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Immoral Purposes: Marriage and the Genus of Illicit Sex

ABSTRACT. In *Lawrence v. Texas*, the Supreme Court situates its opinion within the history of laws banning sodomy. *Lawrence*, however, is also part of another historical narrative: the history of attempts by federal lawmakers and judges to define the relationships among the genus of illicit sex, the genus of licit sex, and marriage. Viewed from this perspective, *Lawrence* marks the latest intervention in a legal conversation that began when Congress enacted the 1907 Immigration Act and the 1910 Mann Act, each of which prohibited the movement of women across borders—the former, international, the latter, interstate—for "immoral purposes." In the early twentieth century, through these provisions, lawmakers and judges constructed an isomorphic relationship between marriage/nonmarriage and licit sex/illicit sex. The "marriage cure" transported sex across the illicit/licit divide. But courts and legislators came to view these curative powers as a threat to marriage's place in the sociolegal order because individuals used marriage as a tool to evade legal penalties. Thus, they checked the powers of the marriage cure and, in so doing, uncoupled both parts of their original isomorphism. *Lawrence* represents the culmination of this process: the movement of a sexual relationship across the illicit/licit divide at least in part because it made no claim to marriage. This move reflects the persistent status of marriage as simultaneously powerful in its ability to confer legal privileges and to shield people from the dangers of sexual illicitness, and powerless to protect itself from the taint of those same illicit practices.

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INTRODUCTION

Ask yourself what common features unite the following list of practices: bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity. To be sure, each of these practices involves sexualized conduct of one sort or another. Apart from their general sexual character, however, these forms of erotic expression seem to share precious little in common. They involve a wide spectrum of hedonic preferences and an extremely varied range of acts. Moreover, they evoke wildly disparate social meanings and cultural referents. In the minds of most people, for example, having sex with a stranger for money has little in common with having sex with an animal. Having sex with a sibling seems quite different from having sex with a partner who is not your spouse. Being married to two people simultaneously seems quite unlike autoeroticism.

These dissimilarities notwithstanding, the law unites these divergent practices into a coherent category. These are all forms of sexual expression that have traditionally met with legal disapproval and, quite often, criminal sanctions.[1] In fact, in his dissent in *Lawrence v. Texas*, Justice Scalia invokes these practices seriatim for precisely this reason. After the Court's opinion overturning *Bowers v. Hardwick* and striking down as unconstitutional Texas's same-sex sodomy statute, Justice Scalia bemoans predictively, all of these traditionally illicit practices will be protected by the Constitution and will lie beyond the reach of state regulation.[2] Justice Scalia is so confident about the potential repercussions of *Lawrence* that, based solely on the argument in his dissent, one would think that the Court's opinion in *Lawrence* rendered unintelligible, within the parameters of the Federal Constitution, any legal category of illicit sex—that is, of legally disfavored sexual practices subject to restriction or prohibition.

On its own terms, however, the Court's opinion in *Lawrence* does no such thing.[3] Despite the depth of Justice Scalia's ire, his dissent and Justice

1. Although masturbation is not criminal, legal actors have long identified it as a social evil. *See* Geoffrey P. Miller, *Law, Self-Pollution, and the Management of Social Anxiety*, 7 MICH. J. GENDER & L. 221, 222 (2001).

2. Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

3. Others have analyzed the narrowness of *Lawrence* in various respects. *See, e.g.*, Katherine M. Franke, Commentary, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004); Suzanne B. Goldberg, Lawrence *& the Road from Liberation to Equality*, 46 S. TEX. L. REV. 309 (2004); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528 (2004); David D. Meyer, *Domesticating* Lawrence, 2004 U. CHI. LEGAL F. 453; Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615 (2004).

Kennedy's opinion for the Court notably share a common commitment to maintaining a robust category of sexual practices that can be legally prohibited; they simply disagree about whether or not same-sex sodomy belongs in that category. According to Justice Kennedy, although states may no longer criminalize private, adult, consensual, same-sex sodomy, they may still criminalize other forms of sexual behavior. States remain entitled to draw this distinction because, in the Court's view, these other forms of still-illicit intimacy are meaningfully different than the type of sexual relationship at stake in and protected by *Lawrence*. Justice Scalia's dissent notwithstanding, then, the Court's opinion in *Lawrence* actually takes pains to reinforce the existence of an intelligible legal line between illicit and licit sex, even as the watershed holding moves across the line one particular form of intimacy—private, consensual sex between adults of the same sex.

To locate the line between licit and illicit sexual expression, *Lawrence* carefully distinguishes the relationship between John Geddes Lawrence and Tyron Garner, the defendants in the case, from the traditionally prohibited forms of sexual expression allegedly unaffected by the Court's holding (presumably, relationships and practices such as those on Justice Scalia's list of horribles). In drawing these distinctions, the opinion's language implicitly delineates some of the respective features of licit and illicit sex.[4] For instance, the Court points out, the sex between Lawrence and Garner involved only two people (a traditional marker of licitness); it was not polyamorous (a traditional marker of illicitness).[5] Both partners were of majority (a marker of licitness), so there was no concern about either sex between minors (a marker of illicitness) or sex between an adult and a minor (another marker of illicitness).[6] The sex was consensual (licit), not coercive (illicit).[7] Furthermore, in three salient senses, the sexual relationship between Lawrence and Garner was private

4. In upholding a Florida statute that prohibits gays and lesbians from adopting children, the Eleventh Circuit quoted this very paragraph of the *Lawrence* opinion to differentiate the facts in the case before it—involving a gay couple and their foster children—from the facts of *Lawrence*. *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004). The Utah District Court also quoted this paragraph in upholding the state's ban on polygamy after *Lawrence*. *See* Bronson v. Swensen, No. 2:04-CV-21 TS, 2005 U.S. Dist. LEXIS 2374, at *12 (D. Utah Feb. 15, 2005) (order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment).

5. *Lawrence*, 539 U.S. at 578 ("The case does involve *two* adults . . . ." (emphasis added)).

6. *Id.* ("The present case does not involve minors.").

7. *Id.* ("[The case] does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.").

(licit), not public (illicit).[8] First, the sexual acts in question occurred in a home, not in public space.[9] Second, the relationship did not involve the public market, that is, prostitution.[10] Finally, and perhaps most significantly, the relationship was about gratifying personal commitments and desires, not about claiming public rights or entitlements. As the Court states, the relationship between Lawrence and Garner did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[11] Lawrence and Garner, in other words, never sought to formalize their relationship as a marriage. Seeking such public entitlements, of course, would not have been illicit in the sense that prostitution or sex in public spaces are illicit; that is, attempting to marry would not have subjected Lawrence and Garner to criminal prosecution. Nonetheless, the Court's analysis suggests that the absence of any claim to the public goods of marriage—like the absence of sexual acts in public spaces or the public market economy—influenced its decision to view the sex between Lawrence and Garner as entitled to constitutional protection. The absence of a claim to marriage, in other words, seemingly bolstered the licit nature of Lawrence and Garner's conduct—conduct that, in the Court's words, was not simply about sexual satisfaction but rather could constitute "but one element in a personal bond that is more enduring."[12]

Notably, given the Court's pointed analysis, none of the legal arguments raised in the *Lawrence* litigation involved marriage at all. Lawrence and Garner never intimated to the Court the slightest desire for either the social trappings or the legal privileges of marriage. Yet each of the three major opinions in the case—Justice Kennedy's opinion, Justice O'Connor's concurrence, and Justice Scalia's dissent—shadow boxes with the specter of same-sex marriage. Justices Kennedy and O'Connor each take pains to distinguish their respective arguments from those that would favor a right to same-sex marriage. If Lawrence and Garner had sought to marry, Justice Kennedy suggests, *that* would have been different. Likewise, in her concurrence holding the Texas sodomy statute unconstitutional on equal protection grounds, Justice O'Connor differentiates between the unconstitutional prohibition of same-sex sex and the constitutional prohibition of same-sex marriage. According to

8. *Id.* ("The petitioners are entitled to respect for their private lives."). On different notions of privacy in this constitutional context—that is, "zonal, relational, and decisional"—see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443 (1992).

9. *See Lawrence*, 539 U.S. at 578 ("[The case] does not involve public conduct . . . .").

10. *See id.* ("[The case] does not involve . . . prostitution.").

11. *Id.*

12. *Id.* at 567.

Justice O'Connor, Texas could not punish the relationship between Lawrence and Garner because the state "cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage."[13] *That* case would be different, she posits, because "[u]nlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[14] By contrast, Justice Scalia's dissent envisions a direct slippery slope between the holding in *Lawrence* and constitutional protection for same-sex marriage. In different ways, then, each of these opinions goes out of its way to link the movement of a sexual activity over the illicit-licit line to the institution of marriage, despite the fact that the case involved no claim to marriage. Legal discussions of licit and illicit sex seemingly raise the specter of marriage even when the parties to the particular case do not.

This Article is about the relationships among legal definitions of sexual illicitness, legal definitions of sexual licitness, and legal constructions of marriage. It argues that *Lawrence*'s modern approach to defining these relationships should be understood in light of the history of judges' and lawmakers' attempts to use marriage to locate and police the boundary between the categories of licit and illicit sex. In this Article, therefore, I situate *Lawrence* not within the historical context offered by the opinion itself—the history of sodomy laws and the legal regulation of same-sex sex[15]—but rather within the history of past federal attempts to define a broad category of illicit sex. Specifically, I analyze the intertwined histories of two federal statutory provisions that created explicit legal categories of illicit sex: the "immoral purpose" provisions of the Immigration Act of 1907 and the White-Slave Traffic Act of 1910 (also known as the Mann Act). Each of these provisions prohibited the movement of women across certain borders—the former, international, the latter, interstate—for either prostitution or "other immoral purposes."[16] The limiting contours of this vague "immoral purpose" language lay in the interpretive principle of *ejusdem generis*: When a law refers to something specific—like "prostitution"—and then refers to a more general category—like "immoral purpose"—the general category should be construed

13. *Id.* at 585 (O'Connor, J., concurring).

14. *Id.*

15. *See id.* at 568-71 (majority opinion); *see also* Brief of Professors of History George Chauncey et al. as Amici Curiae in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102).

16. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)); Act of February 20, 1907 (Immigration Act of 1907), ch. 1134, 34 Stat. 898.

to apply to things that are of the same type, or genus, as the specific term.[17] The statutory provisions, in other words, did not apply to all forms of immoral behavior, only sexual immoralities, of which prostitution was understood to be the prototype.[18] These provisions of the Immigration and White-Slave Traffic Acts thus forced courts and lawmakers to define, however unscientifically, the elements of the genus of sexual immorality. In so doing, they eschewed philosophical notions of immorality and, with little explicit methodology, classified what forms of sexual expression properly inhabited the category of illicit sex.

These "immoral purpose" provisions, therefore, offered judges and lawmakers the occasion to think carefully about the broad category of prohibited sexual relations—a category that hovers ominously over legal discussions of particular forbidden practices, such as same-sex sodomy in *Lawrence*, but one that judges and lawmakers rarely confront directly. In the context of the Immigration Act and the Mann Act, judges and lawmakers confronted the content and contours of illicit sex not, as in *Lawrence*, to determine what forms of intimate behavior lay beyond the reach of state regulation, but rather to determine what forms of intimate behavior lay within the reach of federal regulation.

This history of the "immoral purpose" provisions is not the narrow doctrinal history of *Lawrence*. The Supreme Court surely did not need to advert to this history to answer the constitutional question of whether Texas's sodomy law violated the Fourteenth Amendment.[19] These statutory provisions,

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17. On this principle of interpretation, see RUPERT CROSS, STATUTORY INTERPRETATION 135-37 (John Bell & George Engle eds., 3d ed. 1995); and Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 937-38 (1996).

18. On the social and legal place of prostitution, see RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918 (1982). Other laws defining who could become a member of the American polity invoked morality to refer to broader types of behavior. *See, e.g.*, Note, *Naturalization and the Adjudication of Good Moral Character: An Exercise in Judicial Uncertainty*, 47 N.Y.U. L. REV. 545 (1972) (analyzing the meaning of "good moral character" in the context of naturalization law). On the ambiguity of the meaning of prostitution, the core of the genus in question, see *infra* text accompanying notes 53-69.

