IMB industry per se constitutes a form of sex trafficking.¹²

The increasing prevalence of IMBs thus raises two central concerns: IMBs potentially expose women to domestic violence and abuse without offering adequate protections or resources, and IMBs potentially facilitate international trafficking in women. In response to these growing concerns, in late July 2003, Senator Cantwell introduced the International

¹⁰ Juliette Terzieff, *New Law Puts Breaks on International Bride Brokers*, WOMEN'S ENEWS, Mar. 5, 2006, <http://www.womensenews.org/article.cfm/dyn/aid/2659/context/cover/>. The Tahirih Justice Center, founded in 1997, provides legal services to "immigrant and refugee women who have fled to the U.S. to seek protection from human rights abuses." About the Tahirih Justice Center, <http://www.tahirih.org/tahirih/about/index.html> (last visited Jan. 11, 2007). The Center began a "Campaign to Stop Exploitation by International Marriage Brokers," in which it has advocated for regulation of the IMB industry and provided legal services to mail-order brides. Legal Advocacy: An Overview of TJC Legal Programs, http://www.tahirih.org/tahirih/inaction/legal_advocacy.html#genderclaims (last visited Jan. 11, 2007).

¹¹ Robert J. Scholes, *Appendix A: The "Mail Order Bride" Industry and Its Impact on U.S. Immigration*, in INS Report, *supra* note 4, at app.A, 4 (1999), available at http://www.uscis.gov/files/article/MobRept_AppendixA.pdf. Notably, there have been no other prominent studies conducted on the IMB industry since 1999.

¹² See Vanessa Brocato, *Profitable Proposals: Explaining and Addressing the Mail-Order Bride Industry Through International Human Rights Law*, 5 SAN DIEGO INT'L L.J. 225, 226 (2004). The INS Report to Congress emphasizes the danger of exploitation:

[A]ttention to mail-order marriages reflects growing concern regarding the global recruitment and transportation of women in a variety of exploitative ways. The information on trafficking suggests that mail-order brides may become victims of international trafficking in women and girls. The global magnitude and impact of this traffic in women are already well documented.

INS REPORT, *supra* note 4, at 1; see also discussion *infra* Part I.B.

Marriage Broker Regulation Act (IMBRA). Hearings on the proposed legislation expressed unease with the informational and power disparities inherent in IMB matches that make women vulnerable to both abuse and trafficking; however, IMBRA was ultimately attached to the Violence Against Women Act (VAWA) Reauthorization Bill of 2005, rather than included as an amendment to the Trafficking Victims Protection Act of 2000 (TVPA), which was also up for reauthorization in 2005.¹³ Garnering unanimous support, IMBRA easily passed through both the House and the Senate.¹⁴ On January 5, 2006, President Bush signed IMBRA into law, and on March 6, 2006, it went into effect.

Part I of this Article examines the rationales for regulating the IMB industry—specifically, the purported connections between the industry and both domestic violence and trafficking—and traces pre-IMBRA attempts to deal with problems associated with the IMB industry. Since the 1980s, these attempts have shifted from a recognition of the IMB problem as one of marriage fraud to one of domestic violence, and from a recognition of mail-order brides as perpetrators of sham marriages to potential victims of domestic violence. Part II examines in detail IMBRA's provisions, concluding that, reflective of the choice to attach IMBRA to VAWA instead of TVPA, IMBRA approaches the purported IMB problem primarily as one of domestic violence, rather than international trafficking. Further, IMBRA views the solution to this problem as the correction of informational imbalances inherent in the IMB industry. Prior to IMBRA, IMBs did not provide mail-order brides with any information on their consumer husbands, and provided them with only limited information on their rights in the immigration process. Under IMBRA, IMBs are required to provide mail-order brides with somewhat more comprehensive information. But in deeming the solution to be primarily informational in nature, this Article argues, IMBRA ignores many of the more systemic power imbalances between mail-order brides and consumer husbands, and between mail-order bride exporter countries and mail-order bride importer countries, that render

¹³ Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. (2005) (enacted); Trafficking Victims Protection Act of 2000, 22 U.S.C.S. §§ 7101-7112 (2000). The Senate Foreign Relations Committee's Subcommittee on East Asian and Pacific Affairs held hearings on IMBRA, receiving testimony from Senator Cantwell, John R. Miller (Director, Office to Monitor & Combat Trafficking in Persons, Department of State), Michele A. Clark (Johns Hopkins University School of International Studies Foreign Policy Institute), Suzanne Jackson (George Washington University Law School), and Donna M. Hughes (University of Rhode Island Women's Studies Program, Kingston). See 150 CONG. REC. D. 752 (daily ed. July 13, 2004).

¹⁴ Terzoeff, *supra* note 10.

the IMB industry problematic. In doing so, IMBRA overlooks not only the ways in which the IMB industry facilitates trafficking in women and girls, but also the ways in which the IMB industry might per se constitute trafficking in women and girls. To that end, because IMBRA recognizes mail-order brides primarily as potential domestic violence victims rather than trafficking victims, and because IMBRA attempts to prevent this victimization primarily by correcting informational imbalances, this Article argues that IMBRA may under-recognize or mis-recognize mail-order brides as a group. Part III analyzes current constitutional challenges to IMBRA and concludes by proffering some proposals for augmenting IMBRA and enriching its recognition of both the IMB problem and the women who become mail-order brides.

I. THE ROAD TO IMBRA: WHY REGULATE IMBS?

In 1999, the INS conducted a study of mail-order marriages in an effort to determine the extent to which the IMB industry poses a problem that should be regulated. Inquiring into the connections between domestic violence, trafficking, and marriage fraud, the study concluded that, although there are well-founded reasons to suspect that the IMB industry contributes to all three, no available data exists indicating the extent to which the IMB industry acts as a conduit for domestic violence, trafficking, and marriage fraud.¹⁵ Despite this lack of data, however, both the law and the media have increasingly viewed the IMB industry as posing significant dangers to mail-order brides.¹⁶ But the ways in which the industry has been deemed problematic has changed over time, even while the incidence and pervasiveness of the problems posed by the industry remain unknown.

A. The Connection Between IMB Relationships and Domestic Violence

In 1998, eighteen-year-old Anastasia King moved from her native Kyrgyzstan to America, where she married thirty-seven-year-old Indle

¹⁵ See INS REPORT, *supra* note 4, at 1, 4, 6.

¹⁶ For a discussion of the law's increased attention toward the IMB industry as dangerous to mail-order brides, see *infra* Part I.C. For examples of the media's attention in this area in recent years, see Jane O. Hansen, *From Russia, for Love*, ATLANTA J.-CONST., Dec. 5, 2004, at 1A; Asjylyn Loder, *Mail Order Brides Find U.S. Land of Milk, Battery*, WOMEN'S ENEWS, June 22, 2003, <http://www.womensenews.org/article.cfm/dyn/aid/1390/context/archive>; Editorial, *Mail-Order Love*, BALT. SUN, July 16, 2003, at 16A; David Cho, *Couple's Divorce Reveals Its Far-Reaching Results: Md. Dispute Illustrates Legal Perils for Mail-Order Brides*, WASH. POST, July 8, 2001, at C1.

King, Jr., an American citizen living in Seattle, Washington. Indle, a divorcée who had abused his previous wife, selected Anastasia from an IMB catalogue of mail-order brides. The marriage soon turned violent. By 2000, Indle had decided that he wanted to divorce Anastasia. Unwilling to pay for a divorce, Indle conscripted a tenant in his home to help him kill Anastasia. Indle, weighing nearly three hundred pounds, pinned Anastasia to the ground while the tenant choked her to death with a necktie. Anastasia's body was found in a shallow grave in a junkyard. Later, it was discovered that Indle, while planning Anastasia's murder, was already seeking another wife through an IMB.¹⁷

Anastasia King's story is often told by scholars and activists advocating for greater regulations targeting IMBs. Unfortunately, because the Department of Justice does not distinguish between American-born and foreign-born persons—let alone American citizens and mail-order brides—in its crime statistics on domestic violence, most of the information on domestic abuse in IMB relationships is similarly anecdotal.¹⁸ Consequently, the extent to which the IMB industry fosters violent relationships remains unknown. As this section argues, however, informational and power imbalances inherent in IMB matches suggest that the incidence of domestic violence in these relationships is higher than the national average.¹⁹ Further, this section contends that such imbalances are compounded by the IMB industry's apparent willingness to provide services to violent men.²⁰ Despite the lack of data, therefore, there is good reason to conclude that the IMB industry fosters relationships in which the risk of domestic violence is great.

¹⁷ For Anastasia King's story, see Brocato, *supra* note 12, at 236; 149 CONG. REC. S. 9960, 9960-61 (statement of Sen. Cantwell (D-WA)); David Fisher, *Indle King Found Guilty*, SEATTLE POST-INTELLIGENCER, Feb. 22, 2002, at B1. For brief summaries of similar cases in twelve different states, see Tahirih Justice Center, *Illustrative Cases of Women and Their Children Exploited and Abused Through the International Marriage Brokerage Industry*, [http://tahirih.org/legal/docs/IMBRACasesfor2005Intro\(SHORT\).DOC](http://tahirih.org/legal/docs/IMBRACasesfor2005Intro(SHORT).DOC) (last visited Jan. 11, 2007).

¹⁸ INS REPORT, *supra* note 4, at 15.

¹⁹ *Id.*; Scholes, *supra* note 11, at 4.

²⁰ EQUALITY NOW, THE WILLINGNESS OF "MAIL-ORDER BRIDE" COMPANIES TO PROVIDE SERVICES TO VIOLENT MEN 1 (1999), available at <http://www.equalitynow.org/reports/mailorderbride.pdf> [hereinafter EQUALITY NOW REPORT].

1. Informational and Power Imbalances

Prior to the passage of IMBRA, the American IMB client received a complete background check on his mail-order bride through immigration procedures, as well as photographs and extensive information from the IMB, including favorite movies and sexual preferences.²¹ For example, Maksim Introductions, an IMB specializing in Russian woman, provides the male client with questionnaires filled out by potential mail-order brides. These questionnaires include questions like the following: "Is it easy to offend you?," "Are you jealous?," "Do you want to become more beautiful?," "What tooth-paste do you use?," "Are you ready to discuss sex matters openly?," and "Are you ready for experiments in sex?"²² Conversely, pre-IMBRA, a mail-order bride received no information on her prospective husband other than what he provided willingly during their correspondence.²³ Based on such informational imbalances, the 1999 INS Report on the IMB industry concluded:

Unlike dating services or personal ads, the mail-order bride transaction is "one where the consumer-husband holds all the cards." In using these services, the male customer has access to and chooses from a pool of women about whom personal details and information are provided, while the women are told virtually

²¹ Cantwell, *supra* note 17, at 9961.

²² Maksim Introductions, 120+ Questions for Your Lady, http://www.yoshkarola.com/e/docs.shtml?questions_to_lady (last visited Jan. 30, 2007). Maksim Introductions' list includes only sample questions; the full list is available for members-only viewing. See also Gary Libman, *Lonely American Males Looking to the Orient for Mail-Order Brides*, L.A. TIMES, Sept. 14, 1986, at 1. Libman reports that an IMB named American Asian Worldwide Services requires potential mail-order brides to fill out questionnaires that inquire into "whether she has physical defects or has flat, medium or full breasts. It also asks whether she would marry a black man, whether she believes in women's liberation, whether she can accept premarital sex, and 'What kind of a lover are you? Affectionate, shy and submissive, passionate, inhibited, uninhibited.'" See also Donna R. Lee, *Mail Fantasy: Global Sexual Exploitation in the Mail-Order Bride Industry and Proposed Legal Solutions*, 5 ASIAN L.J. 139, 144 (1998) (citing Libman).

²³ Cantwell, *supra* note 17, at 9961. See also Brocato, *supra* note 12, at 230 ("These businesses provide women's (but not men's) names, photos, explicit biographical information, and addresses either in hard copy brochures or on the Internet. The transfer of information is almost entirely one-sided; the women only learn information their prospective suitor chooses to disclose."); INS REPORT, *supra* note 4, at 4.

nothing about the male customer—or only what he chooses to reveal about himself.²⁴

Consequently, while the consumer husband was provided with extensive personal information on his mail-order bride, including her criminal history (if any), the mail-order bride remained largely uninformed about her consumer husband, including whether he had a criminal record or history of domestic violence.

The informational imbalances inherent in the pre-IMBRA IMB industry were compounded by power imbalances between mail-order brides and consumer husbands. Mail-order brides generally come from economically distressed countries where women are systematically subordinated and offered few opportunities.²⁵ To illustrate, Cherry Blossoms, “one of the largest and oldest” IMBs, “lists over 6,000 women at any one time.”²⁶ According to Professor Scholes’s research in the 1999 INS Report on the mail-order bride industry, the site on average advertises 4,600 women from Asia, more than 3,000 of whom are from the Philippines, where the mail-order bride industry has actually been outlawed, and 1,700 from the former Soviet Union.²⁷ The remaining women are from Latin and South America.²⁸ Analyzing five IMB catalogues, the study found that of the Asian women advertised, twenty percent are between sixteen and twenty years-of-age, forty-one percent are between twenty-one and twenty-five, and twenty-four percent are between twenty-six and thirty.²⁹ Only eleven percent are between thirty-one and thirty-five, and less than four

²⁴ INS REPORT, *supra* note 4, at 4.

²⁵ Brocato, *supra* note 12, at 233 (noting that most mail-order brides come from the Philippines or the former Soviet Union).

²⁶ Scholes, *supra* note 11, at 2.

²⁷ *Id.* As of February 14, 2007, Cherry Blossoms was advertising 32,264 women from the Philippines and 1,380 women from the former Soviet Union (the large majority are from Russia or Ukraine). In order to find current numbers, search by country on Cherry Blossoms’s homepage. Cherry Blossoms, <http://www.blossoms.com> (last visited Feb. 14, 2007).