19. Although these statutes suggest a relationship between legal rules and larger notions of morality, this Article does not seek to intervene in either the age-old debate about the relationship between law and morals or in the current discussion about the state of morals regulation after *Lawrence*. *See, e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233 (2004); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1112-13 (2004). Instead, this Article explores how the language of sexual morality was interpreted by judges and lawmakers engaged in the particular project of defining the spheres of licit and illicit sex.

however, constitute the broader history of when, at different moments in the past, legal actors have attempted to resolve the core quandary that the Court confronted in *Lawrence*: how to draw an intelligible legal line between sexual licitness and illicitness against a messy backdrop of diverse social practices and noisy cultural commentary. Situating *Lawrence* in this historical context—when lawmakers contemplating the meaning of sexual licitness and illicitness were preoccupied with trafficking in women, not the rights of same-sex couples—clarifies that *Lawrence* is about not only the right of two men or two women to engage in particular erotic acts, but also the broader question of how and why the law privileges certain forms of sexual expression as markers of good citizenship while it denounces other forms of sexual expression as markers of criminality.[20]

I argue that the history of the enactment and interpretation of the "immoral purpose" provisions of the Immigration Act and the Mann Act suggests that the legal genus of illicit sex has been persistently constructed in relation to the archetypal legal site for licit sex: marriage. Through the construction and interpretation of these statutory provisions, legal actors first constructed and then dismantled an isomorphism between marriage/nonmarriage and licit sex/illicit sex. *Lawrence*, I argue, represents the final dismantling of this isomorphism. If, historically, marriage was the sine qua non of licit sex and nonmarriage necessarily marked sex as illicit, *Lawrence* turns that construct on its head by linking the licit nature of same-sex sex to its location outside of legal marriage.

It is, perhaps, unsurprising that marriage has played a pivotal role in the legal regulation of sex. American judges were not the first people to equate marriage and sexual licitness—this link had deep roots in Christian constructions of sexual morality that posited marriage as the site where lust was transformed into virtue.[21] To say that, historically, courts and lawmakers

20. As the Court notes in *Lawrence*, Texas's sodomy law, while "purport[ing] to do no more than prohibit a particular sexual act," 539 U.S. at 567, actually restricted what other countries already recognized as "an integral part of human freedom," *id*. at 576. On the role of sexual conduct in defining contemporary notions of citizenship, see LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP 1-10 (1997). Similarly, borders have been critical sites for defining citizenship—that is who is entitled to be a member of the polity. *See, e.g.*, Mary L. Dudziak & Leti Volpp, *Introduction: Legal Borderlands: Law and the Construction of American Borders*, 57 AM. Q. 593, 594 (2005). Situating *Lawrence* in the history of federal laws regulating national and state borders thus highlights the connections between the citizenship stakes of *Lawrence* and other legal sites where citizenship has been defined.

21. *See, e.g.*, JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 3 (1997). Early Christian doctrine had denounced even

did not reason philosophically about sexual immorality is not to imply that their legal views were not influenced by nonlegal philosophical approaches, particularly religious principles. Though marriage in the United States was a civil institution, Christian constructions of the relationship perpetually shaped legal views of marriage.[22] Legal actors' choice to use the language of morality to regulate sexual practices surely reflected their inherent comfort with the religious language of sexual classifications. Undoubtedly, in fact, they reasoned in a commonsensical, imprecise manner in these areas precisely because they were operating within a presumed shared, quasi-religious framework.

These inchoate religious underpinnings, however, did not determine the precise legal architecture that courts and legislatures would erect to regulate the specifics of licit sexual conduct and the doctrinal ramifications of illicit behavior in a system that professed a complete separation from religion. Thus, although the basic legal equation of marriage and sexual licitness, on the one hand, and nonmarriage and sexual illicitness, on the other, is hardly shocking, early-twentieth-century judges and lawmakers quickly confronted the complexities of building and maintaining such a simple typology within the law.

Indeed, the history of the legal meaning of "immoral purpose"—language taken from federal statutory provisions that, on their face, did not regulate marriage—reveals a fraught relationship between marriage and legally immoral sexual relationships and, thus, between the genera of licit and illicit sex.[23] On the one hand, through the enactment and interpretation of these acts regulating various forms of nonmarital intimacy, lawmakers and judges constructed marriage as both the antithesis of immoral sex and as a cure for legal immorality.[24] In this respect, the "marriage cure" held the potential to

"chaste" marital sex in favor of celibacy. *See* ROSEMARY RADFORD RUETHER, CHRISTIANITY AND THE MAKING OF THE MODERN FAMILY 45 (2000).

22. *See, e.g.*, NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 6 (2000); Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988). I am grateful to Nancy Cott for pushing me on this point.

23. On the intersections of federal law and family law, see, for example, Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998); Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175 (2000); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991); and Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

24. In this Article, in other words, I explore the meaning of marriage by examining the history of federal statutes that explicitly regulated other practices—immigration and interstate

transform a relationship from legally immoral to legally moral. If parties engaged in illicit sex became spouses, their sex was usually brought within the law's protective aegis. On the other hand, the history of the "immoral purpose" language in the 1907 Immigration Act and the 1910 White-Slave Traffic Act also reveals the perceived dangers of the powerful "marriage cure," dangers inherent in the ability of individuals engaged in illicit sexual practices to marry for the purely instrumental reason of evading legal penalties. The powers of marriage, in other words, created incentives for individuals to avail themselves of its cure. Lawmakers perceived such instrumental uses of marriage as a threat to marriage's proper status as the bedrock of the sociopolitical order and, thus, in both the immigration law and Mann Act contexts, judges and legislators ultimately restricted the reach of marriage's curative powers. In so doing, they depicted marriage not as a potent check on sexual immorality, but as a fragile institution capable of being hopelessly tainted by contact with immoral sexual practices. In the name of preserving marriage, therefore, certain relationships were deemed so corrosive of marriage that they lay beyond the reach of the powers of the marriage cure.

Throughout this history of the law's doctrine and language (rather than its enforcement), I start from the premise that—in the past and the present—legal notions of sexual illicitness shape people's intimate identities and their chosen forms of erotic expression, even if most people are never prosecuted for violating the law's regulations. As discussed below, judges certainly enforced the "immoral purpose" provisions of the 1907 Immigration Act and the 1910 Mann Act.[25] But most people—even those who violated the terms of these acts—evaded prosecution. Nonetheless, legal definitions of sexual illicitness exert powerful, albeit inchoate, forces that affect people's intimate lives. Some might alter their sexual relationships to avoid violating formal legal proscriptions, even those that are rarely, if ever, enforced.[26] Others might fear that their illicit behavior, even if never prosecuted, could affect other aspects of

movement of women. As I have argued elsewhere, lawmakers often defined marriage through laws that regulated the legal status of unmarried persons. In so doing, they adjudicated the legal rights of unmarried people by situating them in a relationship to marriage, a legal institution they had not chosen to enter. *See* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

25. On the history of the enforcement of the Mann Act, see DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT (1994).

26. *See, e.g.*, Doe v. Duling, 782 F.2d 1202 (4th Cir. 1986) (dismissing for lack of a case or controversy plaintiffs' claims that Virginia's unenforced fornication law had a chilling effect on plaintiffs' sex lives); Berg v. State, 100 P.3d 261 (Utah Ct. App. 2004) (dismissing on standing grounds a post-*Lawrence* challenge to the state's sodomy and fornication statutes).

their legal status.[27] Still others, even in the absence of any realistic fear of prosecution, might experience themselves as less-than-equal citizens if their intimate identities are expressed in practices that the law constructs as within the genus of illicit sex.[28]

The "immoral purpose" provisions of the 1907 Immigration Act and the 1910 White-Slave Traffic Act conjured into being the genus of illicit sex through laws that directly linked intimate behavior and citizenship insofar as they regulated people's movement across borders. The central sexual practice at the heart of these legal conversations was the perceived problem of trafficking in women, across both international and domestic borders.[29] This Article is

27. *See, e.g.*, S.B. v. L.W., 793 So. 2d 656, 663 (Miss. Ct. App. 2001) (Payne, J., concurring) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), as a reason to deny custody to a gay parent); *In re* Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987) (relying on *Bowers* to uphold the statutory ban on homosexual adoption).

28. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that same sex couples must be allowed to marry because the state constitution "forbids the creation of second-class citizens").

29. The legal history of these acts, then, necessarily intersects with the social history of the early-twentieth-century panic over the so-called white-slave trade, a topic that, in turn, implicates the history of the legal regulation of prostitution. My goal in this Article is not to enter the debate about how widespread the problem of the white-slave trade actually was. This was contested terrain in the early twentieth century. *See, e.g.*, White Slave Traffic: Presentment of the Additional Grand Jury for the January Term of the Court of General Sessions in the County of New York, in the Matter of the Investigation as to the Alleged Existence in the County of New York of an Organized Traffic in Women for Immoral Purposes (June 29, 1910), *reprinted in* O. EDWARD JANNEY, THE WHITE SLAVE TRAFFIC IN AMERICA 56, 61 (1911) ("We have found no evidence of the existence in the County of New York of any organization or organizations, incorporated or otherwise, engaged as such in the traffic in women for immoral purposes, nor have we found evidence of an organized traffic in women for immoral purposes."); *see also infra* Section I.C. (discussing the Dillingham Commission's report and its acknowledgment that there seemed to be no organized white-slave trade). Moreover, this question continues to engage historians and scholars concerned with whether early-twentieth-century reformers identified a true problem or stirred up an unfounded moral panic. *See, e.g.*, EDWARD J. BRISTOW, PROSTITUTION AND PREJUDICE: THE JEWISH FIGHT AGAINST WHITE SLAVERY 1870-1939 (1982); MARK THOMAS CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA (1980); FREDERICK K. GRITTNER, WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW 4 (1990); PAMELA HAAG, CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM 65-74 (1999); LANGUM, *supra* note 25, at 3; ROSEN, *supra* note 18, at 112-16. Nor is this Article about the social history of prostitution or the varied historical approaches to prostitution reform. *See, e.g.*, TIMOTHY J. GILFOYLE, CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790-1920 (1992); MARILYNN WOOD HILL, THEIR SISTERS' KEEPERS: PROSTITUTION IN NEW YORK CITY, 1830-1870 (1993); BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION (1987); JANNEY, *supra*; ROSEN, *supra* note 18; WILLOUGHBY CYRUS WATERMAN, PROSTITUTION AND ITS REPRESSION IN NEW YORK CITY, 1900-1931 (1932).

about the ways in which federal laws sought to regulate a particular form of sex in the early twentieth century by branding it immoral, and the repercussions of those laws for the legal regulation of multiple forms of nonmarital sexuality. Moreover, it is about how the legal regulation of prostitution merged with the legal regulation of other forms of nonmarital sex and created a legal space for federal judges and lawmakers to define and redefine the line between licit and illicit sex, as well as the shifting role played by marriage in policing the licit-illicit divide.

Legal conversations and changes, of course, shape and reflect larger historical contexts of evolving social, political, and cultural norms. Lawmakers added the "immoral purpose" language to federal immigration law in 1907. The Supreme Court decided *Lawrence v. Texas* almost a full century later in 2003. At multiple moments between 1907 and 2003, courts and lawmakers grappled with the meaning of illicit sex and its relationship to marriage. At each moment of legal intervention, the relevant judges and lawmakers confronted particular social and legal circumstances. Married life and nonmarital sex looked different to judges, and meant different things to them, in the 1910s than they did in the 1930s, or in the 1960s, or in 2003. So too did myriad other social and legal phenomena that, no doubt, interacted with judges' and lawmakers' views of the genus of immoral sex: for example, constructions of gender and race, and women's rights. Thus, although at any particular moment, judges and lawmakers clung to precedents defining the genus of illicit sex, they simultaneously interpreted and revised them within their particular historical context.

In Part I, I begin by analyzing the early legislative and judicial history of the sexual immorality language of the 1907 Immigration Act, and arguing that legal actors consistently proved unable to agree about precisely what acts fell within the genus of immoral sex and why they did. For instance, the history of the first "immoral purpose" case to reach the United States Supreme Court, *United States v. Bitty*,[30] reveals judicial disagreement about what made prostitution fundamentally immoral, as well as what other sexual practices were enough like prostitution to fall within the genus of illicit sex imagined by the federal lawmakers who enacted the Immigration Act. I contend that, from *Bitty* onward, although their conversations about preventing immoral sex were filled with language about protecting women, judges and lawmakers branded certain forms of sexual expression illicit when they thought those practices would threaten not particular women, but rather a particular model of the family centered on marriage. Within these discussions of immoral sex,

30. 208 U.S. 393 (1908).

marriage emerged not only as the antithesis of illicit sex, but as the cure for sexual illicitness.