²⁸ Scholes, *supra* note 11, at 2. As of February 14, 2007, Cherry Blossoms was advertising 769 women from Latin and South America. Cherry Blossoms, <http://www.blossoms.com> (last visited Feb. 14, 2007).

²⁹ Scholes, *supra* note 11, at 2.

percent are over thirty-five.³⁰ By contrast, consumer husbands' median age is thirty-seven.³¹ Consumer husbands are also typically white, well-educated, middle-class, divorced, and conservative.³² According to one study, ninety-four percent of consumer husbands are white, fifty percent have completed at least two years of college, forty-two percent hold professional or managerial positions, fifty-seven percent have been previously married, thirty-five percent have fathered at least one child, and seventy-five percent desire more children.³³

In conjunction with their greater economic and social power, consumer husbands possess "real and imagined power" to allow the mail-order bride to immigrate to the United States and then threaten deportation and arrest once she is here.³⁴ Imbalances in power and information, when combined with cultural difference, linguistic barriers, mail-order brides' lack of social and support networks in America, and the marketing of mail-order brides as submissive and deferential, create a situation in which the threat of domestic violence is very real. Indeed, as Professor Scholes's research for the 1999 INS Report concluded:

While no national figures exist on abuse of [mail-order brides], there is every reason to believe that the incidence is higher in this population than for the nation as a whole. Authorities agree that abuse in these marriages can be expected based on the men's desire for a submissive wife and the women's desire for a better

³⁰ *Id.* Professor Scholes's research found, however, that the ages of mail-order brides from the former Soviet Union tended to be older:

For the 1,700 Soviet women listed currently by Cherry Blossoms, just 8 percent are under 20, 23 percent between 21 and 25, 25 percent between 26 and 30, 20 percent from 31 to 35, 14 percent from 36 to 40, 7 percent aged 41 to 45, and 3 percent over 45. That is, just 31 percent are under 25 compared to the 61 percent of Asian women.

Id. It is worth noting that, even with the somewhat older mail-order brides from the former Soviet Union, seventy-six percent are under the age of thirty-five.

³¹ *Id.* at 3.

³² Brocato, *supra* note 12, at 231; Scholes, *supra* note 11, at 2-3; Erin Elizabeth Chafin, *Regulation or Proscription?: Comparing American and Philippine Proposals to Solve Problems Related to the International Marriage Broker Industry*, 23 PENN ST. INT'L L. REV. 701, 705-07 (2005).

³³ Scholes, *supra* note 11, at 2-3.

³⁴ INS REPORT, *supra* note 4, at 5.

life. At some point . . . her new independence and his domination are bound to conflict. The problem . . . is largely due to the men's unrealistic expectations.³⁵

2. The IMB Industry's Provision of Services to Violent Men

The apparent willingness of IMBs to match violent men with mail-order brides only compounds this already problematic situation. In 1999, Equality Now conducted an undercover research project in an effort to determine the extent to which IMBs would provide services to men with violent histories.³⁶ The project sent numerous IMBs an email, supposedly from a man seeking a mail-order bride, in which the potential customer explained that he had pled guilty to disorderly conduct in response to criminal assault charges brought by two ex-wives.³⁷ Equality Now received sixty-six responses: fifty-nine stated that they were willing to accept him as a customer, four requested more information, and just three refused to accept him as a customer.³⁸ Some of the responses received from IMBs were shocking:

As far as sponsoring your alien fiancée, the government couldn't care less if you're Jack the Ripper, as long as you're out of jail and free to marry. As far as bitches go, I think I understand. They assert that "No" means "No" except when they're nagging, in which case, "No" means, "Keep nagging and try to get beaten." I think the language barrier actually helps here; it's hard to squawk through a language barrier.³⁹

Equality Now's research demonstrates what appears to be a pervasive willingness on the part of IMBs to match violent men with foreign women. Significantly, Equality Now's research also reveals that many IMBs keep information about their male clients' violent pasts from the women: some of

³⁵ Scholes, *supra* note 11, at 4.

³⁶ EQUALITY NOW REPORT, *supra* note 20, at 1. Founded in 1992, Equality Now is a non-governmental organization that works for the "protection and promotion of the human rights of women around the world." http://www.equalitynow.org/english/about/about_en.html (last visited Jan. 11, 2007).

³⁷ EQUALITY NOW REPORT, *supra* note 20, at 1-2.

³⁸ *Id.* at 1.

³⁹ *Id.* at 2.

the email responses from IMBs advised the fictitious customer not to disclose his abusive background in communications with his potential mail-order bride, and others advised him to reveal his background voluntarily, but none stated that they would provide the women with this information, or that the man must disclose this information in order to use their services.⁴⁰ By knowingly placing women in potentially dangerous situations, therefore, IMBs appear to have exacerbated the informational imbalance that already contributes to the probability of domestic violence occurring in these relationships.

B. The Connection Between IMB Relationships and Trafficking

In 1990, twenty-six-year-old Helen Clemente immigrated to the United States from her native Philippines to marry Eldon Doty, a retired police officer living in the Seattle area who had selected her as a mail-order bride through an IMB. Eldon, however, had recently divorced his wife, Sally, solely for the purpose of bringing Helen to America and forcing her to work as a domestic servant. While legally married to Helen, Eldon and Sally continued to live as husband and wife. Finally, after three years of forced servitude, Helen managed to run away. Eldon and Sally were able to strike a deal with the INS, granting them immunity, while Helen was detained by the INS for seventy-eight days. She continues to fight deportation.⁴¹

Like Anastasia King's story, Helen Clemente's story is often told by scholars and activists advocating for greater regulations targeting IMBs. Unfortunately, just as the information on domestic abuse in IMB relationships is often anecdotal, most of the information regarding the connections between IMBs and trafficking stems from stories like Helen Clemente's or analogies to IMB-facilitated trafficking in other countries. Based on this evidence, however, this section contends that the IMB industry traffics some women into the United States in violation of TVPA. But as this section further argues, the trafficking problem posed by the IMB industry is more fundamental: rather than simply facilitate trafficking in women, the IMB industry might per se constitute trafficking in women.

⁴⁰ *Id.*

⁴¹ For Helen Clemente's story, see Cantwell, *supra* note 17, at 9961; Brocato, *supra* note 12, at 250; ASIAN WOMEN & ALLIES FOR NON-VIOLENCE INT'L, WASHINGTON STATE COALITION: A MODEL FOR INCLUSIVENESS TO COMBAT HUMAN TRAFFICKING 4-5 (2004), available at <http://depts.washington.edu/womenctr/programs/AW&ANI%20Packet.pdf>.

**1. Documented and Anecdotal Evidence of IMB-Facilitated
Trafficking in Violation of the Trafficking Victims Protection Act**

The Trafficking Victims Protection Act in the United States protects persons who have been subjected to “severe forms of trafficking in persons.”⁴² TVPA’s definitional section provides that the term “severe forms of trafficking in persons” encompasses two types of trafficking: (1) “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age,” and (2) “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁴³ Significantly, under this definition of trafficking, persons trafficked for sex or labor must not have consented to their condition. Instead, TVPA requires non-consent: the trafficked person must have been “induced by force, fraud, or coercion.” Helen Clemente’s experience falls within this definition: Eldon Doty induced Helen to immigrate to the United States as his mail-order bride, only to subject her to involuntary servitude once she arrived. Documented evidence of IMB-facilitated trafficking in other countries, along with stories like Helen’s and the IMB industry’s connections to the sex industry, has led scholars to conclude that Helen’s experience is not unique, and that IMBs facilitate nonconsensual trafficking of women into the United States in violation of TVPA.

For instance, several United States embassies throughout the world have reported, and a study conducted by the Global Survival Network concluded, that IMBs provide a cover for organized prostitution rings that traffic and victimize recently immigrated mail-order brides.⁴⁴ Likewise,

⁴² 22 U.S.C. § 7102(8).

⁴³ *Id.* §§ 7102(8)(A)–(B).

⁴⁴ Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides,”* 70 GEO. WASH. L. REV. 475, 480, 496 (2002). Global Survival Network turned its findings into a documentary, filming Russian criminal organizations using IMBs to recruit women for “work abroad.” Specifically, these organizations used IMB-gathered information to identify potential mail-order brides who could be induced to travel with promises of marriage, or “whose disappearance might not be noticed.” *Id.* at 496. The INS made note of the GSN documentary in its report to Congress:

A recent documentary produced by the Global Survival Network (GSN) reveals how mail-order bride businesses are used as fronts to recruit and traffick [sic] Russian women to Germany, Japan, and the United States for the sex industry. Specifically, GSN reports that traffickers have

John R. Miller, the Director of the State Department's Office to Monitor and Combat Trafficking in Persons, has extrapolated from reports documenting the trafficking of Vietnamese women into brothels in Taiwan that similar sex trafficking may occur in the United States.⁴⁵ Similarly, as evidence of a pervasive relationship between the IMB industry and sex trafficking, scholars point to cases in Germany, where some "consumer-husbands [have] pimp[ed] their mail-order brides to their friends,"⁴⁶ and to cases in the United Kingdom, where criminal organizations involved in prostitution and sex tourism have been found to operate IMBs, advertising women online for sale both to brothels and to men as mail-order brides.⁴⁷

become interested in sending women to the United States because fiancée visas are easily obtained.

INS REPORT, *supra* note 4, at 4.

⁴⁵ For example, in a statement to the Senate Committee on Foreign Relations, John R. Miller, the Director of the Office to Monitor and Combat Trafficking in Persons, explained:

Recent reports reveal trafficking of women from Vietnam to Taiwan through which Vietnamese women were married legally to Taiwanese men they did not know until they were transported to Taiwan. In these cases, marriage brokers appear to be used—advertising and recruiting women who seek a foreign marriage as a means to improve their lives, only to be forced into sexual servitude in brothels in Taiwan. While the examples presented here deal with Asia, they are stories repeated around the world. It is important to note that this is a worldwide phenomenon that likely touches many countries and every continent. The potential for similar trafficking of foreign women to the United States using ostensibly legal and legitimate marriage brokers is real and serious.

Potential for Trafficking by Marriage Brokers Called Serious: "Mail-Order Brides" Often Victims of Deception, Says State's Miller, STATE DEP'T: INTERNATIONAL INFORMATION PROGRAMS, July 14, 2004, <http://usinfo.state.gov/gi/Archive/2004/Jul/15-123355.html>. Professor Scholes notes:

There are reports of a different kind of fraud . . . in which women are recruited into prostitution through the international matchmaking services. This new slave trade has not, however, to the author's knowledge, occurred in the United States, although it is a well documented trade involving Russian women imported into Israel.

Scholes, *supra* note 11, at 4.

⁴⁶ Eddy Meng, Note, *Mail-Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REFORM 197, 223 (1994).

⁴⁷ Jackson, *supra* note 44, at 478-79.

Like the IMB industry abroad, the IMB industry operating in the United States has close ties to Internet pornography, sex tourism, and prostitution: IMB websites often have links to sites specializing in "Internet porn, sex tourism, and escort services,"⁴⁸ and often advertise on adult websites and in magazines like *Penthouse*.⁴⁹ Moreover, IMB "romance tours," during which men travel abroad to meet hundreds of would-be-mail-order brides, often closely resemble sex tours.⁵⁰ For instance, the romance tours offered by A Foreign Affair, an IMB, offer male clients "[o]ngoing one-on-one personal introductions to the 1,000's of featured women who are profiled on the Internet and in the color catalogs," and "fully catered, invitation only large Socials," with "[d]ifferent women attending each Social!"⁵¹ Priced between \$3,695 and \$9,995,⁵² and lasting between ten and forty-five nights, the romance tours include airfare, accommodations at "Top-Rated International Hotels," a "Fiancee Visa Kit," and "Full Visa Assistance."⁵³ Likewise, Big Apple Oriental Tours, a sex tourism company prosecuted by former New York Attorney General Eliot Spitzer, offers twelve-day tours to the Philippines and Thailand for \$2,195. The tours include airfare, hotel accommodation, and transportation. Upon arrival, the male client selects his "companion," whom he can swap for a different companion at any point during the trip.⁵⁴ But unlike sex tourism clients,

⁴⁸ Brocato, *supra* note 12, at 250. See also Chance for Love, *supra* note 8 (providing a link to "Buy Sex Toys Online"); TOPDATE.net, <http://www.topdate.net> (last visited Feb. 7, 2007) (providing, inter alia, links to the Ladies in the Nude Marriage Agency and XXX Escorts Agency). TOPDATE.net is also listed as a link on other IMB websites, such as Russian Mail Order Brides Directory, <http://mailbrides.netfirms.com> (last visited Feb. 7, 2007).

⁴⁹ Craig Harris, *Marriage Brokers Scrutinized*, ARIZ. REPUBLIC, Oct. 15, 2005, at 1A.

⁵⁰ Meng, *supra* note 46, at 209, 223.

⁵¹ A Foreign Affair Romance Tours, <http://www.loveme.com/tour/> (last visited Feb. 13, 2007). See also Cherry Blossoms Private Romance Tours, <http://www.blossoms.com/cgi-bin/start.cgi/asianToursFlat.html> (last visited Apr. 28, 2006) (providing an Advanced Romance Tour, priced at \$1,570, which introduces customers to "20 to 30 women" and includes "A to Z Fiancee Visa Support").

⁵² A Foreign Affair Tour Reservation Form, <http://www.loveme.com/tour/order/order.shtml> (last visited Feb. 13, 2007).

⁵³ A Foreign Affair Romance Tours, *supra* note 51.

⁵⁴ Equality Now, *Sex Tourism: Big Apple Oriental Tour Operators Indicted for Promoting Prostitution*, WOMEN'S ACTION 12.2, Mar. 2004, available at http://www.equalitynow.org/english/actions/action_1202_en.html.