Marriage's curative powers surely bolstered its formidable legal status, designating it the definitive marker of sexual licitness. But even as lawmakers and judges hailed marriage's powers in the context of defining "immoral purpose," they simultaneously perceived dangers to marriage inherent in the relationship between moral and immoral sex. In Part II, I argue that within the context of legal attacks on the white-slave trade, marriage's curative powers paradoxically threatened to reveal the inherent fragility of marriage. Thus, I argue that lawmakers and judges tried to check these dangers of the marriage cure through legislation, such as the White-Slave Traffic Act and later amendments to the 1907 Immigration Act. Counter to the initial jurisprudence on the meaning of "immoral purpose," their discussions reveal that marriage could not always cure sexual illicitness. Conversely, with its decision in *Hansen v. Haff* in 1934, the Supreme Court effectively conceded that not all sex outside of marriage carried an immoral purpose.[31] In the decades after the passage of the immoral purpose provisions, then, the ties between marriage and sexual licitness, on the one hand, and nonmarriage and sexual illicitness, on the other hand, had begun to fray.

In Part III, I analyze two later Supreme Court Mann Act cases and suggest that, over time, the Act's "immoral purpose" language forced the Court to confront the multiple potential meanings of marriage and, thus, the multiple potential relationships among marriage, licit sex, and illicit sex. First, in *Cleveland v. United States*,[32] the Court brought polygamy within the reach of the Mann Act despite the vociferous arguments offered by a Utah lawyer named Claude T. Barnes, the only previous commentator to offer a sustained interpretation of the meaning of "immoral purpose."[33] In *Cleveland*, the Court rejected the argument that polygamy could not be part of the genus of immorality because it was just a form of marriage, the core licit relationship. Next, in *Wyatt v. United States*, the Court at last made explicit what judges and lawmakers had long implied: Marriage itself, not any particular woman, was the victim of the illicit sexual practices proscribed by the Mann Act. Marriage, therefore, needed to be defended and, from this position of weakness and vulnerability, could offer no curative powers.

I conclude in Part IV by returning to the contemporary regulation of intimate behavior. I argue that through the immoral purpose provisions

31. 291 U.S. 559, 562 (1934).

32. 329 U.S. 14, 16-18 (1946).

33. CLAUDE T. BARNES, THE WHITE SLAVE ACT: HISTORY AND ANALYSIS OF ITS WORDS "OTHER IMMORAL PURPOSE" (1946).

lawmakers and judges first constructed and then dismantled an isomorphism between marriage/nonmarriage and licit/illicit sex, and that *Lawrence v. Texas* is the legacy of this process. *Lawrence*, in other words, is the legacy not only of the privacy jurisprudence of *Griswold v. Connecticut*, but also of the sexual morality jurisprudence of *United States v. Bitty*. Moreover, situating *Lawrence* in this historical context highlights the relationship between the case's holding and legal constructions of marriage. *Lawrence*, I argue, stands for the inversion of the marriage cure: the recognition of a sexual relationship as licit, not in spite of its nonmarital status, but (at least in part) because of its nonmarital status.

I. THE GENUS OF SEXUAL IMMORALITY AND THE MARRIAGE CURE

In 1875, Congress entered the business of regulating prostitution. It did so through immigration legislation aimed at keeping foreign prostitutes from crossing into the United States.[34] Responding, at least in large part, to the perception that Chinese women were coming to America to work as prostitutes,[35] the 1875 "Page Law," as it was known after its sponsor, Congressman Horace F. Page, addressed prostitution in two separate provisions. First, the Act forbade "the importation into the United States of women for the purposes of prostitution."[36] This provision further declared void all contracts in the service of prostitution and made it a felony knowingly and willfully to import, cause to be imported, or hold for the purpose of importation any woman for prostitution.[37] Second, in a later provision, the Act prohibited certain categories of people from immigrating to the United States, including women "imported for the purposes of prostitution."[38]

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34. *See* Act of Mar. 3, 1875, ch. 141, §§ 3, 5, 18 Stat. 477, 477.

35. *See* COTT, *supra* note 22, at 136; GEORGE ANTHONY PEFFER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION 8 (1999); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 695-715 (2005); Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882-1924*, 27 LAW & SOC. INQUIRY 271, 291 (2002). As Peffer argues, although more attention has been paid to the 1882 Exclusion Act, the Page Law "served as America's central anti-Chinese legislation for seven years. . . . Thus, before exclusion, the most effective legal barrier directed at Chinese immigrants focused on preventing women from coming to the United States." PEFFER, *supra*, at 8.

36. Act of Mar. 3, 1875, § 3.

37. *Id.*

38. *Id.* § 5. On earlier state provisions excluding persons perceived to be undesirable, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

In 1907, Congress amended these particular prostitution-related provisions to broaden their reach.[39] Once again, the 1907 Act responded, at least in part, to concerns about the entry into the United States of Chinese women to be prostitutes.[40] Unlike the Chinese Exclusion Acts, which had been passed since the Page Law, the supplemented anti-prostitution provisions of the 1907 Immigration Act were not, on their face, directed at Asians. Instead, the Act simply prohibited "women or girls coming into the United States for the purpose of prostitution or for any *other immoral purpose*."[41] Similarly, it forbade the importation of women for prostitution or other immoral purpose.[42] Any woman found in a house of prostitution within three years of her entry into the United States could be deported. In addition, the revised Act made it a felony to "keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any *other immoral purpose*, any alien woman or girl, within three years after she shall have entered the United States."[43]

Despite the dramatic, expansive language of these amendments, lawmakers offered little commentary on the meaning of the ambiguous "other immoral purpose" language. A House of Representatives report on the 1907 amendments tersely and opaquely explained only that the reach of the Act was being extended "in order effectively to prohibit undesirable practices alleged to have grown up."[44] Against this backdrop of virtual legislative silence, it fell to the Supreme Court in 1908 to interpret the scope of the "other immoral purpose" language of the Immigration Act. In *United States v. Bitty*, the Court did just that.[45] In so doing, the Court nimbly demonstrated how a law about which sexual practices would prevent people from crossing United States borders—a law deeply intertwined with concerns about Asian immigration—

39. *See* Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 898-99. The 1875 Act was also amended and expanded in 1891 and 1903. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 419-20 (1981). As Cott has observed, "[f]rom the 1890s through the 1920s there was hardly a session of Congress that did not debate restriction of immigration." COTT, *supra* note 22, at 140.

40. *See* Stevens, *supra* note 35, at 291.

41. Immigration Act of 1907, § 2 (emphasis added).

42. *Id.* § 3.

43. *Id.* (emphasis added). Notably, in 1907 Congress directly linked a woman's status in the American polity to her intimate identity by legislating that an American woman who married a foreigner took his nationality. *See* COTT, *supra* note 22, at 143. Lawmakers, in other words, found multiple ways to link a woman's sexual and familial identity—both in and out of marriage—with her status as a citizen.

44. AUGUSTUS GARDNER, IMMIGRATION OF ALIENS INTO THE UNITED STATES, H.R. REP. NO. 59-4558, at 19 (1906).

45. *See* United States v. Bitty, 208 U.S. 393, 401-03 (1908).

could quickly morph into a law about the role of marriage within the diverse polity defined by those borders.

A. Concubinage and Sexual Immorality

John Bitty was arrested as soon as the ship carrying him from England docked at New York City's harbor on August 4, 1907. Violet Sterling, a twenty-one-year-old English woman whose ticket identified her as Betty Bitty, was taken ashore as a witness.[46] When Bitty and Sterling were escorted off the ship, conflicting stories confounded authorities seeking to determine the nature of their relationship. According to James Cathon, another passenger on the steamer, as the ship approached New York, Sterling confided to him that she had left London with Bitty but now did not "trust herself with him ashore."[47] Sterling herself told police that she had met Bitty on a London street where she was wandering one day. After chatting, Bitty offered her a job in his cigarette factory. Although the job proved short-lived (because London authorities seized the factory's goods), Sterling claimed that Bitty subsequently asked her to escort him to America, promising her work upon their arrival.[48] Speaking through his attorney, however, Bitty told a different story. "The girl worked for me in London," he said. "[W]hen I started for New York she begged me not to leave her. I engaged passage for her as my niece, as I thought that would look better. I had taken a fatherly interest in her."[49]

Despite his tale of innocent, paternal concern, Bitty was arrested and charged with violating section three of the Immigration Act of 1907, which prohibited, among other things, "import[ing] or attempt[ing] to import, into the United States, any alien woman or girl for the purpose of prostitution or for any other immoral purpose."[50] No one alleged that Sterling was a prostitute. Instead, the indictment charged that Bitty had imported Sterling for an "immoral purpose," to wit: that "she shall live with him as his concubine."[51] Bitty demurred.[52]

Had Bitty violated the terms of the 1907 Immigration Act? He had certainly entered the United States with a woman, but was he bringing her across the

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46. *Greek Accused by Girl; Both Arrested*, CHI. DAILY TRIB., Aug. 5, 1907, at 5.

47. *Employer, Not Her Uncle*, N.Y. TIMES, Aug. 5, 1907, at 2.

48. *Girl and Her "Uncle" Held*, WASH. POST, Aug. 6, 1907, at 10.

49. *Id.* (internal quotation marks omitted).

50. Immigration Act of 1907, ch. 1134, § 3, 34 Stat. 898, 899.

51. Transcript of Record at 4, United States v. Bitty, 208 U.S. 393 (1908) (No. 503).

52. *See* United States v. Bitty, 155 F. 938, 938 (C.C.S.D.N.Y. 1907), *rev'd*, 208 U.S. 393 (1908).

border for an immoral purpose? The language of the indictment only complicated matters by naming his relationship as concubinage. Law enforcement authorities clearly assumed that concubinage was an immoral purpose within the meaning of the Act. But neither the indictment nor the text of the Act defined what made a woman a concubine. As Bitty's case traveled through the courts, it became clear that the meaning of concubinage and its relationship to the Immigration Act's definition of sexual immorality—a definition with prostitution at its core—were highly contested.

The trial court pondered these questions and dismissed the case against Bitty. "In plain language," Judge Charles M. Hough explained, a concubine was just a mistress. Thus, the indictment effectively charged Bitty with either "br[inging] his mistress into the United States, or . . . br[inging] here a woman who, so far as his desires go, shall be his mistress, if she is not already."[53] In other words, it accused him of entering the country with a woman, not his wife, with whom he had a real or potential sexual relationship. The task before Judge Hough, then, was to determine whether this was a practice enough like prostitution to locate it within the genus of immoral sex. The case thus compelled the court to define prostitution, as well as its relationship to concubinage.

Prostitution, Judge Hough observed, had two key components: indiscriminate sex and monetary exchange. Borrowing from an 1846 Massachusetts case, he defined prostitution as "'[t]he act of permitting illicit intercourse for hire—an indiscriminate intercourse, or what is deemed public prostitution.'"[54] Concubinage, by contrast, referred to a marriage-like relationship, albeit one that did not conform to the particulars of the law. A concubine, the judge explained, citing to no authority for what he apparently understood to be an obvious definition, "cohabit[s] with a man without ceremonial marriage, or consent and intent good at common law."[55] Marriage, as understood by the law (evidence of diverse social practices notwithstanding), involved neither indiscriminate sex nor financial exchange. Thus, the court concluded, "from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be included by general words in a statute directed against the latter unfortunate class."[56] Because an "immoral purpose" had to be like prostitution in order to fall within the Immigration Act, and because concubinage entailed uncommodified,

53. *Id.* at 939.

54. *Id.* (quoting Commonwealth v. Cook, 53 Mass. (12 Met.) 93, 97 (1846)).

55. *Id.* at 939-40.

56. *Id.* at 940.

nonmarital cohabitation, Bitty's importation of Sterling to be his concubine or mistress did not violate the Act's restrictions. Concubines, in other words, were different enough from prostitutes to fall outside of the genus of sexual immorality.