IMB clients can bring their “companions” home with them. These ties and similarities to the sex industry, when compounded with well-documented evidence of IMB trafficking in other countries and anecdotal evidence of trafficking in this country, has led many to conclude that an unregulated IMB industry contributes, perhaps significantly, to nonconsensual sex trafficking in women and girls in violation of TVPA.

2. The IMB Industry and the Concept of Per Se Trafficking

Some scholars, however, have posited that the IMB industry does not simply facilitate trafficking in women and girls; rather, the IMB industry might per se constitute sex trafficking in women and girls.⁵⁵ According to Professor Kathleen Barry, per se trafficking in women and girls constitutes any “situation where women or girls cannot change the immediate conditions of their existence, where regardless of how they got into those conditions, they cannot get out; and where they are subject to sexual violence and exploitation.”⁵⁶ Unlike TVPA’s definition of trafficking, Professor Barry’s definition does not require the victim’s non-consent. As a result, regardless of whether they consented to becoming mail-order brides, women or girls filtered through the IMB industry could be deemed trafficked persons. Given that the IMB industry commodifies prospective mail-order brides—advertising and selling them as merchandise—and given that IMBs, pre-IMBRA at least, often misrepresent the nature of the relationship the woman is entering into or fail to disclose information on the male client’s criminal or abusive background, there is good reason to conclude that the IMB industry might per se constitute sex trafficking.⁵⁷ Moreover, the great disparities in bargaining power and the significant informational and power imbalances between the male client and the mail-order bride render informed consent problematic, if not impossible. Therefore, conceptualizing the IMB industry as per se sex trafficking, regardless of consent, may prove helpful in defining and combating the IMB problem.

The Coalition Against Trafficking in Women (CATW) has endorsed the notion that the IMB industry constitutes per se trafficking. As

⁵⁵ See, e.g., Brocato, *supra* note 12, at 251-52 (arguing that the IMB industry “may constitute a form of trafficking in and of itself”).

⁵⁶ KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 40 (1979). See also Meng, *supra* note 46, at 219 (discussing Barry’s conceptualization of “sexual slavery”).

⁵⁷ See Brocato, *supra* note 12, at 251-52; Chafin, *supra* note 32, at 702, 708-09.

CATW's website explains, "[t]he business of bride trade or marriage matching is sex trafficking because it treats women as a commodity to be sold to foreign men."⁵⁸ Evident in IMB advertising, the commodification of mail-order brides manifests in the treatment of these women as sexual objects and as gender and ethnic stereotypes. Examples of such commodification have been catalogued by scholars: "docile, exotic and available as bed partners and domestic help at the same time;" "passionate lovemaking guaranteed;" "[t]wo Million Submissive Doll-Like Women for Sale."⁵⁹ As advertised by many IMBs, mail-order brides are available for purchase, sexual use, and perhaps even domestic service. In this sense, IMBs seem to foster a conception of mail-order brides as personal, live-in prostitutes. Indeed, some Australian consumer husbands have claimed that they purchased mail-order brides because "it was cheaper to get an Asian wife than to get an Australian prostitute."⁶⁰

Even in less extreme cases, however, where IMB clients are not specifically looking for a prostitute, mail-order brides are brought to America with the expectation that they will have sexual relations with the male client, even before he proposes marriage. For instance, IMBs help their male clients obtain a fiancée visa, which expires after ninety days, at which time the woman will be deported unless the couple marries.⁶¹ IMBs

⁵⁸ Coalition Against Trafficking in Women – Asia Pacific, Frequently Asked Questions, <http://www.catw-ap.org/faqs.htm> (last visited Feb. 7, 2007). CATW "is an international network of feminist groups, organizations and individuals fighting the sexual exploitation of women globally." About CATW-AP, <http://www.catw-ap.org/aboutus.htm> (last visited Feb. 7, 2007).

⁵⁹ Meng, *supra* note 46, at 207 (cataloguing various IMBs' use of gender and ethnic stereotypes). Many IMB websites characterize mail-order brides as diametrically opposed to the "feminazis" found in western countries. As one website explains:

Do we want her to stop taking care of herself after we are married? (No need to bother looking good now right, I've already got him so I can quit trying to look my best and I can gain all the weight I want.) Do we want her to be the boss? Do we want her to put her career first? Do we want to come home to a bag of delivery food? Do we want to change everything about us that made us who we are? Do we want to spend our evenings and weekends taking the latest "relationship test" from some magazine to find out how inadequate we are? If you answered "yes" to any of this then you are in the wrong place. Go to Oprah.com or Dr.Phil.com and you will be much happier.

Goodwife.com, <http://www.goodwife.com> (last visited Feb. 7, 2007).

⁶⁰ Meng, *supra* note 46, at 223.

⁶¹ 8 U.S.C.S. § 1184(d)(1) (LexisNexis 2006).

advertise this as a trial period during which the man can decide whether he wants to marry or return his merchandise.⁶² Since the potential bride must marry within ninety days or face deportation, she likely feels tremendous pressure to acquiesce to any sexual requests or demands made by the male client, even though he might not have proposed marriage.⁶³ Unfortunately, even if she marries the male client within ninety days, the mail-order bride will continue to face such pressure for at least two years: marriage to an American citizen confers conditional permanent resident status, which will be converted to permanent resident status only if the consumer husband petitions for such status after at least two years of marriage (unless the wife can demonstrate battery or extreme cruelty).⁶⁴ As a result of these intersecting pressures—created by the IMB industry, male clients, and INS immigration procedures—many mail-order brides may find themselves in a state of “sexual slavery akin to prostitution.”⁶⁵ In this sense, the IMB industry may per se constitute sex trafficking, even when women and girls “consent” to become mail-order brides.

Considering the issues surrounding commodification, consent, the consumer husband’s sexual and domestic expectations, and criminal organizations’ and sex industries’ connections to the IMB industry, all of which are compounded by INS immigration procedures, the IMB problem may be primarily one of trafficking. Indeed, the IMB industry may be a trafficking industry. As a result, domestic violence may be conceived of as a subset of the trafficking problem. In other words, domestic violence may be something that happens to women who have been trafficked as mail-order brides. Further, examples of sex trafficking in immigrant women, such as rape, sexual abuse, or sexual coercion by consumer husbands, may be mis-recognized as domestic violence problems rather than trafficking problems because they occur under the auspices of marriage and engagement.⁶⁶

⁶² See Meng, *supra* note 46, at 209.

⁶³ *Id.*

⁶⁴ See 8 U.S.C.S. § 1186a (LexisNexis 2000). See also discussion *infra* Part I.C.

⁶⁵ Meng, *supra* note 46, at 242.

⁶⁶ Jackson, *supra* note 44, at 477-78. See also Kathryn A. Lloyd, *Wives for Sale: The Modern International Mail-Order Bride Industry*, 20 NW. J. INT’L L. & BUS. 341, 344-45 (2000) (“[T]he laws which regulate human trafficking have not been interpreted to apply to the mail-order bride industry, largely because of the presence of some level of consent to the transaction from the bride or her family, and because the transaction contain the legitimizing social and religious force of marriage.”).

C. Pre-IMBRA Attempts to Resolve Problems Associated with the IMB Industry

IMBRA does not represent the first attempt to regulate the IMB industry. Potential problems with the IMB industry came to the attention of the INS in the 1980s, when the Immigration Marriage Fraud Amendments (IMFA) made it more difficult for the spouse of an American citizen to become a resident.⁶⁷ IMFA responded to growing concerns that immigrant brides would be able to obtain resident status through sham marriages by granting immigrant brides conditional status until the second anniversary of the marriage, at which point the woman could be granted permanent resident status if her husband petitioned for removal of conditional status within ninety days of their second anniversary.⁶⁸ If the husband decided not to petition for removal of conditional status within the ninety-day period, the mail-order bride would face deportation.⁶⁹ This amendment to the INA augmented protections that the consumer husband already enjoyed with regard to the fiancée visa petition process—the male client rather than the mail-order bride petitions for her fiancée visa application, which expires ninety-days after admission of the immigrant fiancée into the country unless the couple marries.⁷⁰ During the initial ninety-day trial period, the consumer husband can evaluate his merchandise and decide whether he wants to return, exchange, or marry her. At this stage of attempts to solve the mail-order bride problem, in the processes for both visa applications and permanent resident status, immigration law thus recognized mail-order brides as potential con-artists who would abandon their husbands after achieving permanent residency status. In the eyes of the law, the consumer husbands were the potential victims of the mail-order bride merchandise, and Congress thus vested power over the bride's status in the consumer husband.⁷¹

Following the passage of IMFA in 1986, as the stories of Anastasia King, Helen Clemente, and other mail-order brides captured the media's attention, the law began to move away from protection of the consumer

⁶⁷ Immigration Marriage Fraud Amendments, 8 U.S.C. § 1186a (1986), *amended* by 8 U.S.C. § 1186a (2000). *See also* Chafin, *supra* note 32, at 709-10.

⁶⁸ Chafin, *supra* note 32, at 710.

⁶⁹ *Id.*

⁷⁰ 8 U.S.C.S. § 1184(d)(1).

⁷¹ Chafin, *supra* note 32, at 710.

husband and toward protection of the mail-order bride.⁷² Recognizing the woman as a potential victim of domestic violence rather than simply a potential perpetrator of marriage fraud, a 1990 amendment waived the requirement that the citizen spouse cooperate in the petition for permanent resident status, but only if the immigrant spouse could make a sufficient showing that the citizen spouse had inflicted battery and extreme cruelty.⁷³ In 1994, this shift in recognition also manifested in the Violent Crime Control and Law Enforcement Act, which provided that in cases of battery and extreme cruelty, deportation proceedings against immigrant spouses would be suspended, and immigrant spouses could self-petition for conditional permanent residence.⁷⁴ Further, in 1996, the Mail Order Bride Act (MOBA) required IMBs to provide mail-order brides with “information regarding conditional permanent status and the battered spouse waiver under such status, permanent resident status, marriage fraud penalties [and] the unregulated nature of the business engaged in by such organizations.”⁷⁵ But these laws made no further attempts to regulate the IMB industry and expressed some confusion about whether mail-order brides should be identified as potential domestic violence victims or perpetrators of fraud. For instance, MOBA stated: “Although many of these mail-order marriages work out, in many other cases, anecdotal evidence suggests that mail-order brides find themselves in abusive relationships. There is also evidence to suggest that a substantial number of mail-order marriages are fraudulent under United States law.”⁷⁶

Significantly, none of these laws addressed trafficking concerns, but rather viewed the IMB problem as one of either domestic violence or marriage fraud. To that end, the Trafficking Victims Protection Act of 2000 (TVPA) did not include mail-order brides in its narrow definition of

⁷² *Id.* (discussing the law’s shift from consumer to mail-order bride protectionism). IMBRA, discussed *infra* Part II.A, can be seen as the culmination (for the time being) of this shifting focus.

⁷³ Chafin, *supra* note 32, at 710; Immigration Act of 1990, 101 P.L. 649, § 701 (1990) (codified in 8 U.S.C. § 1186a(c)(4) (2000)).

⁷⁴ Chafin, *supra* note 32, at 711; Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in sections of titles 8, 18, and 42 of the U.S.C.). The self-petition provisions can be found at 8 U.S.C. §§ 1154(a)(1)(A)(iii)-(iv) and (a)(1)(B)(ii)-(iii).

⁷⁵ Mail Order Bride Act, 8 U.S.C. § 1375(b)(1) (2000), *repealed by* the International Marriage Broker Act of 2005, H.R. 3402, 109th Cong. (2005) (enacted).

⁷⁶ *Id.* § 1375(a)(3).

trafficking victims,⁷⁷ despite concerns about the connections between the IMB industry and trafficking. This declination to recognize the IMB problem as one of trafficking has continued even as the law, culminating with IMBRA, has come to see the IMB problem primarily as one of domestic violence rather than marriage fraud.

II. IMBRA: A REGULATORY SCHEME TARGETING IMBS AS A CONDUIT OF DOMESTIC VIOLENCE

IMBRA, the most comprehensive attempt to address the perceived problems with mail-order brides and the IMB industry, as well as the first attempt to regulate IMBs themselves, can be broken down into three major components: (1) its alterations to the visa application process, (2) its imposition of information and monitoring requirements in the application process, and (3) its direct regulation of IMBs. In each area, consistent with the general movement of the law since the 1980s, IMBRA approaches the IMB industry as posing primarily a problem of domestic violence rather than trafficking, and deems the solution primarily to be the correction of an informational imbalance rather than a power imbalance. Notably, IMBRA does not address the issue of marriage fraud, preferring to recognize mail-order brides as potential victims rather than potential perpetrators of fraud. Further, following its clear preference for recognizing domestic violence over trafficking, and informational imbalances over more systematic and problematic power imbalances, IMBRA deems mail-order brides capable of informed consent, and thus implicitly accepts that the freedom to contract should be preserved in the IMB industry.

A. An Overview of IMBRA's Regulatory Scheme

1. Changes to the Fiancé(e) and Spouse Visa Petition Process

IMBRA begins by attempting to impede the willingness of IMBs to provide services to violent men by amending §§ 214(d) and (r) of the Immigration and Nationality Act (INA).⁷⁸ These sections govern the visas, known as K nonimmigrant visas, that may be issued to an American citizen's fiancé(e) or spouse.⁷⁹ As amended, the INA now requires that any

⁷⁷ Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101 et seq. (2000).

⁷⁸ 8 U.S.C.S. 1184(d).