Although Judge Hough presented his conclusions as the product of shared and conventional social intuition, the very existence of the case before him—in which the parties disputed both whether Violet Sterling was a concubine and whether concubinage belonged in the same genus of sexual practices as prostitution—belied his tacit assertion of general consensus. In fact, lawyers and courts were never in agreement on the precise meaning of either concubinage[57] or prostitution.[58] On appeal before the United States Supreme

57. In the decades before Bitty's case entered the judicial system, a number of state courts of last appeal sought to clarify the meaning of concubinage and, in so doing, suggested that some dissent existed within the relevant legal communities about when a woman became a concubine. In one Missouri case, for instance, the lawyer for a man charged with taking a girl for concubinage argued that the term "means something more than an indulgence in one single act of sexual intercourse or cohabitation with another for the period of one single night only." State v. Feasel, 74 Mo. 524, 525 (1881). Concubinage, the lawyer posited, required "illicit intercourse with her for 'an indefinite or considerable length of time.'" *Id.* The court, however, rejected his contention, concluding that the defendant had taken the girl for concubinage if he had "cohabit[ed] with her as man and woman in sexual intercourse for any length of time, even for a single night, without the authority of legal marriage." *Id.*; *see also* Henderson v. People, 17 N.E. 68, 72 (Ill. 1888) (rejecting the argument "that any great length of time, or long-continued illicit intercourse, is necessary to the establishment of that relation which results in concubinage . . . . The relation which gives rise to the disreputable state of woman indicated by that term may, like that of marriage, be contracted or assumed in a day as easily as in a year."); State v. Bussey, 50 P. 891, 895 (Kan. 1897) ("When a man and woman not married agree to cohabit with each other as though the marriage relation existed between them, without fixing any limit as to the duration of the relation, she becomes his concubine as soon as cohabitation begins. As the trial court stated, a long-continued illicit intercourse is not necessary to constitute the relation of concubinage . . . ."); State v. Overstreet, 23 P. 572, 574-75 (Kan. 1890) ("We presume that the *gravamen* of the offense of concubinage is not simply living in the same house together, but having intercourse with each other, as man and wife, when there has been no legal marriage. . . . After one act of sexual commerce, the happiness and honor of the girl are destroyed; her character is gone; her reputation may be ruined."); People v. Cummons, 23 N.W. 215, 215 (Mich. 1885) (holding that the terms "concubinage" and "prostitution" in a statute "were evidently intended to cover all cases of lewd intercourse"); People v. Bristol, 23 Mich. 118, 127 (1871) ("The word 'concubinage' has no settled common-law meaning, and if we look at the derivation and the usage of etymologists, we shall find it to be a comprehensive term, covering any illicit intercourse.").

58. *See, e.g.*, Haygood v. State, 13 So. 325, 325 (Al. 1893) (overturning the defendant's conviction for enticing a girl for prostitution where the trial court had instructed the jury that the crime encompassed taking the girl away to have sex with another person, because, in the view of the appellate court, prostitution entails "common, indiscriminate sexual intercourse with men; or, at least . . . sexual intercourse by others than the party who thus entices her");

Court, Bitty's lawyers and the government waded into this ambiguous legal territory, sparring over this very question of the relationship among marriage, nonmarital sex, and prostitution.[59] In so doing, they quickly revealed both the terms concubinage and prostitution, as well as the relationship between them, as sites not of shared understanding but of social and legal dissensus.

Bitty's attorneys, eager to differentiate the prostitute from the concubine, stressed the difference between prostitution and other forms of nonmarital sex. The explicit exchange of money for sex, they insisted, marked that difference. Echoing the trial court, Bitty's lawyer argued that "[t]he term 'prostitute' necessarily implies the idea of a female who hires the use of her body for money, whereas the term 'mistress' implies the case of one who cohabits with a male without being married to him."[60] Bitty's brief conceded that a mistress's actions may be a form of sexual immorality. Nonetheless, his lawyer argued, most often "a man's mistress never receives any pecuniary consideration for her immoral acts."[61] Thus, if the question for the Court was what forms of sexual behavior were like prostitution, the brief concluded that "[t]here is a marked degree of difference between a prostitute and a mistress."[62] By contrast, the government's brief lumped together all "illicit sexual relations as immoral" and, thus, within the reach of the 1907 Immigration Act.[63] From a legal perspective, the government argued, "no distinction in kind is drawn between

Sisemore v. State, 204 S.W. 626 (Ark. 1918) (differentiating between nonmarital sex and prostitution, but acknowledging variations in courts' definitions); State v. Stoyell, 54 Me. 24, 27 (1866) ("A prostitute is a female given to indiscriminate lewdness for gain. In its most general sense, prostitution is the setting one's self to sale, or of devoting to infamous purposes what is in one's power. In its more restricted sense, it is the practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female."); State v. Brow, 15 A. 216, 216 (N.H. 1888) (rejecting as the incorrect definition of prostitution, without further explanation, the trial court's instruction to the jury that if the defendant had enticed away a girl "with the intent and for the purpose of maintaining and continuing unlawful sexual relations with her, for an indefinite period, and living with her in a condition of concubinage or criminal cohabitation, she was enticed away for purposes of prostitution"); People *ex rel.* Howey v. Warden of City Prison, 101 N.E. 167 (N.Y. 1913) (overturning the defendant's conviction for enticing a woman for prostitution because, counter to the view of the trial court, a "single act of intercourse" cannot constitute prostitution).

59. *See* Brief for the Defendant in Error at 3-5, United States v. Bitty, 208 U.S. 393 (1908) (No. 503) [hereinafter Defendant's Brief]; Brief for the United States at 9, *Bitty*, 208 U.S. 393 (No. 503).

60. Defendant's Brief, *supra* note 59, at 5.

61. *Id.*

62. *Id.*

63. Brief for the United States, *supra* note 59, at 9.

mere illicit cohabitation and prostitution. Both are immoral in the eye of the law; if they differ, it is merely in the *degree* of immorality."[64]

The Supreme Court embraced the government's arguments and overturned the district court's opinion. While Judge Hough had marked both indiscriminateness and monetary exchange as the indelible markers of prostitution—evils definitionally absent from a relationship between a man and his concubine or mistress—the Supreme Court offered a different account of what located prostitution at the core of the genus of immoral sex. Prostitution, Justice Harlan wrote, "refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men."[65] The monetary commodification of sex, then, was not necessary for a relationship to be one of prostitution. Instead, the Court offered an alternate account of the immoral nature of prostitutes' behavior. Prostitutes, according to the Court, threatened the critical sociolegal institution of the marriage-based family:

> The lives and example of such persons are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."[66]

Based on this revised interpretation of the immorality of prostitution, the Supreme Court offered a different account of the relationship between prostitution and other forms of nonmarital sex than the account offered by the trial court. The Supreme Court reasoned that living in a state of concubinage was, in fact, an immoral purpose "of the same general class or kind" as prostitution.[67] After all, if the core harm of prostitution was the threat that it posed to marriage, then all relationships that stood outside of marriage and threatened its position as the sole institution for sexual intimacy fell within the genus of sexual immorality.[68] Concubinage was a form of "illicit intercourse,

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64. *Id*. at 12.

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

66. *Id*. (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1884)).

67. *Id*. at 402.

68. For a different account of the conflict between marriage and prostitution, see COTT, *supra* note 22, at 136-37, which argues that prostitution was presumed to be coercive, thereby reinforcing that marriage was consensual.

not under the sanction of a valid or legal marriage."[69] Thus, as the Court explained:

> The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse.[70]

By bringing Violet Sterling into the United States to live with him outside of marriage, therefore, John Bitty had violated the Immigration Act of 1907.

B. The Marriage Cure

With its opinion in *Bitty*, the Supreme Court seized on the ambiguous "other immoral purpose" language of the 1907 Immigration Act to mark as illicit sexual relations that challenged the place of marriage in the social order—that is, relationships that made visible what any social observer knew: that marriage was not the sole model of sexual intimacy. The Court marked as illicit the broad category of sex outside of marriage. Women who were not wives and were in sexual relationships with men, the Court suggested, were enough like prostitutes to fall within the legal genus of sexual immorality and, thus, the reach of the "immoral purpose" language of the 1907 Act. John Bitty violated the relevant provision of the immigration law because he was not married to Violet Sterling when he brought her into the United States.

Through this explication of the immoral nature of prostitution in *Bitty*, the Supreme Court constructed a rather simple, isomorphic typology: Marital sex was licit, nonmarital sex was illicit. This scheme at once enshrined marital sex as the sole member of the genus of licit sex and also implied that marriage possessed a curative power that policed the illicit-licit line. If marital sex was, by definition, moral, then to cross the illicit-licit divide a couple simply had to marry. Had John Bitty and Violet Sterling been married, for example, Bitty would have harbored no immoral purpose akin to prostitution when he brought Sterling into the United States.

In this respect, the immigration law's construction of marriage and its curative powers echoed other contexts in which marriage transformed the legal status of sexual activities from illicit to licit. State fornication laws, for example,

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69. *Bitty*, 208 U.S. at 401.

70. *Id.* at 402.

criminalized sex outside of marriage.[71] Marriage rendered the very same sexual acts licit. In fact, at the time *Bitty* was decided, even the criminality of forced sex (or other forms of domestic violence) was cured by marriage.[72] Marital rape exemptions stipulated that sex between a husband and wife was, by definition, licit.[73] Marriage, in other words, was the core legal site for licit sex. In fact, sex—redefined as licit—was a fundamental part and an "Essential Obligation[]" of the legal institution of marriage.[74]

Marriage, to be sure, could not cure all forms of illicit sex or their adverse legal consequences. Some forms of illicit sex stood outside the reach of the marriage cure because state laws prohibited certain people from marrying each other. Thus, certain sexual partners could not avail themselves of marriage's legally transformative powers. Family members, for instance, could not cure the illicitness of their sexual unions through recourse to marriage.[75] Nor could same-sex couples.[76] Nor could minors.[77] Nor could sexual unions of more than two adults.[78] Nor could sexual unions involving an adult who was already married to someone else.[79] Nor, in the pre-*Loving v. Virginia* world, could interracial couples in states with laws prohibiting their legal unions. By excluding them from marriage and its curative powers, the law marked these sexual unions as indelibly illicit.

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71. *See, e.g.*, Doe v. Duling, 782 F.2d 1202, 1204 (4th Cir. 1986) (discussing Virginia's fornication law, enacted in 1819); Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 253 & n.1 (1978).

72. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

73. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1428-33 (2000).

74. Graham v. Graham, 33 F. Supp. 936, 938 (D. Mich. 1940) (quoting RESTATEMENT OF THE LAW OF CONTRACTS § 587 (1932)).

75. On incest regulation see, for example, Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right To Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262, 273-74 (2000).

76. *See, e.g.*, GEORGE CHAUNCEY, WHY MARRIAGE? 59-136 (2004); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 15-50 (1996).

77. *See, e.g.*, MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 105-08 (1985).

78. *See, e.g.*, SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002); *see also* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

79. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 81-84 (2d ed. 1997).

Moreover, a different type of limit on the marriage cure—albeit a very narrow one—marked some sex as illicit despite its marital nature. As a doctrinal matter, for example, many states' sodomy laws applied to acts of sodomy between married couples.[80] Specific sexual acts, therefore, could render illicit even intimate acts between a husband and a wife. In fact, in the pre-*Griswold v. Connecticut* era, state laws criminalizing the use of birth control by married couples effectively rendered illicit forms of nonprocreative sex—at least when its nonprocreative nature was marked by artificial contraceptives—even within a marriage. These laws, however, had little practical bite. As a practical matter, even before the development of a robust constitutional right to marital privacy, marriage protected a couple's intimate life from legal scrutiny.[81] As the Supreme Court suggested in *Bitty*, if a couple availed themselves of the marriage cure they altered their rights, not only within their private bedroom, but also at the country's public borders.

C. The White-Slave Trade and Sexual Immorality

Far from putting to rest the many questions about the relationship among prostitution, marriage, and other forms of nonmarital sexual intimacy, the Supreme Court's opinion in *United States v. Bitty* constituted just one voice within an emerging conversation among federal lawmakers on this topic. This conversation, focused on the problem of the so-called white-slave trade and the entry of women into the United States for immoral purposes, afforded lawmakers further opportunity to define the genus of illicit sex.

The same 1907 amendments to the 1875 Immigration Act that added the "immoral purpose" language to the Act's original prostitution restriction explicitly spurred this conversation among lawmakers by creating an Immigration Commission to "make full inquiry, examination, and investigation . . . into the subject of immigration."[82] Senator William P. Dillingham of Vermont chaired the Commission that, among other projects,

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80. *See, e.g.*, Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976) (rejecting a constitutional challenge, on marital privacy grounds, to the sodomy conviction of a woman for sexual acts with her husband and another man); State v. Schmit, 139 N.W.2d 800, 809 (Minn. 1966); State v. Nelson, 271 N.W. 114, 118 (Minn. 1937); *see also Sodomy*, *in* 2 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 1010 (Francis Rawle ed., 1897) ("It may be committed between two persons both of whom consent, even between husband and wife.").