⁷⁹ K nonimmigrant visas are issued to aliens who are the fiancé(e) or spouse of a citizen of the United States pursuant to INA §§ 101(a)(15)(K)(i)-(ii). 8 U.S.C. §§

American citizen petitioning for a fiancé(e) or spouse visa, regardless of whether he or she is an IMB client, provide information on any criminal convictions pertaining to nearly thirty enumerated crimes, including domestic violence and trafficking.⁸⁰ Further, for fiancé(e) visas, but not for spouse visas, IMBRA's amendments require: (1) that the petitioner has not previously applied for two or more fiancé(e) visas, and (2) that two years have elapsed since any previously approved petition for a fiancé(e) visa.⁸¹ The Secretary of Homeland Security, however, may waive these requirements at his or her discretion when there is justification for doing so.⁸² But there is an exception to the Secretary's discretion here: waiver cannot be granted if the fiancé(e) visa petitioner has a record of violent criminal offenses against any person, regardless of whether that offense falls within the crimes enumerated at the end of the section.⁸³

1101(a)(15)(K)(i)-(ii). Since the provisions of IMBA are gender-neutral and apply to both fiancées (i.e., women who are engaged to be married) and fiancés (i.e., men who are engaged to be married), I will use the term fiancé(e) to refer to both fiancées and fiancés.

⁸⁰ These enumerated crimes include domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse, stalking, homicide, murder, manslaughter, rape, abusive sexual contact, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, and false imprisonment. In addition, attempts to commit some of these crimes, as well as having three or more alcohol- or drug-related convictions, must be disclosed in a petition for a fiancé(e) visa. 8 U.S.C.S. §§ 1184(d)(1)(3)(B) & (r)(4)(B)(ii); H.R. 3402 §§ 832(a)(1)(D) & (a)(2)(B).

⁸¹ 8 U.S.C.S. § 1184(d)(2)(A); H.R. 3402 §§ 832(a)(1)(D) and (a)(2)(A). The requirements are less stringent for spouse visas. Under § 1184(r)(4)(B)(ii), if the petitioner has had two or more fiancé(e) or spouse visas approved in the past ten years, the Secretary of Homeland Security will notify the beneficiary of the application "about the number of previously approved fiancé(e) or spousal petitions listed in the database." However, unlike in the fiancé(e) visa petition process, the petitioner will not be denied the spouse visa. 8 U.S.C.S. § 1184(r)(4)(B)(ii); H.R. 3402 § 832(a)(2)(B).

⁸² 8 U.S.C.S. § 1184(d)(2)(B).

⁸³ *Id.* This exception, however, is tempered by further exceptions. Under certain circumstances, a waiver may be granted despite a record of violent criminal offenses when the petitioner is a battered person, or has been subjected to extreme cruelty, but was not the person primarily responsible for violence in the relationship. IMBRA's amendments to the INA identify three such circumstances: (1) when the petitioner acted in self-defense, (2) when the petitioner violated a protection order granted for the petitioner's own protection, or (3) when the petitioner's crime did not cause serious bodily injury and was connected to the petitioner's subjection to battery or extreme cruelty. 8 U.S.C.S. § 1184(d)(2)(C)(ii); H.R. 3402 § 832(a)(2)(C)(ii).

By changing who may obtain a fiancé(e) visa and when, IMBRA aims to prevent both serial-petitioning, which Indle King attempted while plotting the murder of his mail-order bride, and the issuance of visas to petitioners with violent criminal histories. In this sense, IMBRA's amendments to the petition process address primarily domestic violence rather than trafficking concerns, denying (unless one of the exceptions applies) visas to any individual petitioner who has been convicted of a violent crime, which is defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."⁸⁴ Significantly, since instances of trafficking may occur via fraud rather than force, trafficking may or may not fall within this definition.⁸⁵ Therefore, it remains uncertain whether a given trafficking conviction, although the petitioner would be required to disclose it, would be grounds for outright denial of a fiancé(e) visa.

Moreover, even if IMBRA prevents some individual traffickers from obtaining fiancé(e) visas, IMBRA's changes to the petition process will tend to prevent domestic violence more than organized forms of trafficking. The Polaris Project, an international non-governmental organization (NGO), has emphasized that although some traffickers do operate as individuals, "[m]uch human trafficking occurs through decentralized criminal networks, or small groups of criminals that specialize in certain areas of a network."⁸⁶ Further, "[l]arge organized crime groups . .

⁸⁴ 8 U.S.C.S. § 16 (1984).

⁸⁵ For example, the State Department has stated that trafficking victims are usually "forced, coerced or lured through fraud." BUREAU OF INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, HUMAN SMUGGLING AND TRAFFICKING CENTER (HSTC) CHARTER (2004), *available at* <http://www.state.gov/p/inl/41444.htm>. Recognizing that trafficking is often affected by means other than force, the U.N.'s definition of trafficking in its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children provides: "'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception" Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, at art. 3(a), Annex II, U.N. Doc. A/55/383 (Nov. 15, 2000).

⁸⁶ HumanTrafficking.com, Human Trafficking 101: Who Are the Traffickers?, http://www.polarisproject.org/humantrafficking/trafficking_ht3/who_traffickers.htm (last visited Jan. 12, 2007). Based in the United States and Japan, the Polaris Project is an NGO

. control large sectors of trafficking in certain geographic areas, including Russia, Eastern Europe and the FSU, Japan, Hong Kong and Colombia.”⁸⁷ Since IMBRA focuses on the individual petitioner, groups or organizations involved in human trafficking may be able to circumvent IMBRA’s restrictions.⁸⁸ For instance, such groups or organizations can avoid IMBRA’s restrictions by simply having someone without prior violent criminal convictions apply for the visa.

Under IMBRA, serial petitioners, perpetrators of domestic violence, and individuals who use force to traffic will thus find it more difficult to obtain a fiancé(e) visa. However, groups and organizations involved in human trafficking, as well as individuals who use fraud rather than force to traffic, may still be able to obtain fiancé(e) visas with relative ease. By single-mindedly focusing on individuals and crimes of violence, therefore, IMBRA’s changes to the petition process combat domestic violence primarily and individual instances of trafficking only secondarily. More organized or subtle forms of trafficking, including the notion that the IMB industry per se constitutes trafficking, are not addressed by these changes and restrictions. In any case, many of IMBRA’s restrictions can be avoided entirely by conducting the marriage abroad and applying for a spouse visa, since the changes to the petition process apply only to fiancé(e) visas.⁸⁹

working to fight human trafficking. Polaris Project, <http://www.polarisproject.org/polarisproject/> (last visited Jan. 12, 2007).

⁸⁷ HumanTrafficking.com, *supra* note 86. Notably, women who enter the United States as mail-order brides disproportionately come from many of the large trafficking sectors identified by the Polaris Project as controlled by large organized crime groups. *See* discussion *infra* Part II.B.

⁸⁸ In most cases, traffickers face a minor risk of prosecution, and many non-professional criminals engage in trafficking groups or organizations. HumanTrafficking.com, *supra* note 86.

⁸⁹ *See* discussion *supra* note 81 and accompanying text. IMBRA amendments to the INA’s visa petition process focus upon fiancé(e) rather than spouse visas. IMBRA does not restrict who can obtain a spouse visa. In cases of serial applicants, IMBRA simply informs the spouse visa application beneficiary “about the number of previously approved fiancé(e) or spousal petitions listed in the database.” Serial petitioning, however, does not constitute grounds for denial of a spouse visa. Likewise, IMBRA simply informs spouse visa applicant beneficiaries about applicants’ criminal histories, but does not deny spouse visa petitions on this ground. *See* 8 U.S.C.S. §§ 1184(r)(4)(B)(i)-(ii); H.R. 3402 § 832(a)(4)(B). Consequently, although an applicant with a record of violent criminal offenses cannot be granted a fiancé(e) visa (except under certain unusual circumstances), he could be granted a spouse visa. Under IMBRA, therefore, a consumer husband who would be denied a fiancé(e) visa could simply circumvent IMBRA restrictions by marrying his mail-order bride while on a Romance Tour abroad and by applying for a spouse visa upon arrival in the United States.

2. New Informational and Monitoring Requirements in the Petition Process

Beyond restricting who may obtain a fiancé(e) visa and when, IMBRA's amendments to INA §§ 214(d) and (r) attempt to remedy the lack of information and monitoring in the petition process. First, IMBRA obligates the Secretary of Homeland Security to create a monitoring database, which will track any petitioner who has filed multiple petitions for fiancé(e) or spouse visas.⁹⁰ Under this system, if any petitioner receives approval for a second fiancé(e) or spouse visa, the Secretary will notify the petitioner that his or her information has been entered into the database.⁹¹ Further, when any petitioner receives approval for two fiancé(e) or spouse visas within a ten-year period, the Secretary of Homeland Security will notify not only the petitioner, but also the fiancé(e) or spouse in any future petition, of the number of approved petitions listed in the monitoring database.⁹² As a result, potential mail-order brides will be informed as to whether their potential husbands are serial-petitioners.

Finally, IMBRA's amendments require that any fiancé(e) or spouse who is the subject of a petition be provided with copies of an information and resources pamphlet on domestic violence.⁹³ Pursuant to IMBRA § 833(a), this informational pamphlet will be created by the Secretary of Homeland Security, in consultation with the Attorney General, the Secretary of State, and relevant nongovernmental organizations (NGOs).⁹⁴ These newly-developed pamphlets will be made available to K nonimmigrant visa applicants—fiancé(e)s and spouses who are the subject of visa applications under INA §§ 101(a)(15)(K)(i) and (ii)—and will include, *inter alia*, information on (1) the processes for K nonimmigrant visa applications and marriage-based immigration, (2) the illegality of domestic violence, sexual assault, and child abuse, (3) domestic violence and sexual assault services in America, (4) the legal rights of immigrant victims of abuse and other crimes, (5) the potential use of K nonimmigrant

⁹⁰ 8 U.S.C.S. § 1184(r)(4)(A).

⁹¹ *Id.*

⁹² *Id.* § 1184(r)(4)(B)(i).

⁹³ *Id.* § 1184(r)(4)(B)(ii).

⁹⁴ H.R. 3402 § 833(a); 8 U.S.C.S. § 1375a(a) (2006). IMBRA identifies such relevant NGOs as those possessing "expertise on the legal rights of immigrant victims of battery, extreme cruelty, sexual assault, and other crimes." *Id.*

visas by American citizens who, with or without a criminal record, may have a criminal history, and (6) the IMBRA requirement, discussed below, that IMBs provide foreign clients with background information on American petitioners' marital and criminal histories.⁹⁵ Further, the pamphlet must explain that any information regarding a petitioner's marital and criminal history may be incomplete or inaccurate.⁹⁶ By providing potential mail-order brides with information about the petition process, their rights, and the services and laws available to them in America, these pamphlets represent a significant aspect of IMBRA's attempt to level the discrepancies in information available to IMB male clients and potential mail-order brides.

IMBRA attempts to augment this written information by providing K nonimmigrant applicants with an oral summary of the pamphlet, as well as information on any protection orders against the petitioner and criminal convictions of the petitioner, during visa interviews.⁹⁷ In turn, the interviewer must ask whether the K nonimmigrant applicant was matched to the petitioner via an IMB.⁹⁸ If the relationship resulted from an IMB match, the interviewer must obtain the name of the IMB and confirm that the IMB has complied with IMBRA by providing the applicant with information on the petitioner's criminal history.⁹⁹ In this sense, IMBRA not only provides

⁹⁵ 8 U.S.C.S. § 1375a(a)(2). In addition, IMBRA's pamphlets must be translated into foreign languages, "including Russian, Spanish, Tagalog, Vietnamese, Chinese, Ukrainian, Thai, Korean, Polish, Japanese, French, Arabic, Portuguese, Hindi, and such other languages as the Secretary of State, in the Secretary's discretion, may specify." *Id.* § 1375a(a)(4)(A).

⁹⁶ *Id.* § 1375a(a)(2)(H). K nonimmigrant applicants will receive these pamphlets with an instruction packet regarding the visa application package. This package is mailed directly to the applicant, and includes a copy of the visa petition submitted by the petitioner, as well as any criminal background information on the petitioner that the Secretary of Homeland Security possesses. In addition to being enclosed in this package, the pamphlet will be made publicly available at all consular posts, posted on federal websites, and made available to IMBs and NGOs. *Id.* § 1375a(a)(5).

⁹⁷ *Id.* §§ 1375a(b)(1)(A) & (B).

⁹⁸ *Id.* § 1375a(b)(1)(C).

⁹⁹ *Id.* However, IMBRA specifies:

[N]o official of the Department of State or the Department of Homeland Security shall disclose to a nonimmigrant visa applicant the name or contact information of any person who was granted a protection order or restraining order against the petitioner or who was a victim of a crime of violence perpetrated by the petitioner, but shall disclose the relationship of the person to the petitioner.

the potential mail-order bride with personal information on her potential husband, but also attempts to gather much needed information on the IMB industry: how many K nonimmigrants are mail-order brides, and which IMBs are helping bring them to the United States.

IMBRA further attempts to address the informational problem surrounding the IMB industry by commissioning the Government Accountability Office (GAO) to conduct a study on IMBRA's impact on the IMB industry and the K nonimmigrant visa process, and to publish a report on its findings within two years of IMBRA's enactment.¹⁰⁰ Specifically, the GAO report will analyze, *inter alia*, annual data on: (1) any influx or reduction in the number of K nonimmigrant visa petitions, (2) the number of petitions denied because of the applicant's criminal convictions, (3) the number of waivers to petition denial granted, (4) the incidence of serial-petitioners, (5) the number of marriages resulting from IMB matches, (6) the degree of IMB compliance with regulations directly affecting the industry, (7) the extent to which violent persons are using IMB services, and (8) the accuracy of the background information provided by the petitioner and gathered by the Secretary of Homeland Security.¹⁰¹ This project should begin to fill the information gap that became apparent after the 1999 INS study on mail-order bride marriages failed to uncover meaningful data on the IMB industry and IMB relationships. In particular, the GAO report will help identify the extent to which violent men are availing themselves of IMBs and the K nonimmigrant petition process. To that end, the GAO report should help Congress and the INS determine whether, as suspected, the IMB problem is one of domestic violence. But IMBRA's provisions on the GAO report do not directly address the question of whether the IMB industry facilitates or constitutes trafficking in women, focusing instead upon whether IMBRA is "identifying [petitioners with] past instances of domestic violence."¹⁰² In this sense, the GAO report, consistent with the larger regulatory scheme instituted by IMBRA, focuses on confirming the law's recognition of the IMB industry as a conduit for domestic violence rather than trafficking, and ignores the question of whether the IMB industry is a sex trafficking industry.