81. As the Supreme Court notes in *Lawrence v. Texas*, historically, "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." 539 U.S. 558, 569 (2003); *see also* Poe v. Ullman, 367 U.S. 497 (1961) (dismissing as nonjusticiable a challenge to Connecticut's unenforced birth control law).

82. Immigration Act of 1907, ch. 1134, § 39, 34 Stat. 898.

undertook a comprehensive study of the entry of women into the United States as part of an international sex trade.[83] Based on extensive investigations using undercover agents, the Commission submitted a report to Congress on December 10, 1909, entitled *Importing Women for Immoral Purposes*.[84] Although the title of the report clearly borrowed the "immoral purpose" language of the 1907 immigration amendments, and although the report post-dated the *Bitty* opinion's interpretation of that language, the content of the report made perfectly clear that, in this context, "immoral purposes" had a particular meaning that was distinct from the Court's capacious understanding in *Bitty*. In the context of the 1909 report, "immoral purposes" referred not to nonmarital relationships, or to concubinage, or even to standard forms of prostitution. Instead, by "importing women for immoral purposes," the report meant to invoke the particular (although, as the report unwittingly revealed, ill-defined) phenomenon of white-slave trafficking.[85]

The report opened with the observation that white-slave trafficking was "the most pitiful and the most revolting phase of the immigration question."[86] Yet, against this backdrop of disgust and horror, the meaning and status of white slavery plagued the Commission. Contrary to "much talk in the newspapers," for example, the Commission candidly revealed that it had found no evidence of a single "great monopolistic corporation whose business it is to import and exploit these unfortunate women."[87] Nevertheless, the Commission found much evidence of trafficking in white women for sex, which it described in great detail.[88] These practices, the Commission argued, "ha[ve] brought into the country evils even worse than those of prostitution."[89] For this, the

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83. This was part of a larger conversation among observers and activists about the growing dangers and evils of white slavery. *See, e.g.*, JANNEY, *supra* note 29, at 13-34.

84. *See* U.S. IMMIGRATION COMM'N, IMPORTING WOMEN FOR IMMORAL PURPOSES: A PARTIAL REPORT FROM THE IMMIGRATION COMMISSION ON THE IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES, S. DOC. NO. 61-196 (1909) [hereinafter IMPORTING WOMEN FOR IMMORAL PURPOSES].

85. *Cf.* GRITTNER, *supra* note 29, at 3 (stating that "*white slavery* came to mean the forced prostitution of white women and girls by trick, narcotics, and coercion"). On the deeper historical roots of this term, see *id*. at 15-57. On the indeterminacy of the term itself, see HAAG, *supra* note 29, at 63. *See also* JANNEY, *supra* note 29, at 56 (reprinting the report of the New York City grand jury on white-slave traffic and quoting the judge's charge to the grand jury, reprinted in the grand jury's report, which identifies its subject as the "organized traffic in women for immoral purposes, or what has come to be known as the white slave traffic").

86. IMPORTING WOMEN FOR IMMORAL PURPOSES, *supra* note 84, at 3.

87. *Id*. at 23.

88. *Id*. at 25.

89. *Id*. at 10.

Commission blamed degenerating European norms, which the report targeted as the origins of the sex trade in America. "[C]onditions of vice" in Europe, the Commission reported, had "lowered the standard of degradation of prostitution."[90] In Europe, "[u]nnatural practices" flourished—practices that were being exported to America through trafficking in women.[91]

Even as the Commission's report insisted that the white-slave trade was a pressing problem, the report implicitly grappled with how to identify the core immorality of the phenomenon. Much as the judges in *Bitty* had toiled to identify the immoral core of prostitution in order to define its legal reach and genus, so too did the Commission squirm and struggle to identify with precision the proposition that it wanted to seem perfectly obvious: the basic evil of the white-slave trade. Perhaps it was deception. Indeed, the Commission's investigators discovered some women who had been lured into the country under false pretenses only to find themselves prostituted.[92] Or perhaps it was coercion: After all, this was, allegedly, a form of slavery, and investigators found some evidence of particular women who were forced to remain in prostitution against their will.[93]

The Commission itself, however, had to concede that deception and coercion—the salacious stuff of horrific media reports—could not provide a compelling and accurate account of the harms of white slavery. In fact, the report stated with candor that

> [t]o guard against the sensational beliefs that are becoming prevalent, it is best to repeat that the agents of this Commission have not learned that all or even the majority of the alien women and girls practicing prostitution in the United States in violation of the immigration act were forced or deceived into the life.[94]

Moreover, the report conceded that, given the economic conditions many of these women faced in Europe, their importation into the United States for prostitution potentially provided "the opportunity for higher gains, a higher economic standard of living, an opportunity for travel, and the interest of a new environment, and perhaps at times a hope of a real betterment of

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90. *Id.*

91. *Id.* at 10. On the role that images of European vice played in discussions of white slavery, see GRITTNER, *supra* note 29, at 4.

92. *See* IMPORTING WOMEN FOR IMMORAL PURPOSES, *supra* note 84, at 14-16.

93. *See id.* at 25.

94. *Id.* at 31; *see also* COTT, *supra* note 22, at 146-47 (describing investigations that revealed that women were not deceived when brought to the United States for prostitution).

conditions."[95] In other words, many women might rationally have concluded that they would benefit economically and, ultimately, socially from coming to America, even as sex workers. And they may very well have been correct.

If many of the individual women involved (the alleged victims of the trade) were not demonstrably injured through the white-slave trade, however, the Commission nonetheless identified a fundamental harm inflicted by white slavery. As the Commission reported:

> This traffic has intensified all the evils of prostitution which, per-haps more than any other cause, through the infection of innocent wives and children by dissipated husbands and through the mental anguish and moral indignation aroused by marital unfaithfulness, has done more to ruin homes than any other single cause.[96]

In other words, much as the *Bitty* Court explained the harm that linked the immorality of prostitution and concubinage, one harm of the white-slave trade—whose participants acted with another "immoral purpose"—was that it allegedly undermined marriage and the traditional family with the married couple at its core. Just a year after *Bitty*, then, the Dillingham Commission's report reinforced a sharp dichotomy between the genus of immoral sex and the genus of marriage. Even in the absence of coercion or deception, the relationships within the so-called white-slave trade contravened legal notions of sexual morality, at least in part because they threatened the institution of marriage.

II. MARRIAGE AND IMMORAL SEX: THE POWERS AND DANGERS OF THE MARRIAGE CURE

A. Illicit Sex as a Threat to Marriage

As lawmakers focused on abolishing the white-slave trade, their investigations forced them to confront a more complicated relationship between marriage and immoral sex—one in which the line between licit and illicit sex was not always perfectly clear, and in which marriage was both powerful and vulnerable in the face of sexual immoralities. The Dillingham Commission's analysis of the dangers of white-slave traffic already gestured at this more complicated relationship between marriage and immoral sex. Even as its observations preserved marriage as the vessel for crossing the illicit-licit

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95. IMPORTING WOMEN FOR IMMORAL PURPOSES, *supra* note 84, at 7.

96. *Id.* at 10.

divide, its account of the harm of the white-slave trade simultaneously suggested that illicit sex loomed as a threat to the core licit sexual institution of marriage. After all, marriage might possess the legal power to cure sexual immoralities, but—by the Commission's own account—marriages could likewise be destroyed by the harmful and corrupting influences of sexually immoral practices like the white-slave trade.

Marriage, in other words, was not omnipotent. The marital bond was not always strong enough to prevent husbands from succumbing to the temptations of immoral sex, thereby destroying their families. "[D]issipated husbands," their reprehensible ways not reformed by marriage, could be corrupted by the powers of illicit sex. The Dillingham Commission's report thus painted marriage as at once powerful and fragile. On the one hand, as the antithesis of immoral sex, marriage could expunge the illicit nature of nonmarital practices. On the other hand, those very same practices could, instead, prompt marital unfaithfulness and, in fact, the dissolution of marital homes. If marriage was the potential cure for illicit sex, illicit sex was a potential threat to marriage.

Investigations of white-slave traffic suggested not only that the influence between the genus of moral sex and the genus of immoral sex might go in both directions, but also that the boundary between these genera—a boundary allegedly policed by marriage—might be less clearly defined than judges and lawmakers wished to imagine. In the course of their efforts to identify people entering the country for immoral purposes, immigration officials unwittingly revealed both the fragility of the line between the genera of moral and immoral sex, and the dangers inherent in marriage's curative powers. The Dillingham Commission report, for example, noted how difficult it was for immigration officials to enforce the immigration laws designed to prohibit the entry of immoral women because inspectors had no weapons at their disposal other than their ability to judge women at ports of entry "mainly by their appearance and the stories they tell."[97] Discerning immoral women proved to be a surprisingly tricky business.[98] One inspector "stopped by mistake the wife of a prominent citizen of one of our leading commercial cities. . . . The inspector was judging merely by her appearance and manner . . . ."[99] Alarmingly, then, as they sought to define the meaning of "immoral purpose" on the ground,

97. *Id.* at 19.

98. Lawmakers and judges confronted this ambiguity in other settings as well. On the indeterminacy of what patterns of behavior suggested that a woman was a wife, see Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000).

99. IMPORTING WOMEN FOR IMMORAL PURPOSES, *supra* note 84, at 19.

inspectors confronted the confusing reality that wives and prostitutes did not necessarily look or act differently from one another.[100]

Worse still, the investigations reported by Dillingham's Commission suggested that the legal line between the immoral woman and the moral wife might be too easy to cross. Herein lay a fundamental problem rooted in the curative power of marriage. Marriage's power to cure illicit sex constituted its unique sociolegal position as the vehicle for crossing the illicit-licit divide. As investigators discovered, though, if marriage was the antidote to sexual illicitness, it was an antidote that could be easily manipulated by those in need of its curative powers. In fact, the Dillingham Commission's report suggested that participants in the white-slave trade fully grasped the immense power of the marriage cure and transformed marriage—allegedly the hallowed bedrock of the social order—into a crass tool to evade legal prosecution. Investigators charged that, rather than face prosecution under the Immigration Act's immoral purpose provision, couples married. In so doing, they used marriage instrumentally to cross from the genus of immoral sex to the genus of moral sex. Although historians have suggested that very few prostitutes actually married men to escape deportation, many lawmakers perceived the availability of the curative power of marriage as a vexing problem for the law enforcement officials charged with enforcing the 1907 Immigration Act.

One detective in the New York City police department, for example, recounted a conversation he had with a non-American woman who was arrested for entering the United States for an immoral purpose. Mary Doe, as he called her, was found guilty of entering for an immoral purpose and was ordered to be deported. Authorities, however, kept her in the country to serve as a witness in a case against a man charged with harboring prostitutes. While she was waiting to testify, an American man—called Richard Roe in the detective's account—married her. In so doing, he granted her American citizenship, and she was released from legal custody to the custody of her husband.

100. These inspectors were not the first people to realize that the line between wives and prostitutes might be an uncomfortably blurry one. Before Judge Hough and Justice Harlan sparred over the meaning of prostitution, woman's rights activists in the late nineteenth century, critical of coverture and traditional constructions of marriage, had pointed out that the husband-wife relationship often bore a striking resemblance to prostitution. Much like prostitutes, these early feminists argued, wives often exchanged sex for support. Marriage, then, was just a form of "legalized prostitution." *See* Hasday, *supra* note 73, at 1427-33. If woman's rights activists relished the critical bite of this analogy, early-twentieth-century immigration inspectors certainly did not. Confusing a wife for an immoral woman undermined their authority, as well as their confidence in their mission.

Mary candidly explained to the detective her situation:

> "Don't you know what he wanted from me . . . ? Don't you know that he had another girl in his house . . . and when we got there he introduced me to her (an old prostitute named Laura) and told me she was his wife, but that I would stay with them and that we both would make good money by both hustling from his house?"[101]

Mary then made explicit the nature of her marriage: "Of course you know," she told the detective, "that if I married that fellow Roe, it was only to beat deportation and be safe forever as I am now an American citizen."[102] This was not the normative model of marriage that lawmakers embraced. This relationship, after all, was not a compelling account of the genus of licit sex. In fact, it suggested that a marital relationship could be used for illicit purposes.

The same New York City detective also recounted his conversation with a woman he called Jane Doe, another non-American arrested for entering the country for immoral purposes. She too was ordered deported but held to serve as a witness in a pending case. She too married an American citizen—in this case, an immigration official who, in her words, "got 'dead stuck' on me, because I appeared to be a nice girl . . . . I know how to behave, when necessary."[103] Displaying her marriage certificate to the detective, Jane explained that her new husband had moved to Texas, but she had stayed in New York. "I couldn't live with that man," she stated. "[H]e isn't making enough money. I don't want to go into the dressmaking business and earn $8 or $9 a week when I can make that every day on Broadway."[104] The detective closed his affidavit with the observation that "[a]lmost every night I see the said Jane Doe (now Mrs. Doe) soliciting on Broadway and taking men to hotels in that vicinity."[105] Again, then, the Commission confronted evidence that the legal formalities of marriage did not necessarily create the enduring families or the conventional, committed marriages that judges and lawmakers imagined when they contrasted the genus of sexual immorality with the morality of marriage. Perhaps marriage did not always transport an individual's actions across the illicit-licit line.

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101. IMPORTING WOMEN FOR IMMORAL PURPOSES, *supra* note 84, at 45 app. IV-B (reproducing affidavits from a report of the New York Commissioner of Police).

102. *Id.*

103. *Id.* at 45.

104. *Id.* at 46.

105. *Id.* at 46.

Moreover, as the detective's cases depicted, if marriage's curative powers could not always expunge the immoral taint of certain sexual relationships, marriage nonetheless retained the power of conferring citizenship. Whether or not their motives were pure, when an American man married a foreign woman eligible for citizenship, he made her an American citizen (who thus could not be deported).[106] In most contexts this link between marriage and citizenship was thought to bolster the moral foundations of the social order; marriages and families, after all, created good citizens.[107] If men were marrying immoral women and granting them citizenship, however, the link between marriage and citizenship created a grave threat to the social order: With the aid of American men, the wrong women, it seemed, might become citizens.

This was certainly not an entirely novel fear. The 1855 federal statute that had first allowed American men to pass their citizenship on to their wives had stipulated that "any woman who might lawfully be naturalized under the existing laws" could take on her husband's American citizenship.[108] Until Reconstruction, this meant that, because blacks could not be naturalized citizens, black women could not become citizens through marriage.[109] Until the 1940s, Asians could not become naturalized citizens and, thus, Asian women could not become citizens by marrying American men.[110] Even though lawmakers had long linked marriage and citizenship, they had also long recognized that marriage should not be a route to citizenship for women thought to be undesirable as members of the polity. As lawmakers contemplated the immoral purpose provisions of the 1907 Immigration Act, however, they feared that the naturalization requirements did not sufficiently protect the polity from immoral women.

Therefore, even as the Dillingham Commission was preparing its report, the Secretary of Commerce and Labor asked Attorney General George W. Wickersham to issue an advisory opinion on whether marriage to an American man (and, thus, the acquisition of United States citizenship) necessarily

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106. *See* COTT, *supra* note 22, at 143.

107. *See id.* at 142-43.

108. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604; Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 POL. & SOC'Y 1 (1984).

109. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 42-43 (1996). In 1790, Congress limited naturalization to "any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years." Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103.

110. *See* Low Wah Suey v. Backus, 225 U.S. 460 (1912); Kelly v. Owen, 74 U.S. (7 Wall.) 496 (1868); Stevens, *supra* note 35, at 286-88.

precluded the deportation of a woman who had entered the country in violation of the 1907 Immigration Act's immoral purpose provisions. The Attorney General advised that once a non-American woman eligible for citizenship married an American man, she necessarily became a citizen. "Of course," he noted, if the marriage was "entered into merely for the purpose of evading the immigration laws and with no intention on the part of the parties to live together as man and wife," then "a different question would be presented."[111] If no fraud was involved, however, then the mere fact of a woman's sexual immorality did not preclude her becoming a citizen. "It may be argued with some force," Attorney General Wickersham conceded, "that Congress could not have intended . . . to confer citizenship upon alien women of immoral character, in view of the fact that the naturalization laws have always required an applicant for citizenship to be of good moral character."[112]

Acknowledging this argument, however, Wickersham clung to a strong version of the marriage cure. Congress, he opined, could very well have "considered the fact that a woman was married to a citizen of the United States as indicative of her good character, whatever she may have been previous to her marriage."[113] After all, Wickersham observed, "character is not immutable, and while acts of prostitution are indicative of bad character, the entering of a prostitute into the lawful state of matrimony indicates a reformation and present good character, which it is the duty of society to encourage."[114] Marriage, in other words, cured a woman's character insofar as that character was linked to sexual immoralities, rendering her fit to participate in the polity.

Although this view bolstered the power of marriage, law enforcement officials, including the Commissioner-General of Immigration, nonetheless believed it impeded their efforts to crush the white-slave trade. Pursuant to a 1904 international treaty for the repression of the trade in white women, which the United States ratified in 1905, the Commissioner-General of Immigration was designated the official who represented the United States in this international effort.[115] On January 31, 1910, in response to a request from the Senate for information regarding "what action, if any, has been taken, under the treaty ratified . . . for repression of the trade in white women," President Taft sent the Senate Committee on Immigration a report by Commissioner-General Daniel J. Keefe pointing explicitly to the dangers of the marriage cure.

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111. Alien Woman Married to An American Citizen, 27 Op. Att'y Gen. 507, 520 (1909).

112. *Id.* at 515.

113. *Id.* at 516.

114. *Id.* at 519.

115. *See* International Agreement for the Suppression of the "White Slave Traffic" art. 1, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

"One of the great difficulties encountered in the deportation of alien prostitutes," Keefe reported, "has been the contraction of marriages to citizens of the United States as soon as warrant proceedings have been instituted."[116] Or as another observer of the white-slavery phenomenon noted, "[i]n the mind of the trafficker there is no sanctity attached to marriage. . . . [I]nstances are known where men have legally married women only to force them into an immoral life in order to collect money from them. The lax marriage laws of the States facilitate such a proceeding . . . ."[117]

B. From International to Interstate Borders

Faced with the inability of immigration officials to enforce the 1907 Immigration Act with sufficient vigor to stamp out the perceived problem of the white-slave trade, the Dillingham Commission recommended a series of policy changes with respect to enforcement of the immigration laws.[118] In addition, the Commission proposed that new laws be added to the arsenal for the fight against white slavery. To this end, the report advised states to enact more stringent laws against prostitution.[119] Moreover, it advised federal lawmakers that "[t]he transportation of persons from any State, Territory, or District to another for the purposes of prostitution should be forbidden under heavy penalties."[120]

Federal lawmakers swiftly seized upon this suggestion. On December 21, 1909, Congressman James R. Mann of Chicago, Chairman of the House Committee on Interstate and Foreign Commerce, introduced a bill to combat "white slave traffic."[121] Passed the next year, the Mann Act (as it would become known) neatly bridged concerns about the movement of women across both international and interstate borders. It proposed to criminalize a range of behaviors that were thought to contribute to the movement of women for white slavery. In terms of interstate borders, section two of the Act prohibited transporting or aiding in the transportation in interstate or foreign commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any

116. SUPPRESSION OF THE WHITE-SLAVE TRAFFIC: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. DOC. NO. 61-214, pt. 2, at 10 (1910) (requiring each signatory to establish an "authority who will be directed to centralize all information . . . [and] correspond directly" with other signatory nations' designated authorities); *see also* COTT, *supra* note 22, at 147.

117. JANNEY, *supra* note 29, at 24-25; *see also* Stevens, *supra* note 35, at 292.

118. *See* IMPORTING WOMEN FOR IMMORAL PURPOSES, *supra* note 84, at 33-34.

119. *See id*. at 38.

120. *Id.* at 36.

121. WHITE SLAVE TRAFFIC, H.R. REP. NO. 61-47 (1909).

other immoral purpose."[122] Moreover, it specifically prohibited procuring or aiding in the procurement of any transportation tickets to be used to transport any woman or girl in interstate or foreign commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose."[123] In another section, the Act made it a felony to "knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing" any female to move in interstate or foreign commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose."[124] This provision stated explicitly that such actions were illegal regardless of whether or not the woman's consent was obtained. Section six of the Act turned its attention away from interstate movement of women and back to the more traditional concerns of immigration law: "regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery."[125] This provision designated the Commissioner-General of Immigration as the official authority to receive information on "the procuration of alien women and girls with a view to their debauchery."[126]

The question of Congress's power to pass the White-Slave Traffic Act once again pushed lawmakers to define the exact nature of the amorphous problem of illicit sex—that is, the genus of sexual immorality. Defenders of Mann's bill pointed to Congress's treaty power pursuant to an international agreement on suppressing white-slave traffic as congressional authority for the provisions of the bill regulating the entry of women into this country.[127] The remainder of the bill, however, generated substantial controversy over its constitutionality under Congress's power to regulate interstate commerce.[128] After all, the legal regulation of prostitution was the proper province of the states—a core example of states' police power. Thus, the introduction of the White-Slave Traffic Act spurred lawmakers to define with precision what exactly—if not prostitution per se—they sought to regulate through this federal law and why they had the power to do so.

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122. White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, §2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)).

123. *Id.*

124. *Id.* § 3.

125. *Id.* § 6.

126. *Id.*

127. *See* WHITE SLAVE TRAFFIC, S. REP. NO. 61-886, at 2 (1910).

128. *See id.* at 7-10.

Mann's report to the House of Representatives attempted to distinguish white-slave traffic from garden-variety prostitution in order to convince lawmakers that his proposed legislation in no way interfered with the states' traditional police powers. To this end, the opening section of Mann's report made clear that his bill did "not endeavor to regulate, prohibit, or punish, prostitution or the keeping of places where prostitution is indulged in."[129] Later, it further refined its focus, with every step honing in on a more precise account of what constituted the core regulable features of white slavery. The legislation, Mann's report stated, was "not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general," nor was it intended to regulate "voluntary prostitution."[130] In contrast to these practices, Mann pointed to lack of consent as the core evil of white slavery: "The characteristic which distinguishes 'the white-slave trade' from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution."[131] Thus, the report stated, "[t]he term 'white slave' includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude."[132] Moreover, like the Court in *Bitty* and the Dillingham report, Mann described the illicit sexual practices in question as a threat to marriage and its place in the polity. The report noted that the victims of the white-slave trade "are those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens."[133] The white-slave trade, in other words, robbed women of the opportunity to participate in the traditional family.

A minority report from the House Committee on Interstate and Foreign Commerce, however, argued that Congress had no power to pass Mann's bill. Congressman William Richardson, author of the minority report, argued that Congress should remain in the business of regulating immigration and leave the regulation of prostitution to the states.[134] Moreover, defending states'

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129. WHITE SLAVE TRAFFIC, H.R. REP. NO. 61-47, at 1 (1909).

130. *Id.* at 9-10.

131. *Id.* at 10.

132. *Id.*

133. *Id.* at 11.

134. *Id.* pt. 2. This debate only highlighted the fraught relationship between the Mann Act and more traditional forms of immigration law—a debate most visible in the conflict between Congressman Mann of the Interstate Commerce Committee and Congressman Howell of the Immigration Committee, whose committee had the proper authority to address the problem of white slavery. One day before Mann's committee reported out its White-Slavery

rights on the floor of the House, Congressman Richardson opposed Mann's bill and specifically pointed to the dangerous ambiguity of a federal law regulating anything as ill-defined as "immoral purposes." "What is the commerce here in this bill?" Richardson asked. He continued:

> Does he say that anybody is to receive that woman? Simply the vague, indefinite statement that she is going to start from a place in one State and is going to another for immoral purposes. Immoral purpose? There are a great many good and benevolent people in this country that think that horse racing is immoral and that chicken fighting is immoral. There are a great many people who believe that. How are you going to define immoral purposes under this bill? They are vague and indefinite. There is nothing tangible in such a declaration.[135]

C. Immoral Purposes Under the Mann Act

Throughout this conversation, lawmakers linked Mann's bill to the 1907 Immigration Act as enacting a single, common project—albeit with distinct sources of congressional power. And just as the drafters of the Mann Act borrowed the "immoral purpose" language from the 1907 Immigration Act, Mann's opponents borrowed from the Supreme Court's jurisprudence on the Immigration Act to bolster their arguments, citing the 1909 case of *Keller v. United States*.[136] In *Keller*,[137] the Court struck down as unconstitutional a

Act, Howell reported out a competing immigration bill also targeting white slavery. *See Second White Slave Bill*, N.Y. TIMES, Dec. 19, 1909, at 3. Congressional debates about Howell's proposed immigration law, which—like Mann's bill—proposed to criminalize the interstate transportation of women for prostitution and immoral purposes, highlighted the blurry line between immigration and domestic policies. As Congressman Bennet acknowledged, "That provision, of course, is not strictly an immigration provision. It relates to citizens as well as aliens. It was put in the bill in order to make the provision relating to the deportation and punishment of people engaged in this nefarious business complete." 45 CONG. REC. 517-18 (1910).