Id. § 1375a(c).

¹⁰⁰ *Id.* §§ 1375a(f)(1)-(2).

¹⁰¹ *Id.* § 1375a(f).

¹⁰² *Id.* § 1375a(f)(1)(E).

3. Direct Regulations of IMBs

IMBRA also directly regulates IMBs, prohibiting certain activities while imposing various affirmative duties. For example, IMBRA prohibits IMBs from providing any information on persons under the age of eighteen, and also requires IMBs to search public sex offender registries in every state where the American client has lived for the past twenty years.¹⁰³ Further, IMBRA mandates that IMBs collect certain background information on American clients, including, *inter alia*: (1) any protection orders or restraining orders issued against the American client, (2) any marital history, (3) any previous applications for K nonimmigrant applications, and (4) any arrest or conviction for one or more enumerated crimes, such as murder, domestic violence, rape, trafficking, prostitution, and pimping.¹⁰⁴ The IMB receives this information from the client, who

¹⁰³ *Id.* §§ 1375a(d)(1)-(2).

¹⁰⁴ *Id.* § 1375a(d)(2)(B) enumerates the following types of background information that IMBs must collect from American clients:

(B) Background information. The international marriage broker shall collect a certification signed (in written, electronic, or other form) by the United States client accompanied by documentation or an attestation of the following background information about the United States client:

(i) Any temporary or permanent civil protection order or restraining order issued against the United States client.

(ii) Any Federal, State, or local arrest or conviction of the United States client for homicide, murder, manslaughter, assault, battery, domestic violence, rape, sexual assault, abusive sexual contact, sexual exploitation, incest, child abuse or neglect, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or stalking.

(iii) Any Federal, State, or local arrest or conviction of the United States client for—

(I) solely, principally, or incidentally engaging in prostitution;

(II) a direct or indirect attempt to procure prostitutes or persons for the purpose of prostitution; or

(III) receiving, in whole or in part, of the proceeds of prostitution.

(iv) Any Federal, State, or local arrest or conviction of the United States client for offenses related to controlled substances or alcohol.

(v) Marital history of the United States client, including whether the client is currently married, whether the client has previously been married and how many times, how previous marriages of the client were terminated and the date of

must provide signed certification and appropriate documentation.¹⁰⁵ In turn, the IMB must provide this background information—along with a copy of the IMBRA informational pamphlet and the results from its search of the public sex offender registries—to the foreign national client, who must then provide signed written consent before the IMB may release her personal contact information to the American client.¹⁰⁶ To that end, IMBs may no longer release foreign national clients' personal contact information for promotional purposes. If an IMB violates any of these provisions, IMBRA provides for both civil and criminal penalties: IMBs could find themselves facing fines of between \$5,000 and \$25,000 and maximum sentences of five years.¹⁰⁷

Unlike many early attempts to solve perceived problems with the IMB industry, therefore, IMBRA imposes direct regulations and affirmative duties on IMBs. For instance, MOBA, which IMBRA repealed, implicitly condoned the character of the IMB industry by providing mail-order brides with information explaining that the IMB industry is largely unregulated.¹⁰⁸ In contrast, IMBRA recognizes that the industry itself represents a major component of the problem. Prior to IMBRA's enactment, IMBs were not providing potential mail-order brides with any information on their potential husbands or the visa petition process; at the same time, IMBs were providing male clients not only with a wealth of information on potential mail-order brides, but also with attorneys to guide them through the K nonimmigrant visa petition process.¹⁰⁹

As with IMBRA's other provisions, however, these regulations target IMBs as primarily conduits of domestic violence rather than

termination, and whether the client has previously sponsored an alien to whom the client was engaged or married.

(vi) The ages of any of the United States client's children who are under the age of 18.

(vii) All States and countries in which the United States client has resided since the client was 18 years of age.

Id. § 1375a(d)(2)(B).

¹⁰⁵ *Id.* § 1375a(d)(2)(B).

¹⁰⁶ *Id.* § 1375a(d)(3)(A)(iv).

¹⁰⁷ *Id.* § 1375a(d)(5). IMBRA specifies that these penalties are not to the exclusion of any other penalties or remedies that may be available under the law. *Id.* § 1375a(d)(5)(C).

¹⁰⁸ 8 U.S.C. § 1375 (2000).

¹⁰⁹ See discussion *supra* notes 21, 22, 23, and 24 and accompanying text.

trafficking. With the exception of the provision requiring information on any criminal convictions for trafficking or pimping, nearly all of IMBRA's regulations pertain to gathering and disseminating to potential mail-order brides information on individuals' violent criminal backgrounds, previous marriages, and previous alcohol or substance abuse. As discussed above, this focus on both individuals and violent crimes combats domestic violence primarily, and individual instances of trafficking only secondarily, while largely bypassing more organized or subtle forms of trafficking.¹¹⁰

B. IMBRA's Shortcomings: How IMBRA May Mis-Recognize or Under-Recognize Mail-Order Brides and the IMB Problem

IMBRA's amendments to the INA center upon several key assumptions that, in the aggregate, may prevent IMBRA from addressing central elements of the IMB problem. In particular, IMBRA accepts the concept of freedom of contract: IMB customers, including both the mail-order bride and the consumer husband, are capable of freely contracting through an IMB once informational imbalances are corrected. By doing so, IMBRA adopts a contractualist conception of marriage, assumes that informed consent in IMB matches is possible, and continues earlier consumer protectionist attempts to solve the IMB problem. This recognition and treatment of the IMB problem, however, ignores the more pervasive and systematic power imbalances inherent in the IMB industry.

As discussed above, women who immigrate into the United States as mail-order brides are disproportionately from economically distressed countries with histories and present practices of subordinating women.¹¹¹ Often young and from countries offering women few employment opportunities or social welfare benefits, mail-order brides in many cases see the IMB industry as the only option available to them.¹¹² Unfortunately, women who become mail-order brides find themselves in an industry that commodifies them and in an immigration process that incentivizes them to stay in relationships for at least two years in order to gain permanent residency. Given this scenario, the 1999 INS report on mail-order marriages concluded: "These are relationships fostered by for-profit enterprises, where the balance of power between two individuals is skewed to empower the male client who may be seen as 'purchasing' a bride and a woman who has

¹¹⁰ See discussion *supra* Part II.A.1.

¹¹¹ See discussion *supra* Part I.A.1.

¹¹² Brocato, *supra* note 12, at 233-34.

everything to gain from entering into this arrangement and staying in it, no matter what the circumstances.”¹¹³ Pre-IMBRA, these power imbalances were further compounded by imbalances in the information available to mail-order brides and consumer husbands.¹¹⁴

Despite the power imbalance caused by discrepancies between bride-exporting states like the Philippines and bride-importing states like America, and between the men and women themselves, IMBRA assumes that women will be able to participate in the IMB industry if provided with adequate information on the industry, the immigration process, and the men whom they are coming to marry. In this sense, IMBRA perceives parties to an IMBRA match as capable of freely contracting through an IMB once the informational imbalance is corrected. If a woman knows whether her potential husband has been convicted of an offense relating to domestic violence, she will be able to freely choose whether to terminate or proceed with her visa application process. IMBRA does recognize that information may be incomplete or incorrect, and, to that end, IMBRA’s pamphlet explains that any information regarding a petitioner’s marital and criminal history may be incomplete or inaccurate.¹¹⁵ But the IMB industry may continue to be problematic even when IMBRA’s informational safeguards succeed. Specifically, the power imbalances between the men and women in many IMB matches—which are fostered and exacerbated by the marketing techniques employed by IMBs—may be so fundamental as to render informed consent impossible.¹¹⁶ Since IMBRA addresses power imbalances only to the extent that they are caused by informational imbalances, IMBRA may not address what is truly problematic about these relationships.

By adopting the concept of freedom of contract, IMBRA thus implicitly adopts a contractualist conception of marriage. According to Professor Mary Lyndon Shanley, the contractualist conception of marriage assumes that parties to a marriage are “rational and bounded individuals,” and posits that “the best way to treat citizens as free and equal adults is to stop affording marriage a special public status and permit the parties

¹¹³ INS REPORT, *supra* note 4, at 8.

¹¹⁴ See discussion *supra* Part I.A.1.

¹¹⁵ 8 U.S.C.S. § 1375a(a)(2)(H).

¹¹⁶ See Chafin, *supra* note 32, at 703 (arguing that the “inclusive definition of trafficking in persons . . . should include mail order brides because the vast disparity in bargaining position between the mail order bride and her prospective husband renders her incapable of giving truly informed consent”).

themselves to define its terms and conditions.”¹¹⁷ For Professor Shanley, contractualism in the context of marriage is problematic not only because it emphasizes rational bargaining and individualism, but also because it suggests that marriage constitutes a relationship between individuals in which the public and the state have no legitimate interest.¹¹⁸ This conception of marriage, along with its difficulties, is apparent both in IMBRA’s presumption that (unproblematic) marriage results when individuals possess adequate information, allowing them to rationally bargain, and in IMBRA’s focus on the visa application process and on male clients’ first contacts with potential mail-order brides, rather than on the marital relationship that is formed post-immigration. In this sense, IMBRA limits its regulations to the marital bargaining process while steering clear of the marital relationship itself. But by doing so, IMBRA not only ignores the power imbalances that render bargaining power unequal even after informational imbalances have been corrected, but also fails to protect women after they transition from mail-order fiancées to mail-order brides.¹¹⁹

Further, IMBRA’s recognition of the IMB “solution” as informational, and of potential mail-order brides as capable of giving

¹¹⁷ Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, in JUST MARRIAGE 3, 5 (Deborah Chasman & Joshua Cohen eds., 2004).

¹¹⁸ *Id.* at 15-16.

¹¹⁹ It is worth noting that the above analysis is premised upon what could be deemed a rather condescending view of mail-order brides. Why should we assume that these women, simply because they may be poor and uneducated, are incapable of making informed consent to a marriage contract? Why should we assume that these women are victims of either domestic violence or trafficking? Many of these women, in fact, may not find themselves used by the IMB industry and United States immigration processes. Rather, many may use the IMB industry and the legal system to perpetrate marriage fraud and gain permanent residency status. As a result, the consumer husbands themselves may be victimized by mail-order brides. All of this is true. And it is important to remember that women become mail-order brides for different reasons and under different circumstances. Some may find themselves coerced into the industry, while others may freely and unproblematically choose to enter it. Some may be looking for a loving husband and domestic happiness in an economically more prosperous country, while others may simply be looking for permanent residency in an economically more prosperous country. Indeed, despite its increased focus on domestic violence, the law continues to recognize mail-order brides as both potential victims of domestic violence and potential perpetrators of fraud—IMBRA addresses domestic violence (and trafficking, to a more limited extent) through informational safeguards and regulations, while the INA addresses marriage fraud by requiring mail-order brides, unless they are domestic violence victims, to marry within ninety days of immigration, and remain married for two years, in order to gain permanent residency status. 8 U.S.C.S. §§ 1184(d)(1) & 1186a.

informed consent, follows from IMBRA's recognition of the IMB industry as posing primarily a domestic violence problem. In viewing the problem as one of domestic violence, IMBRA conceives of the IMB problem as one that can be solved by correcting informational imbalances between the two parties, thus resolving the disparity of bargaining power and restoring the freedom to contract. If the woman knows her consumer husband beat his ex-wife, she can avoid placing herself in a dangerous situation. Moreover, to the extent that IMBRA does recognize that IMBs pose some danger of trafficking, IMBRA again treats the problem as one occurring only between the two parties. If the woman knows that her consumer husband was convicted of a trafficking or prostitution-related offense, she can avoid being trafficked. Of course, this approach does not address more organized forms of trafficking and implicitly rejects the argument that the IMB industry per se constitutes a form of sex trafficking.¹²⁰ To that end, this approach does not address the racial, economic, gender, social, age, and educational disparities between the mail-order bride and the consumer husband, or the racial, economic, and social disparities between mail-order bride exporter countries and mail-order bride importer countries.¹²¹

Finally, by recognizing the IMB "solution" as informational, IMBRA continues earlier consumer protectionist attempts to solve the IMB problem. Unlike IMFA, however, which attempted to protect the consumer husband from fraudulent mail-order brides by granting the bride conditional rather than permanent resident status,¹²² IMBRA attempts to protect the consumer wife from abusive or predatory consumer husbands by correcting informational imbalances that might impair the woman's freedom to contract. In other words, just as IMFA attempted to protect consumer husbands, IMBRA attempts to protect consumer wives. IMBRA, in this sense, does not represent a radical departure from previous attempts to address the IMB problem, but rather a continuation of earlier approaches to the industry.

The trouble with the IMBRA and INA recognition schema thus stems from the fact that it does not deem these women victims in the absence of something like domestic violence or an extreme form of trafficking, ignoring the more fundamental and systemic issues that render the IMB industry so problematic. It is important to recognize that, in many cases, the IMB industry may exploit disadvantaged women to such an

¹²⁰ See discussion *supra* Part I.B.2.

¹²¹ See discussion *supra* Part I.A.1.

¹²² For a discussion of IMFA, see *supra* Part I.C.

extent that merely providing them with additional information may be insufficient. Further, it is important to recognize that women may be victims even when they are not abused or trafficked into brothels, strip clubs, or domestic service.¹²³ Because IMBRA does not effect such recognition, more pervasive and systemic power imbalances may continue to render the IMB industry problematic and dangerous to women.

III. THE FUTURE OF IMBRA: THE QUESTION OF WHETHER TO MODIFY IT, LEAVE IT ALONE, OR DECLARE IT UNCONSTITUTIONAL

A. Equal Protection and Freedom of Speech: Should the Courts Declare IMBRA Unconstitutional?

Mail-order brides may find themselves mis-recognized or under-recognized by IMBRA's regulations and consequently under-protected when they arrive in the United States. Consumer husbands, on the other hand, have rebelled against IMBRA's recognition of them not merely as potential abusers, but also as an identifiable group at all. The Internet is littered with postings calling for the repeal of IMBRA. These postings repeatedly emphasize that IMBRA impermissibly provides foreign women with extensive information on their potential husbands that is not available (and by no means should be) to American women.¹²⁴ As some posters have argued, IMBRA's regulations are equivalent to forcing people "in this country . . . to go through a criminal background check before being allowed to meet one another."¹²⁵ In that vein, other posters have emphasized that "[a] wife in USA [sic] cannot get this information on her husband, now it has to be surrendered to foreign nationals, not on US soil and not protected by the Constitution."¹²⁶ Further, IMB proponents have argued that mail-order marriages should not be regulated simply because some are violent. As one IMB owner has explained, because domestic violence is an unfortunate aspect of our society, "[domestic violence] will happen. You

¹²³ See discussion *supra* Part I.B.

¹²⁴ See Wendy McElroy, "Mail-Order Bride" Law Brands All American Men Abusers, FOX NEWS.COM, Jan. 10, 2006, <http://www.foxnews.com/story/0,2933,180487,00.html>.

¹²⁵ Comments from Participants in the Petition to Repeal International Marriage Broker Law, <http://womenrussia.com/uslaw.htm> (last visited Apr. 23, 2006).

¹²⁶ *Id.*

can't hold these relationships to a higher standard than a domestic relationship."¹²⁷ In this sense, consumer husbands are arguing that their courtships and marriages are no different than the courtships and marriages that occur in the United States without the aid of IMBs, and thus should be treated no differently under the law. As a result of this mis-recognition, they conclude, IMBRA violates the "equal protection rights of U.S. citizens who are required to provide extensive background data for foreign romances but not for domestic dating."¹²⁸

Further, IMB proponents also claim that IMBRA violates their rights to free speech under the First Amendment. As one petition to repeal IMBRA states:

For me as a U.S. citizen gentleman, just to say "Hi" to a woman from another country through a legitimate romance agency or tour company, I am now forced to supply any legitimate romance agency or tour company with all my police record information, domestic violence records, and much more (even if I have no such record). My free speech . . . rights are being grossly violated, to say the least.¹²⁹

In online postings on various IMB websites or Repeal IMBRA Petition websites,¹³⁰ current and potential consumer husbands are thus arguing that IMBRA violates the First Amendment's freedom of speech "by restricting the ability of men and women to merely engage in conversation with one

¹²⁷ Harris, *supra* note 49.

¹²⁸ Letter from Gary Bala to Clients, Friends, and Supporters (Jan. 5, 2006), available at <http://www.tlcworldwide.com/newlaw/article1.php>. Bala's article is quoted in online repeal IMBRA petitions. See, e.g., New US Law Regulating International Romance. Act Now!: All American Men are Labeled Abusers Until Proven Otherwise, <http://www.natashaclub.com/IMBRA.html> (last visited Mar. 18, 2007).

¹²⁹ Repeal International Marriage Broker Law Petition, <http://www.petitiononline.com/imbra05/petition.html> (last visited Apr. 23, 2006).

¹³⁰ For additional examples, see Contact Your Representative!, http://www.tlcworldwide.com/newlaw/take_stand.php (last visited Feb. 12, 2007) ("We now live in a country where it is easier for a man to marry a man, than for a man to marry a foreign woman."); Purpose of Online Dating Rights, <http://www.online-dating-rights.com/> (last visited Feb. 12, 2007) ("Online Dating Rights (ODR) is a group of men and a few women who believe that a new federal law called the International Marriage Broker Regulation Act (IMBRA) is unconstitutional, immoral, and misandrist (man-hating)."); IMBRA: The Unconstitutional Law, <http://www.apexvisa.us/imbra.html> (last visited Feb. 12, 2007).

another.”¹³¹ Like the equal protection complaints fomenting online, therefore, IMB proponents’ free speech complaints rest upon a denial of IMBs as a distinct industry and male IMB clients as a distinct group.

In February 2006, less than two months after President Bush signed IMBRA into law, European Connections, an IMB, brought the battle against IMBRA’s recognition of IMBs as distinct entities and IMB clients as a distinct group into an Atlanta district court in *European Connections & Tours v. Gonzales*.¹³² Plaintiff European Connections moved for a temporary restraining order (TRO) against enforcement of IMBRA on grounds that IMBRA violates the right to free speech under the First Amendment and the right to equal protection under the Fifth Amendment.¹³³ With little discussion regarding how it arrived at its conclusion, the district court sided with European Connections and IMB proponents, granting the TRO on the day after IMBRA went into effect:

[T]here is a substantial likelihood that Plaintiff will prevail on the merits of its First and Fifth Amendment claims. . . . [T]here is no governmental interest suitably furthered by the distinctions made by the Act as to the brokers covered by the Act. . . . [T]he Act is more extensive than necessary to serve the governmental interest in protecting immigrant women from domestic abuse by United States males in that the disclosures required to be made by the IMBs are overbroad. . . . [In addition,] the exemption of various types of marriage brokers from regulation under the Act appears to be a violation of the Fifth Amendment.¹³⁴

Significantly, the district court in *European Connections* deemed IMBRA a law that recognizes the IMB problem as one of domestic violence, but rejected IMBRA’s recognition of IMBs and IMB clients on grounds that doing so would violate both the First and Fifth Amendments. However, the district court did not engage in any discussion of whether IMBRA constitutes a suspect, quasi-suspect, or non-suspect classification for equal protection purposes, or whether IMBRA constitutes a content-based

¹³¹ Plaintiffs’ Motion for Preliminary Injunction, Am. Online Dating Ass’n v. Gonzales, No. 3:06-cv-123, at 8 (S.D. Ohio June 29, 2006).

¹³² *European Connections & Tours, Inc. v. Gonzales*, No. 1:06-cv-00426-CC (N.D. Ga. Mar. 7, 2006).

¹³³ *Id.* at 3-4.

¹³⁴ *Id.* at 4-5.

restriction on commercial speech for freedom of speech purposes.¹³⁵ These issues should figure centrally on appeal. Until the appeals process is completed, IMBRA's constitutionality will remain disputed. But as this section argues, there are good reasons to conclude, as did one district court in *American Online Dating Association v. Gonzales*, that IMBRA violates neither equal protection nor freedom of speech.¹³⁶ Indeed, on September 25, 2006, the district judge in *European Connections* dissolved the TRO against enforcement of IMBRA; therefore, the TRO issued in *European Connections* is no longer in effect.¹³⁷

1. Equal Protection

The Fifth Amendment equal protection argument advanced by *European Connections* and other IMB proponents rests upon the claim that IMBRA impermissibly distinguishes between IMBs on the one hand, and non-profit religious or traditional cultural matchmaking services and certain domestic dating services on the other.¹³⁸ In support of this equal protection argument, IMB advocates emphasize that, just as dating and marrying domestic women is a legal activity, dating and marrying foreign women is a legal activity. Despite this fact, online dating services that primarily match American men with American women are exempted from IMBRA, even though they may make some international matches, while online dating services that match American men with foreign women are subjected to IMBRA, even though there is little data substantiating the suspicion that IMBs serve as conduits for domestic violence or trafficking. In other words, IMBRA impermissibly recognizes and distinguishes between different categories of matchmaking services, and between different categories of male clients, when there really are no true or meaningful distinctions.

¹³⁵ *See id.*

¹³⁶ *Am. Online Dating Ass'n v. Gonzales*, No. 3:06-cv-123 (S.D. Ohio May 25, 2006).

¹³⁷ *See* Tahirih Justice Center, Frequently Asked Questions: International Marriage Broker Regulation Act of 2005 (IMBRA), [http://www.tahirih.org/legal/docs/Top10IMBRAFAQs\(Updated3607\).pdf](http://www.tahirih.org/legal/docs/Top10IMBRAFAQs(Updated3607).pdf) (last visited Mar. 18, 2007). Following the dissolution of the TRO in *European Connections* and the denial of a preliminary injunction in *American Online Dating*, "[t]here is now no injunction pending against IMBRA in any court, and thus IMBRA is fully enforceable against all IMBs." *Id.* Meanwhile, in *European Connections*, "[t]he Georgia Judge is expected to issue his final decision on the plaintiff's underlying constitutional challenges shortly." *Id.*

¹³⁸ H.R. 3402 § 833(e)(4)(B), 109th Cong. (2005) (enacted).

Under its equal protection jurisprudence, the Supreme Court analyzes equal protection claims according to a three-tier model, which provides for three different standards of review: (1) the Court will apply strict scrutiny if a law or practice discriminates on the basis of race, alienage, or national origin, or if it selectively burdens the exercise of a fundamental right; (2) the Court will apply intermediate scrutiny if a law or practice discriminates on the basis of gender or legitimacy; (3) finally, the Court will apply a highly deferential rational basis review for most other classifications.¹³⁹ IMB proponents argue that strict scrutiny should be applied to IMBRA's exemptions for non-profit religious or traditional cultural matchmakers and domestic dating services because these exemptions impermissibly impinge upon IMB customers' fundamental right to marry.¹⁴⁰ Alternatively, IMB proponents argue that IMBRA's exceptions cannot survive even the highly deferential rational review because "[t]he unsubstantiated fear that marriage brokers create a link to domestic violence is not justified, and the IMBRA does not further the government interest in preventing domestic violence"¹⁴¹

Notably, in granting European Connections's TRO motion, the district court did not specify whether it deemed IMBRA's exemptions suspect, quasi-suspect, or non-suspect, and did not state which standard of review it applied to IMBRA's exceptions. However, there is good reason to conclude that despite the district court's initial grant of the TRO, IMBRA is not unconstitutional on equal protection grounds. First, IMBRA likely does not selectively burden the exercise of the fundamental right to marry; therefore, IMBRA's exemptions should not be deemed suspect classifications subject to strict scrutiny. IMBs may still facilitate marriage between American men and foreign women, and American men may still use IMBs to meet and marry foreign women. By subjecting IMBs to its

¹³⁹ See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (holding that, because suspect classifications are subject to strict scrutiny under the equal protection clause, a challenged classification will pass constitutional muster only if it (1) is justified by a compelling governmental interest and (2) is narrowly tailored to further that interest); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1996) (holding that quasi-suspect classifications, which are subject to intermediate scrutiny, are unconstitutional unless supported by an "exceedingly persuasive justification"); *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 307, 313-15 (1993) (holding that non-suspect classifications, which are subject to rational basis review, have "a strong presumption of validity," and the party challenging the classification must "negate every conceivable basis that might support it").

¹⁴⁰ See, e.g., Plaintiffs' Motion for Preliminary Injunction at 11-12, 25, Am. Online Dating Ass'n v. Gonzales, No. 3:06-cv-123 (S.D. Ohio June 29, 2006).

¹⁴¹ *Id.* at 23.

regulations, IMBRA mandates certain disclosures and places certain restrictions on the fiancé(e) visa application process, not upon marriage itself.¹⁴² Significantly, many of IMBRA's visa restrictions can be avoided entirely by conducting the marriage abroad and then applying for a spouse visa.¹⁴³ Further, in recent years, the Supreme Court has been unwilling to recognize any new bases of classification—beyond race, national origin, alienage, gender, and legitimacy—as being either suspect or quasi-suspect classifications.¹⁴⁴ Consequently, IMBRA's exemptions should be deemed non-suspect classifications for equal protection purposes, and should easily pass constitutional muster under rational review.

Under rational review, which merely requires that there be some conceivable reason for the classification, a non-suspect classification possesses “a strong presumption of validity,” and the party challenging the classification must “negate every conceivable basis that might support it.”¹⁴⁵ IMBRA's classification of IMBs, non-profit religious matchmakers, traditional cultural matchmakers, and certain domestic dating services garners support from two conceivable legislative rationales: the protection of women from domestic violence and the prevention of trafficking in women. Significantly, the fact that these legislative rationales rest upon mainly anecdotal evidence does not matter; the legislative rationale asserted in support of the classification may rest entirely on “rational speculation unsupported by evidence or empirical data.”¹⁴⁶ Further, the Supreme Court has held that where the non-suspect classification involves “a process of line drawing,” the fact that “Congress had to draw the line somewhere . . . renders the precise coordinates of the resulting legislative judgment virtually unreviewable . . .”¹⁴⁷ Here, in order to regulate the IMB industry, Congress had to draw the line somewhere between IMBs and other dating or matchmaking services that do not pose similar risks for domestic

¹⁴² See discussion *supra* Part II.A.1.

¹⁴³ *Id.* See *supra* note 89 and accompanying text.

¹⁴⁴ See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445-46 (1985) (strongly implying that the Court will not recognize any new suspect or quasi-suspect classification).

¹⁴⁵ *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993).

¹⁴⁶ *Id.* at 315.