135. 45 CONG. REC. 527 (1910). Courts too struggled with the ambiguity of the "immoral purpose" language. *See, e.g.*, United States v. Hobbs, 287 F. 157 (S.D. Fla. 1923) (holding that the inclusion of "or other immoral purposes" was surplusage in an indictment under the Mann Act); People v. Rogers, 170 N.Y.S. 825, 826 (App. Div. 1918) (interpreting a New York law that criminalized inducing a woman for an immoral purpose and holding that "[t]he statute has been bunglingly drawn, and if the statute cannot be interpreted to define by a clear statement the crime intended to be specified, the statute itself can furnish no basis for any prosecution").

136. WHITE SLAVE TRADE, H.R. REP. NO. 61-47, pt. 2, at 4 (1909).

137. 213 U.S. 138 (1909).

provision of the 1907 Immigration Act that made it a felony to "keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States . . . ."[138] While acknowledging that such behavior was "offensive to the moral sense," the Court held that its regulation was solely the province of the states.[139] While Congress, under its immigration powers, could deport a prostitute because of her illicit sexual behavior, its constitutional power did not extend to those whose actions furthered her illicit acts.[140] So too, opponents of the Mann Act reasoned, Congress could certainly regulate the entry of people into the United States, but it lacked the power to regulate illicit sex within the country's borders.

Despite these concerns about its constitutionality, the White-Slave Traffic Act became law on June 25, 1910.[141] Three years after its passage, the Supreme Court vindicated the Act's defenders by holding the Act constitutional as a valid exercise of congressional power. No doubt, the Court reasoned in *Hoke v. United States*, the states, not the federal government, had the power to regulate prostitution that occurred within their borders.[142] Under its commerce power, however, Congress had the power to regulate the movement across state borders "of persons as well as of property."[143] Thus, just as Congress could regulate lottery traffic across state borders—as the Court had recently held in *Champion v. Ames*[144]—so too could it combat the problem not of prostitution per se, but of "the systematic enticement to and enslavement in prostitution and debauchery of women, and, more insistently, of girls."[145]

Initially, then, the Supreme Court's interpretation of the Mann Act and its differentiation between prostitution and white slavery seemed to limit the amorphous immoral purpose language borrowed from the 1907 Immigration Act. *Hoke* certainly suggested that, consistent with Mann's claims before Congress, the White-Slave Traffic Act's language of "prostitution, debauchery,

138. *Id.* at 139 (quoting Immigration Act of 1907, ch. 1134, § 3, 34 Stat. 898, 899).

139. *Id.* at 144.

140. *See id.* at 148.

141. *See* White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)).

142. Hoke v. United States, 227 U.S. 308, 321 (1913) ("There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime.").

143. *Id.* at 320.

144. 188 U.S. 321, 353-64 (1903).

145. *Hoke*, 227 U.S. at 322.

or other immoral purposes" targeted the particular problem of the trafficking in women for sex, a problem rooted in systematic coercion.

On the same day that the Supreme Court handed down *Hoke*, though, it also handed down *Athanasaw v. United States*, a case that, like *Bitty* in the context of the Immigration Act, highlighted the judicial leeway inherent in the Mann Act's ambiguous language and the ill-defined genus of illicit sex. Louis Athanasaw and Mitchell Sampson were convicted of transporting Agnes Crouch across state lines "for the purpose of debauchery."[146] They had provided transportation for Crouch to come from Georgia to work as a chorus girl in their theater in Florida. Upon her arrival, Crouch was shocked by her surroundings. Everyone at the theater, she recalled, was "smoking, cursing, and using such language I couldn't eat."[147] Furthermore, she alleged, Athanasaw "kissed and caressed" her and told her to "be his girl."[148] Crouch expressed her fear and dismay to one of the "boys" at the theater, who called the police on her behalf.[149]

At trial, the defendants argued that the "debauchery" language of the Mann Act could reach only behavior involving sex, which their behavior (however unsavory to the court's palate) did not. The trial court rejected this contention. The judge instructed the jury that "[t]he term debauchery, as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually or tends to lead to sexual immorality."[150] The question for the jury, then, was "whether or not the influences in which this girl was surrounded . . . did not tend to induce her to give herself up to a condition of debauchery which eventually, necessarily and naturally would lead to a course of immorality sexually."[151] The jury convicted.

Faced with the defendants' challenge on appeal, the Supreme Court held that the trial court's instructions were not given in error. The Mann Act, the Court held, could reach the case of Agnes Crouch because, although she had not engaged in sexual acts with the defendants, "the employment to which she was enticed was an efficient school of debauchery of the special immorality which . . . the statute was designed to cover."[152] No one suggested that this school of immorality was under the aegis of the white-slave trade. Agnes

146. Athanasaw v. United States, 227 U.S. 326, 328 (1913).

147. *Id.* at 329.

148. *Id.*

149. *Id.*

150. *Id.* at 331.

151. *Id.*

152. *Id.* at 333.

Crouch, however unfortunate her circumstances, was nobody's slave. Thus, in the hands of the Supreme Court, the genus of immoral sex defined by the White-Slave Act—like the genus of immoral sex defined by the Immigration Act—began to expand.

And, in fact, only a few years later, the Supreme Court stretched the borders of the genus of illicit sex, as defined by the immoral purpose language of the Mann Act, even further in *Caminetti v. United States*.[153] The defendants in *Caminetti*, like John Bitty, were convicted for transporting women for immoral purposes, to wit: that the women would be their mistresses and concubines.[154] On appeal, the defendants contended that the Mann Act was only intended to reach "'commercialized vice,' or the traffic in women for gain."[155] The Supreme Court rejected this argument. To say that transporting a woman to be one's mistress or concubine was not an immoral purpose, the Court reasoned, "would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations."[156] With this, the Court quoted at length from its opinion in *United States v. Bitty*, interpreting not the Mann Act but the 1907 Immigration Act. Because *Bitty*'s definition of immoral purpose, which included concubinage, pre-dated the Mann Act, the Court concluded, it "must be presumed to have been known to Congress when it enacted the law here involved."[157] Even though the Act was titled the White-Slave Traffic Act, therefore, its language clearly included this broader swath of immoral sexual behavior.[158]

In dissent, Justice McKenna rejected this broad definition of immoral purpose. "'Immoral,'" he noted, "is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order."[159] In the context of the Mann Act, however, it had to be limited by the purpose of the statute—to prevent white-slave traffic. In this context, Justice McKenna argued, the phrase was limited to "commercialized vice, [and] immoralities having a mercenary purpose."[160] "In other words," he contended, "it is vice as a business at which the law is

153. 242 U.S. 470 (1917).

154. On *Caminetti*, see LANGUM, *supra* note 25, at 97-118. *See also* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 42-47 (1949).

155. 242 U.S. at 484-85.

156. *Id.* at 486.

157. *Id.* at 488.

158. *See id.* at 489.

159. *Id.* at 497 (McKenna, J., dissenting).

160. *Id.*

directed, using interstate commerce as a facility to procure or distribute its victims."[161] Finally, McKenna argued, *Bitty* could be distinguished, as it interpreted a statute with a broader purpose than the Mann Act—the cessation of "the importation of foreign corruption."[162]

D. Limiting the Marriage Cure

With *Caminetti*, the Supreme Court reinforced *Bitty*'s holding that sex outside of marriage constituted the genus of immoral sex. Moreover—again, despite the presence of a dissent belying any single consensus—it reinforced the idea that the breadth and content of the genus of illicit sex was the product of shared social intuitions and sensibilities. As always, the implicit power of the marriage cure underlay the Court's analysis. If the defendants in *Caminetti* had only married their girlfriends, after all, they could have taken them across state lines with no fear of legal sanctions.

As *Caminetti* was working its way through the courts, federal lawmakers continued to brood over the dangers of the marriage cure in the citizenship context—that is, they continued to question whether the line between licit and illicit could be drawn so neatly by marriage. In particular, Attorney General Wickersham's advisory opinion did not stop lawmakers from worrying about the sinister powers of the marriage cure in the context of immoral women who married American men and, thus, gained United States citizenship. Nor did the Mann Act—although it emerged from discussions about the problems of enforcing the Immigration Act—put a stop to their perception that crafty practitioners of immoral practices were using marriage as a tool to avoid prosecution or deportation.[163] In fact, less than a month after the Supreme

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161. *Id.* at 498.

162. *Id.* at 503. Courts continued to cite *Bitty* in the context of interpreting the Mann Act, thereby creating a shared jurisprudence for these different statutes. *See, e.g.*, Burgess v. United States, 294 F. 1002, 1003 (D.C. Cir. 1924). Likewise, state courts borrowed from this federal jurisprudence in defining what constituted an "immoral purpose" under state laws. *See, e.g.*, State v. Reed, 163 P. 477, 479 (Mont. 1917).

163. *See, e.g.*, STANLEY W. FINCH, THE WHITE SLAVE TRAFFIC, S. DOC. NO. 62-982, at 8 (3d Sess. 1912). Finch, Chief of the Bureau of Investigation of the Department of Justice, proposed that

> [t]here should be an act of Congress authorizing a woman to testify in [a white-slave traffic] case against her husband. This is particularly essential for the reason that . . . it is a common practice for procurers to marry their intended victims, and it is frequently impossible to secure a conviction without the use of the testimony of the woman or girl involved.

Court interpreted the Mann Act in *Caminetti*, Congress amended the 1907 Immigration Act to check the traditional powers of the marriage cure.

The relevant provisions of the Immigration Act of February 5, 1917, had been percolating through Congress for some time. On February 21, 1914, the Secretary of Labor submitted a letter to the Senate Committee on Immigration commenting on a proposed immigration bill amending the 1907 Immigration Act. Among his recommendations, Secretary William B. Wilson proposed that the following be added to the bill: "That for the purposes of this act the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this act shall not invest such female with United States citizenship."[164] "In no other one respect," Wilson explained, "are the provisions of law regarding alien immoral women and the trafficking in such women evaded so extensively as by the marriage of such women to American citizens."[165] Citing to this letter, the Committee on Immigration included Wilson's language in its proposed act. Although the Senate passed the bill on January 2, 1915, it was vetoed by President Wilson (for reasons unrelated to the marriage provision).[166]

The House returned to the bill, however, in 1916, spurring debate on the language originally proposed by Secretary Wilson. Congressman Bennett, for instance, questioned whether the proposed law was "proper or humane."[167] Bennett's concerns reflected the persistent belief that marriage could cure the immoral nature of people's sexual lives. "Is there no such thing," he inquired, "as reform of a woman, or a man, either, for that matter?"[168] Moreover, he opined, the proposed language would expose to blackmail "every alien woman who hereafter marries an American citizen, although she may be chaste as the driven snow, because any man or any woman who has a grudge or prejudice, or simply desires money" could threaten to expose her as "immoral" and thus

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Id. at 8. This was the problem eventually confronted by the Supreme Court in *Wyatt v. United States*, 362 U.S. 525 (1960), discussed *infra* Section IV.B.

164. WILLIAM B. WILSON, REGULATION AND RESTRICTION OF IMMIGRATION, S. DOC. NO. 63-451, at 10 (1914). The proposed language initially spurred debate among members of Congress. Congressman Mann, for instance, argued that the language, taken seriously, suggested that a woman could be a citizen for some purposes, for example "for the purpose of inheritance, [or] for the purpose of protection in other respects," but not for the purpose of the act in question. 53 CONG. REC. 5164, 5173 (1916).

165. WILSON, *supra* note 164, at 10.

166. *See* HUTCHINSON, *supra* note 39, at 163.

167. 53 CONG. REC. 5164, 5173 (1916).