¹⁴⁷ *Id.* at 315-16.

violence or trafficking. The fact that Congress drew the line where it did does not render IMBRA unconstitutional.¹⁴⁸

Currently, one district court has held that IMBRA's exemptions in § 833(e)(4) constitute non-suspect classifications supported by a legislative purpose with a rational basis, and thus survive equal protection rational review. In May 2006, the United States District Court for the Southern District of Ohio rejected a motion in *American Online Dating Association v. Gonzales* for a TRO against enforcement of IMBRA, and in December 2006, dismissed the lawsuit challenging the constitutionality of IMBRA in its entirety.¹⁴⁹ Like European Connections, plaintiff American Online Dating Association (AODA), a consortium of IMBs, alleged that IMBRA's exemptions violate the equal protection clause.¹⁵⁰ In arguing for IMBRA's

¹⁴⁸ In drawing the regulatory line, Congress decided to exempt from its definition of IMBs any organization that "provides dating services if its principal business is not to provide international dating services between United States citizens or United States residents and foreign nationals and it charges comparable rates and offers comparable services to all individuals it serves regardless of the individual's gender or country of citizenship." 8 U.S.C.S. § 1375a(e)(4)(B)(ii) (LexisNexis 2006). This distinction is important. Email pen-pal dating services like Match.com and Date.com provide information, including biographical data and email addresses, to both men and women; these services are either free or provided for a subscription fee that is charged to both male and female clients. See Brocato, *supra* note 12, at 230; Match.com, <http://match.com> (last visited Apr. 23, 2006); Date.com, <http://date.com> (last visited Apr. 23, 2006). Conversely, IMBs such as Cherry Blossoms and TLC Worldwide provide men with women's names, photos, biographical data, sexual preferences, and addresses; they do not provide women with any such information. See INS REPORT, *supra* note 4, at 4; Brocato, *supra* note 12, at 230. At the same time, IMBs charge their male clients for these services, while providing women with these services free-of-charge. See Chafin, *supra* note 32, at 704. In the IMB context, therefore, the transfer of information is completely one-sided. As the INS report on mail-order marriages concluded, "[u]nlike dating services or personal ads, the mail order bride transaction is 'one where the consumer-husband holds all the cards.'" INS REPORT, *supra* note 4, at 4. This situation, which is only compounded by the marketing techniques used by IMBs, supports the conclusion that there are real and meaningful distinctions between email pen-pal dating services and IMBs. Of course, this is not to say that email pen-pal dating services may never be problematic, but rather that real distinctions can be drawn between these types of organizations for the purposes of a law like IMBRA, whose regulations pertain primarily to the gathering and dissemination of information.

¹⁴⁹ Am. Online Dating Ass'n v. Gonzales, No. 3:06-cv-123 (S.D. Ohio May 25, 2006). The Tahirih Justice Center (TJC) is defending this case with the United States Attorney's Office. Press Release, Tahirih Justice Center, A Lawsuit Challenging the Constitutionality of the International Marriage Broker Regulation Act is Dismissed (Dec. 22, 2006) (on file with author).

¹⁵⁰ Plaintiff's Motion for Preliminary Injunction at 20-26, Am. Online Dating Ass'n, No. 3:06-cv-123 (S.D. Ohio June 29, 2006). Although working to overturn IMBRA, AODA describes its membership as being

constitutionality under the equal protection clause, the government asserted that IMBRA's exemptions were supported by the following legislative rationale: "men who pay for access to a foreign bride harbor a heightened sense of ownership that leads to potentially higher rates of abuse."¹⁵¹ AODA responded by submitting "some statistical evidence that tends to debunk this theory."¹⁵² However, the court concluded that such evidence was not enough to demonstrate that IMBRA's exemptions for non-profit religious matchmakers, traditional cultural matchmakers, and certain domestic dating services do not have a rational basis.¹⁵³ Significantly, in articulating the legislative rationale underlying IMBRA, the government could have cited the protection of women from trafficking as an additional legislative rationale for IMBRA's exemptions. Consistent with IMBRA's regulatory scheme, however, the government focused upon IMBRA as a domestic violence statute, stating simply that the IMB industry "leads to potentially higher rates of abuse."¹⁵⁴ The district court agreed with the government, and like the district court in *European Connections*, deemed IMBRA a law that recognizes the IMB problem as one of domestic violence. But unlike the district court in *European Connections*, the district court in *American Online Dating* found that IMBRA's classification of IMBs and IMB clients survives rational review as a non-suspect classification.

in favor of protecting women from violence, in favor of helping women leave bad situations and to help them to move to better circumstances, in favor of romance, in favor of marriage, in favor of stable families, in favor of immigration services being instrumental to avoid potential abuse by males seeking foreign wives.

American Online Dating Association, <http://www.aoda.us/> (last visited Jan. 15, 2007).

¹⁵¹ *Am. Online Dating Ass'n*, No. 3:06-cv-123, at 6.

¹⁵² See Plaintiffs' Motion for Preliminary Injunction, *supra* note 150, at 10-11. Citing the 1999 INS Report, AODA argued that "[w]hile the reported percentage of all American relationships that contain physical abuse is roughly 7%, only 1% of international marriages for which the immigrant spouse was denied conditional entry resulted in confirmed violence." *Id.* Further, AODA contended that "the male clients of these websites tend to be well-educated, financially stable, and in favor of family values, thus making them proportionally less likely to abuse their wives than other, less secure men." *Id.* at 11.

¹⁵³ *Am. Online Dating Ass'n*, No. 3:06-cv-123, at 6.

¹⁵⁴ *Id.*

2. Freedom of Speech

IMB proponents, however, also challenge IMBRA on First Amendment grounds. In both *European Connections* and *American Online Dating*, European Connections and AODA argued that IMBRA violates the First Amendment “by imposing a prior restraint upon protected expression without adequate procedural safeguards.”¹⁵⁵ Although it initially granted European Connections’s TRO motion on the ground that IMBRA likely violated the First Amendment, the district court did not engage in any discussion of whether IMBRA constitutes a content-based restriction, and did not discuss the impact of the commercial nature of the speech on the constitutional analysis. European Connections’s TRO motion, however, gives some insight into the basis of the district court’s ruling.

According to European Connections’s TRO motion, IMBRA allegedly targets commercial speech.¹⁵⁶ At one time, commercial speech was not protected under the First Amendment on grounds that it constituted a commercial activity and could be regulated as such.¹⁵⁷ Today, however, when examining laws that restrict commercial speech, the Supreme Court exercises a version of mid-level scrutiny, thus according commercial speech less protection than political speech.¹⁵⁸ This mid-level scrutiny, known as the *Central Hudson* test, takes the form of a four-pronged analysis, under which courts will first ask whether the commercial speech at issue is either misleading or related to an unlawful activity.¹⁵⁹ If the speech is indeed misleading or related to an unlawful activity, then it is not protected by the First Amendment and may be regulated, restricted, or even prohibited by the government.¹⁶⁰ But if the speech is neither misleading nor related to an

¹⁵⁵ *Id.* at 2.

¹⁵⁶ See Brief for Plaintiff, *European Connections & Tours, Inc. v. Gonzales*, No. 1:06-cv-00426-CC (N.D. Ga. Feb. 24, 2006), available at <http://www.apexvisa.us/motion-ga-imbra.html>. In order to determine if any particular speech can be deemed commercial, courts essentially look to whether the purpose and content of the message are designed to propose a commercial transaction. *Friedman v. Rogers*, 440 U.S. 1, 11 (1979).

¹⁵⁷ *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (finding no constitutional objection to a content-based ordinance that completely prohibited the distribution of leaflets advertising a for-profit exhibition).

¹⁵⁸ *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561-66 (1980).

¹⁵⁹ *Id.* at 563-64. See also *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999) (discussing the *Central Hudson* test).

¹⁶⁰ *Cent. Hudson*, 447 U.S. at 563-64.

unlawful activity, then the government may regulate it only if the remaining three prongs are satisfied: (1) the government interest in regulation is substantial, (2) the regulation directly advances that interest, and (3) a more limited restriction would not serve that interest.¹⁶¹

If IMBRA does target commercial speech, there are good reasons to conclude that the speech targeted is either misleading or related to an unlawful activity. First, as discussed above, by providing women with little or no information on the industry, the immigration processes, or the consumer husbands, the IMB matchmaking business is inherently misleading for the female “consumer.” Indeed, IMBRA’s primary purpose is the rectification of this misleading speech through the correction of informational imbalances. Second, also discussed above, there is evidence indicating that the IMB industry not only facilitates domestic violence and trafficking, but also per se constitutes a form of sex trafficking. Both domestic violence and trafficking are unlawful activities. And the IMB industry’s connections to these crimes should be sufficient to render the industry’s commercial speech unprotected by the First Amendment and consequently subject to government regulation or prohibition.

Even if a court were to proceed to *Central Hudson* test’s final three prongs, however, IMBRA should easily satisfy the substantial government interest and direct advancement prongs: the protection of women from domestic violence and trafficking certainly constitutes a compelling and substantial government interest, and IMBRA (albeit limited in its efforts) directly attempts to protect women from domestic violence by correcting informational imbalances inherent in the IMB industry. The final prong, which requires narrow tailoring, will likely turn on IMBRA’s distinctions between IMBs and other dating services.¹⁶² As discussed above, there are rational and practical reasons for these distinctions—unlike other dating services, IMBs advertise their mail-order brides as commodities costing less than the price of an economy car, charge only male clients for their services, provide information only to male clients, and provide the services of immigration attorneys only to male clients. Further, unlike American singles dating through Match.com, mail-order brides come to the United States dependent upon their consumer husbands, and in order to avoid deportation, they must marry their consumer husbands within ninety days and remain married for at least two years. Under these circumstances, there

¹⁶¹ *Id.* at 564.

¹⁶² See Brief for Plaintiff, *European Connections & Tours, Inc. v. Gonzales*, *supra* note 156 (arguing that IMBRA is not narrowly tailored because the distinctions between IMBs and other dating services are irrational).

appears to be a rational basis for distinguishing IMBs from other dating services.

Indeed, the district court in *American Online Dating* rejected AODA's TRO motion and later dismissed AODA's lawsuit on grounds that IMBRA does not violate the First Amendment's freedom of speech.¹⁶³ In rejecting AODA's freedom of speech argument, District Court Judge Thomas M. Rose found that IMBRA does not prohibit speech, but rather mandates certain disclosures through the regulation of commercial speech.¹⁶⁴ Consequently, the court concluded that IMBRA "compels provision of information regarding a product, the domestic client, being offered to a potential foreign spouse, not unlike product labeling laws that compel and regulate speech in other markets."¹⁶⁵ Such commercial speech regulations, the court emphasized, are subject to *Central Hudson's* intermediate scrutiny test. Given the two substantial interests that the government proffered in support of IMBRA—"preventing the abuse of spouses and the Constitutional authority to regulate immigration"—the

¹⁶³ AODA further argued that IMBRA violates (1) the "putative right of privacy guaranteed by the substantive due process appendage to the Fifth Amendment" by placing "unreasonable and unnecessary restrictions upon intimate human relationships," and (2) the First Amendment right to freedom of association. *Am. Online Dating Ass'n v. Gonzales*, No. 3:06-cv-123, at 2 (S.D. Ohio May 25, 2006). Rejecting AODA's substantive due process claim, the court highlighted AODA's concession that "the Supreme Court has never explicitly held that a person has a fundamental liberty interest in contacting a person from another country in order to develop an intimate relationship," and simply declined to recognize this fundamental liberty interest without guidance from the higher courts. *Id.* at 5-6. AODA based its argument that IMBRA violates a fundamental right, and thus contravenes substantive due process, on the autonomy passages in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). For instance, in its later motion for a preliminary injunction, AODA cited the following passage from *Lawrence* in support of its substantive due process argument: "[T]here are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Plaintiffs' Motion for Preliminary Injunction, *supra* note 150, at 28. District Judge Rose, however, emphasized that "[i]t is difficult for the Court to discern the practical application of the autonomy passages of *Lawrence* passage [sic] to actual cases without guidance from higher courts." *Am. Online Dating Ass'n*, No. 3:06-cv-123, at 6. Likewise, the court rejected AODA's freedom of association claim on the ground that IMBRA "does not impinge upon [the right to marry] at all." *Id.*

¹⁶⁴ *Am. Online Dating Ass'n*, No. 3:06-cv-123, at 4-5 ("Because this speech takes place between a client who is paying money to a broker who is in the business of disseminating information for the client, the Court perceives this also as a form of commercial speech.").

¹⁶⁵ *Id.* at 5.

court held that AODA did not have a substantial likelihood of surviving the *Central Hudson* test and prevailing on its prior restraint claim.¹⁶⁶ Likewise, the court found that “[i]n the absence of a likely First Amendment violation, the public interest is upheld by allowing the enforcement of a law designed to limit the occurrences of domestic abuse.”¹⁶⁷ As with the legislative rationale proffered by the government for equal protection purposes, the governmental interest and public interest proffered by the government and accepted by the district court for First Amendment purposes focuses upon IMBRA as a domestic violence statute. Again, the government could have additionally cited the protection of women from trafficking as both a substantial government interest and a public interest served by IMBRA. However, this characterization of IMBRA is consistent with IMBRA’s regulatory scheme and with the area in which IMBRA is likely to have a greater impact.

AODA’s inability to demonstrate a likelihood of prevailing on the merits not only resulted in the dismissal of its TRO motion in May 2006, but also in the dismissal of its entire lawsuit in 2006.¹⁶⁸ Conversely, European Connections obtained a TRO against enforcement of IMBRA that has subsequently been dissolved. Another challenge to IMBRA’s constitutionality, also brought by European Connections, is currently pending in an Atlanta district court.¹⁶⁹ If IMBRA survives the attack waged on it by European Connections, AODA, and other IMB proponents, the question remains as to whether IMBRA goes far enough. Should IMBRA be amended or expanded? If one deems the IMB problem primarily as one of domestic violence, as the district courts have thus far, and if one deems the solution to be informational in nature, then IMBRA might be a sufficient regulation of the IMB industry. If, however, one deems the IMB problem from a much broader vantage point—encompassing systemic power imbalances, trafficking concerns, domestic violence concerns, and informed consent issues—then IMBRA, although an important first step in the regulation of IMBs, is not sufficient and should be augmented by further regulations.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 7.

¹⁶⁸ Press Release, Tahirih Justice Center, A Lawsuit Challenging the Constitutionality of the International Marriage Broker Regulation Act is Dismissed (Dec. 22, 2006) (on file with author). As of the date this Article was published, more information on Judge Rose’s dismissal of *Am. Online Dating Ass’n v. Gonzales* was not yet available.

¹⁶⁹ *Id.* Tahirih Justice Center is also defending this case with the United States Attorney’s Office.

B. National Criminalization: Should the Government Outlaw the IMB Industry Altogether, or Simply Regulate it Further?

The multifarious problems inherent in the IMB industry, especially when viewed in light of IMBRA's shortcomings, raise some obvious questions. Should the IMB industry be outlawed altogether? Should the law permit marriages (and brides) to be bought and sold? Does society have anything to gain by allowing the IMB industry to conduct business in the United States? From a pure negative liberty perspective, the law should not outlaw the IMB industry because doing so would impermissibly allow the government to infringe on liberty.¹⁷⁰ But from a liberal or utilitarian perspective, the IMB industry should not be outlawed because doing so would simply create a black market for mail-order brides, and consequently exacerbate the problems already associated with the industry.¹⁷¹ Likewise, feminists who advocate for legal prostitution and women's freedom to exploit their sexuality to overcome gendered oppression and disadvantage would probably oppose outlawing the IMB industry altogether, since the industry could be used by women as a means to escape their economically distressed countries and immigrate to the United States (and a better life).¹⁷² Conversely, feminists who oppose legal prostitution and self-exploitation, deeming women's bodies and sexuality inalienable, may support complete prohibition of the IMB industry.¹⁷³

¹⁷⁰ Linda Kelly, *Marriage for Sale: The Mail-Order Bride Industry and the Changing Value of Marriage*, 5 J. GENDER RACE & JUST. 175, 185 (2001) (citing John Stuart Mill's conception of liberty as freedom from all constraint, including the freedom to sell oneself into slavery, in the context of the IMB industry).

¹⁷¹ *Id.* ("A liberal/utilitarian argument would further recognize that criminalizing the industry will not eradicate it but just drive it underground, thereby subjecting its subscribers to greater abuse.").

¹⁷² *Id.* at 185-86. See also Lloyd, *supra* note 66, at 357-58 (noting that the arguments in favor of banning practices such as prostitution and pornography on grounds that they are inherently exploitative apply with equal force to the IMB industry).

¹⁷³ Kathryn Lloyd argues:

The justifications for outlawing such practices as prostitution also apply to the mail-order bride industry. In fact, there may be an even stronger argument for the regulation of the mail-order bride industry . . . [M]ail-order brides are legally bound to their male consumers through the marriage contract and immigration regulations.

Lloyd, *supra* note 66, at 357-58. See also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-36 (1987) (discussing prostitution as a market-inalienability).

The Philippines has adopted the position that the IMB industry must be prohibited in its entirety on grounds that it offends fundamental values concerning personhood. As one Philippine senator explained when urging the legislature to ban the IMB industry, “by making Filipin[a] brides a marketable commodity and flaunting them as such like cattle in tawdry and revolting advertisements this business has gravely insulted all that we, as a nation, hold sacred.”¹⁷⁴ In effect since 1990, the Philippine prohibition of the IMB industry has unfortunately had little impact on the industry and the number of Filipina mail-order brides.¹⁷⁵ Even the most cursory search will produce numerous IMBs specializing in Filipina women, despite the fact that Philippine law criminalizes the establishment or administration of an IMB business that in any way involves or solicits Filipina women.¹⁷⁶ This failure can be attributed to the persistence of social and economic problems that cause women to become mail-order brides, the continuing legality of the IMB industry throughout the world, and the lack of a jurisdictional basis to punish IMBs that “sell” Filipina mail-order brides.¹⁷⁷

In particular, the Philippine prohibition of the IMB industry fails because it does not impact the economic and social conditions that lead women to become mail-order brides or consumer husbands’ demand for mail-order brides in developed countries.¹⁷⁸ As one scholar studying the Philippine IMB ban has emphasized:

The laws of any single nation do not address the factors of supply and demand, which operate in separate countries. The demand in the United States is unaffected by a Filipino law which attempts to limit the supply of Filipinas available to the mail-order bride industry. As evidenced by the large numbers of Filipinas in mail-order bride catalogues, these laws have likewise been ineffective to curb the supply of women for the industry. The basic rules of

¹⁷⁴ Lloyd, *supra* note 66, at 352.

¹⁷⁵ See Chafin, *supra* note 32, at 713; Brocato, *supra* note 12, at 260.

¹⁷⁶ See Rep. Act No. 6955 (1990) (Phil.); Lloyd, *supra* note 66, at 358. For examples of websites advertising Filipina women, see FilipinaHeart.com, <http://www.filipinaheart.com> (last visited Feb. 13, 2007) (advertising a “beautiful Filipina bride”); A Filipina Pen Pal Club: Mail Order Brides Exclusively from the Philippines, <http://www.afilipina.com> (last visited Feb. 13, 2007); Cherry Blossoms, <http://www.blossoms.com> (last visited Feb. 13, 2007) (listing, as of last visited date, 32,195 Filipinas).

¹⁷⁷ Chafin, *supra* note 32, at 713-14. See also Lloyd, *supra* note 66, at 350, 358-60.

¹⁷⁸ Lloyd, *supra* note 66, at 358. See also Chafin, *supra* note 32, at 713.

economics dictate that as long as little action is taken to curb these forces, the industry will continue to flourish, and businesses will continue to earn substantial profits to meet the demand by facilitating the trafficking of women across international boundaries.¹⁷⁹

Further, “[b]ecause the negative externalities of these industries are spread among many nations, and isolated to a disempowered, voiceless group of victims, no single country has the incentive or ability to effectively combat them.”¹⁸⁰ The failure of the Philippine government’s approach thus teaches an important lesson: attempts to regulate the IMB industry domestically, and without appeals to the international community, likely cannot solve the problems inherent in the IMB industry and will tend to drive the industry underground rather than eradicate it.¹⁸¹

Moreover, sex trafficking is a seven billion dollar per year industry.¹⁸² If the IMB industry per se constitutes sex trafficking, or at least facilitates sex trafficking, then like most forms of sex trafficking, the industry will likely be driven underground if nationally criminalized. This is evident from drug trafficking and other forms of human trafficking, which continue to flourish and produce harmful effects despite national criminalization.¹⁸³ Like these other forms of trafficking, the IMB industry, as discussed above, is driven by transnational market forces.¹⁸⁴ As a result, the IMB industry will continue to flourish either legitimately or criminally

¹⁷⁹ Lloyd, *supra* note 66, at 358.

¹⁸⁰ *Id.* at 360.

¹⁸¹ See generally Brocato, *supra* note 12, at 260; Lloyd, *supra* note 66, at 360-62.

¹⁸² Jackson, *supra* note 44, at 478 (noting that, in the world of organized crime, the profits netted by the sex trafficking industry are “surpassed only by international traffic in drugs and weapons”).

¹⁸³ See Lloyd, *supra* note 66, at 360-62. As Lloyd explains:

That the current trafficking of women as mail-order brides can sustain itself though underground and informal channels, as does the drug trade, is supported by the evidence on other forms of human trafficking. This is evidence that mere criminalization of mail-order bride catalogues likely would not be an effective or appropriate solution to stop the international trafficking of women as mail-order brides.

Id. at 362.

¹⁸⁴ *Id.* at 360.

as long as there is a demand for mail-order brides, and as long as potential mail-order brides have limited alternative opportunities at home or abroad.¹⁸⁵ To that end, the only means by which the IMB industry can be curbed—and perhaps eventually eradicated—may rest with policies pursuing economic development, combating gender discrimination, and improving women's economic opportunities.¹⁸⁶ In this sense, the United States could, in conjunction with IMB regulations like IMBRA, combat the IMB problem by working through international bodies such as the United Nations to pursue international human and women's rights standards, as well as sustainable development. Such broader efforts would target the source of the IMB problem while enabling the government to regulate rather than outlaw the industry, thus preventing the industry from being driven underground, where no oversight can be exercised. Unfortunately, this far-reaching, long-term remedy, although potentially the most effective, is also the most difficult, especially considering America's resistance to U.N. facilitated solutions.¹⁸⁷

In the meantime, while the world (hopefully) pursues policies targeting economic development and women's rights, the United States can augment IMBRA's protections by addressing this international problem multilaterally, rather than simply domestically, by working with other nations to better ensure that IMBs comply with current regulations. For instance, by recognizing the Philippine ban on the IMB industry, the United States could amend IMBRA to allow the government to police and prosecute IMBs operating within America that "sell" Filipina mail-order brides. At the same time, the United States government could work with countries like Russia, where the export of mail-order brides is legal, to

¹⁸⁵ See *id.* at 362.

¹⁸⁶ *Id.* ("Pursing policies of economic development and ending discrimination against women may in fact be the only true long term solution to eradicate the negative commodification and international trafficking of women."). Vanessa Brocato argues:

To deal with the root causes of the mail-order bride trade, the global community must create a globalization process that will maximally benefit all people in the world. . . . We must fund international development programs that can educate women and increase their access to private property ownership and other forms of income-generation.

Brocato, *supra* note 12, at 262.

¹⁸⁷ See generally Brocato, *supra* note 12, at 261 (noting, in reference to CEDAW and the ICCPR, that "[t]he United States is woefully behind in ratification of international human rights instruments").

ensure that IMBRA's regulations are complied with abroad. This could be accomplished through bilateral treaties or, more broadly, through United Nations treaties.¹⁸⁸

While pursuing international cooperation and international solutions, which should better target the IMB industry as a trafficking problem, the United States should augment IMBRA domestically in ways that better target both trafficking and domestic violence concerns. First, the United States could employ women's rights groups in the effort to expose the problems associated with the IMB industry, requiring them to report to an IMB monitoring body that would record IMB violations of IMBRA, as well as VAWA and TVPA.¹⁸⁹ This monitoring and reporting system would better expose the problems of trafficking and domestic violence, as well as the extent to which the IMB industry constitutes a sex trafficking industry. Further, this system could be used in conjunction with social service programs specifically created to help all mail-order brides upon their immigration to the United States.¹⁹⁰ Such programs could offer counseling and legal assistance, and could provide women with, or direct women to, vocational training programs and employment placement services.¹⁹¹ By helping mail-order brides navigate the American legal system and immigration processes, and, perhaps more importantly, by helping mail-order brides achieve economic independence and stability, these social service programs could begin to correct the power imbalances that render the IMB industry so problematic.

Regulations augmenting IMBRA could further address the problems posed by the IMB industry by creating a cause of action for women's rights and victim advocacy groups to act as private attorneys general who could police the IMB industry,¹⁹² and bring civil suits against

¹⁸⁸ See Lloyd, *supra* note 66, at 364 ("The United Nations treaties could be a helpful forum under which governments could unite to eliminate the negative effects of the mail-order bride industry and to regulate the private conduct of the parties involved.").

¹⁸⁹ See Brocato, *supra* note 12, at 260-61 (proposing a similar solution in the context of international human rights systems, such as CEDAW and ICCPR, and calling for United States ratification of international human rights instruments in order to make these systems available to women in the United States).

¹⁹⁰ See *id.* at 264-65 (discussing the need for such "services prior to immigrating as a mail-order bride, during the immigration process, and after victimization or abuse").

¹⁹¹ See *id.* (explaining the need for services providing, *inter alia*, medical care, legal assistance, vocational training, and financial assistance for mail-order brides who have been victimized or subjected to abuse).

¹⁹² Lloyd, *supra* note 66, at 361.

individual IMB companies and consumers for violations of IMBRA and specific trafficking or domestic violence harms perpetrated against mail-order brides. Further, if the United States enters into bilateral treaties or ratifies United Nations treaties, as discussed above, these private attorneys general could ensure that IMBs are complying with other countries' regulations and laws, such as the Philippine ban on IMB recruitment or advertisement of Filipina women as mail-order brides.¹⁹³ Likewise, countries that are parties to such treaties could act reciprocally, empowering their NGOs to act as private attorneys general to enforce IMBRA. By creating this cause of action, which could be reciprocal if integrated into international treaties, compliance with laws and regulations targeting IMBs will be better ensured, and IMBs will be forced to internalize the costs of the externalities that they impose upon society.

IV. CONCLUSION

By enacting IMBRA, the United States has taken a major step toward addressing the perceived IMB problem. Through IMBRA's regulations, much needed information on the IMB industry, including its prevalence and connections to domestic violence, will be gathered. Moreover, by correcting informational imbalances, IMBRA will provide potential mail-order brides with the information necessary to decide whether to immigrate to the United States and wed an American consumer husband. Unfortunately, IMBRA does not address the troubling power imbalances that may render informed consent impossible even after informational imbalances have been corrected, and that may render the IMB industry an international sex trafficking (rather than international romance) industry. As such, IMBRA simultaneously mis-recognizes and under-recognizes both the IMB problem and IMB victims. In order to correct such mis-recognition and under-recognition, IMBRA's regulatory scheme should be augmented by further regulations, which should be pursued in conjunction with international agreements. Only by addressing this international problem from an international vantage point, and only by recognizing the complexity of the IMB problem and IMB victims, can IMBRA and its progeny hope to regulate the IMB industry with any real success.

¹⁹³ See generally *id.* ("NGOs could be authorized to bring suit for violating prohibitions on recruitment (such as those in place in the Philippines) and discrimination.").

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Volume 16

2007

Number 3

Deborah L. Rhode

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Pat K. Chew & Lauren K. Kelley-Chew

Subtly Sexist Language

Deborah L. Brake

Perceiving Subtle Sexism: Mapping the Social-
Psychological Forces and Legal Narratives that Obscure
Gender Bias

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