168. *Id.*

deprive her of her citizenship.[169] Bennett noted that his concern was heightened because, in his view, the proposed legislation addressed a very small problem. Counter to the dominant political rhetoric around this issue, Bennett observed that, when he was involved in immigration investigations, "we were never able to find but two authentic cases where a known certain prostitute gained American citizenship by marriage to an American citizen."[170] Congressman Burnett, however, disagreed. "I am informed," he countered, "that it is a matter of frequent occurrence that whenever they go after a woman of that character the woman gets behind some pimp or procurer and he himself marries the woman or gets some one else to do it."[171]

Ultimately, a compromise was reached, which provided

> [t]hat the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the marriage of such an alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this Act.[172]

The 1917 Act passed over President Wilson's veto (motivated by his opposition to the bill's literacy test). The amendments on marriage and citizenship inscribed within federal law a powerful check on marriage's generally capacious curative powers.[173] Moreover, some years after its passage, the 1917 Immigration Act, which incorporated the 1907 Act's immoral purpose provision, gave the Supreme Court the opportunity to redefine dramatically the genus of illicit sex.

E. Limiting Immoral Purposes

In the fall of 1931, Inger Hansen, a Danish woman, was charged with entering the United States for an immoral purpose in violation of the 1917 (and, before it, the 1907) Immigration Act. Hansen had first come to America

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169. *Id.*

170. *Id.*

171. *Id.* at 5173-74.

172. Act of Feb. 5, 1917, 39 Stat. 889 (repealed 1952).

173. *See* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 40 (1998); COTT, *supra* note 22, at 148; HUTCHINSON, *supra* note 39, at 167.

in 1922 when she moved to Los Angeles to work as a domestic servant.[174] In 1925, she began having "illicit relations" with a married man. In 1931, they traveled together to Europe, continuing their "illicit relations" and traveling "for at least part of the time, as husband and wife."[175] Upon their return, suspicious immigration inspectors in Seattle questioned Hansen and she "admitted her previous illicit relations."[176] She claimed that "she intended to continue such relations with him until they reached Los Angeles," but not thereafter.[177] Hansen was ordered deported for entering the United States for an immoral purpose.

After her petition for habeas corpus was denied, Hansen appealed to the Ninth Circuit, claiming that she had not entered the United States for an immoral purpose. In particular, no doubt in an effort to distinguish her fate from that of Violet Sterling before her, Hansen insisted that she was not a concubine. Twenty-three years after the Court's decision in *Bitty*, Hansen sought to refine the definition of concubinage and, thus, the relationship between nonmarital sex and the genus of illicit sex. Concubinage, she claimed, required "unlawful cohabitation, as distinguished from clandestine and sporadic intercourse."[178]

The Ninth Circuit rejected Hansen's argument. In enacting the "immoral purpose" provision of the immigration statute, the court opined quoting *Bitty*, "'Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse.'"[179] Thus, the court concluded that, whether or not Hansen—like Violet Sterling—had assumed the particular status of concubine, "at the time she entered the United States she did so for an immoral purpose: To continue her illicit relations."[180]

Even as the Ninth Circuit clung to the notion of a "commonly entertained" social consensus on views of licit and illicit sex, however, any claim to such general agreement was once again immediately undermined—this time by a dissent from the Ninth Circuit's opinion that invoked its own vision of "common understanding[s]" of licit and illicit sex.[181] To fall within the statute,

174. *See* Hansen v. Haff, 65 F.2d 94, 94 (9th Cir. 1933), *rev'd* 291 U.S. 559 (1934).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 95.

179. *Id.* (quoting United States v. Bitty, 208 U.S. 393, 402 (1908)).

180. *Id.*

181. *Id.* (Mack, J., dissenting).

the dissent chided the court, Hansen's immoral purpose had to be within the same genus of sexual immorality as prostitution. Hansen's actions, however, could not be placed within that genus: "[W]hile the concubine and the mistress are comparable to the prostitute, common understanding draws the line too sharply between those classes and the class which indulges occasionally in extramarital relations . . . ."[182] In the dissent's view, in other words, occasional ventures in nonmarital (or even, perhaps more shocking, extramarital) sex were not akin to prostitution in the collective imagination of society. Moreover, the dissent argued, even if Hansen's sexual actions were immoral, the sexual relations in question were not the "dominant . . . cause or purpose of her return," and it could not have been Congress's intention to deport someone "because in returning to her residence, there to follow her legitimate and gainful occupation, the alien may have expected to indulge in extramarital relations en route or occasionally thereafter."[183]

Further belying the Ninth Circuit's confident intuition about the line between licit and illicit sex, the Supreme Court reversed on appeal, embracing the logic of the dissent below. In a stunningly under-reasoned opinion, the Court concluded that Hansen had not entered the country for an immoral purpose. Under the principle of *ejusdem generis*, the Court stated, referencing *Bitty*, "extra-marital relations, short of concubinage"—that is, relations like those between Hansen and her lover[184]—did not fall within the genus of immoral sex akin to prostitution.[185] The Court offered no support in logic or precedent for this quite surprising and narrow definition of the genus of illicit sex. Moreover, citing to lower court opinions interpreting the Mann Act, the Court held that, with respect to the immoral purpose provision of the Immigration Act, "[i]f the purpose of the journey is not sexual intercourse, though that be contemplated, the statute is not violated."[186] In the case of Hansen, the opinion concluded, "we think it plain that in no proper sense may the entry . . . be said to have been for the purpose of immoral sexual relations."[187]

While nominally following *Bitty*, then, the Supreme Court in *Hansen* actually repudiated the central logic of its earlier opinion—that marital sex was

182. *Id.* at 95-96.

183. *Id.* at 96.

184. The dissent disputed this on the facts of the case. *See* Hansen v. Haff, 291 U.S. 559, 563-64 (1934) (Butler, J., dissenting).

185. *Id.* at 562 (majority opinion).

186. *Id.* at 563.

187. *Id.*

moral and nonmarital sex was immoral. *Hansen* thus signaled a more complicated set of legal relationships among marriage, nonmarital sex, and the genus of illicit sex, as well as, no doubt, a new set of larger legal, social, political, and cultural contexts for these phenomena. The period between *Bitty* and *Hansen*, after all, witnessed dramatic changes to the American polity in multiple areas that inevitably influenced public understandings of sexual norms and behavior. The First World War not only altered the realm of international relations, but also emboldened suffrage activists and engaged sex reformers.[188] The passage of the Nineteenth Amendment enfranchised women and also redefined the relationship among wives, families, and the federal government. Sexual mores also changed markedly in the 1920s, "encourag[ing] acceptance of the modern idea that sexual expression was of overarching importance to individual happiness."[189] Simultaneously, growing numbers of women—especially married women—entered the workforce, actively eschewing the public-private dichotomy of a separate-spheres world.[190]

It is not entirely surprising then that the legal meanings of licit and illicit sex shifted over the course of the first decades of the twentieth century. In rejecting the clear line between licit and illicit sex drawn in *Bitty*, *Hansen* dramatically redefined the genus of illicit sex in a manner that reflected and bolstered the shifting norms of the second quarter of the twentieth century—norms that made possible a more attenuated link between nonmarital sex and immoral sex.

Even against this backdrop of social change, the Supreme Court's opinion exudes a distinctly modern quality. After *Hansen*, although nonmarital sex still signaled illicitness, sex outside marriage (indeed, even sex in violation of a marriage) could fall within the genus of licit sex if it was sporadic or an occasional indulgence as opposed to concubinage-like in its duration and consistency. Gone were the days of *Bitty*'s simple genera of licit sex as marital sex and illicit sex as nonmarital sex. *Hansen* ushered in a doctrinal regime in which some nonmarital sex could fall within the genus of moral sex—even without the powers of the marriage cure.[191] Notably, even after *Hansen*,

188. *See, e.g.*, NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 59-60 (1987); D'EMILIO & FREEDMAN, *supra* note 79, at 212-13.

189. D'EMILIO & FREEDMAN, *supra* note 79, at 235.

190. *See* ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 229 (1982) ("In 1920, less than two million of the eight million wage-earning women were married. By 1930, more than three million of the ten million women who worked for wages were living with husbands . . . an increase of more than 25 percent.").

191. On the perceived dangers to marriage of "acting married," see Dubler, *supra* note 98, at 1006-09. I discuss this aspect of *Hansen* in Part IV.

concubinage still fell within the genus of immoral sex. The Court did not explicitly define concubinage. It simply differentiated between concubinage and "extra-marital relations, short of concubinage."[192] Seemingly, then, in a post-*Hansen* world, the genus of immoral sex included long-term nonmarital sex but not less permanent or committed forms of nonmarital sex. In other words, sex outside marriage that resembled marriage in its duration and commitment was more akin to prostitution than nonmarital sex that eschewed any of the conventional trappings of marriage. The Court gave no explanation for this judgment—grounded perhaps less in a comprehensive theory of sexual regulation than in a desire to avoid repudiating *Bitty*. Its holding, however, gestured at the potentially threatening nature of relationships that resembled marriage without marriage's legal imprimatur.

III. MODERNIZING THE GENUS: THE PLURAL MEANINGS OF MARRIAGE AND IMMORAL PURPOSE

Let's return to where this Article began: considering the question of what links disparate sexualized practices. As a variation on Justice Scalia's list in *Lawrence v. Texas*, ask yourself what common features unite the following practices: female nudity, beastiality, tribadism, pederasty, irrumation, flagellation, masochism, sadism, mixoscopia, frottage, and cunnilingus. Like Justice Scalia's list, this list—authored by Claude T. Barnes in 1946[193]—features a broad range of sexualized practices that appeal to different people. Moreover, like the practices listed by Justice Scalia, these practices evoke different social meanings and cultural markers. Once again, however, the law bonds these diverse practices into an intelligible category. Like the practices listed by Justice Scalia many years later, Barnes's list consists of sexualized practices that the law has traditionally frowned upon. And, as Justice Scalia would do many years later, Barnes crafted this list as an account of the content of the legal category of illicit sex. In constructing his list, however, Barnes's motives were quite different from those of Justice Scalia. In fact, he sought to establish that the genus of illicit sex excluded a practice that, decades later, Justice Scalia would confidently declare illicit: polygamy.

192. *Hansen*, 291 U.S. at 562.

193. BARNES, *supra* note 33, at 31.

A. United States v. Cleveland

Claude T. Barnes was born in 1884 to a Mormon family in Kaysville, Utah, the eighth child of his father's third wife.[194] He trained as a lawyer at both the University of Chicago and the University of Michigan, but his true passions were nature and the natural sciences, subjects on which he published extensively throughout his legal career.[195] In the early 1940s, he was hired to defend a group of polygamous men—adherents to the "original doctrines of the Mormon Church"[196]—who had been charged with violating the Mann Act by transporting their plural wives across state borders. In so doing, their indictments charged, they transported these women for an immoral purpose—that is, polygamy.[197]

His clients were convicted, and, after losing in the Tenth Circuit, Barnes appealed his case to the Supreme Court. In his brief before the Supreme Court, Barnes and his co-counsel sought to convince the Court (once again) that interpreting the "immoral purpose" language of the Mann Act to cover his clients' actions would render the Act's provision unconstitutional as an infringement on the traditional state police powers, and also that his clients' actions could be distinguished from truly immoral sexual practices—those practices that were akin to prostitution, not marriage. Under the principle of *ejusdem generis*, the brief argued, polygamy could not be a part of the genus of immoral sex. The genus of sexual immorality, after all, could not include "voluntary, natural motherhood."[198] Turning to scientific sources, the brief posited that the genus was composed of a "host of sexual perversions and unnatural practices" such as those chronicled in Dr. R. V. Krafft-Ebing's medical treatise, *Psychopathia Sexualis*.[199] Certainly, the petitioners' lawyers argued, it would be "tragic" if the legal definition of sexual immorality could apply to "these lowly people with their humble homes and healthy children."[200] These people, in fact, clung to traditional notions of sexual morality. For example, the brief pointedly recounted, one of the petitioners had "await[ed] the performance of a 'celestial marriage' before sexual relations were

194. *See* Davis Bitton, *Claude T. Barnes, Utah Naturalist*, 49 UTAH HIST. Q. 316, 318 (1981).

195. *Id.* at 321-24.

196. Brief of Petitioners at 6, Cleveland v. United States, 329 U.S. 14 (1946) (Nos. 12-19). In the late nineteenth century, the Mormon Church had formally renounced the practice of polygamy. *See* GORDON, *supra* note 78, at 234.

197. *See* United States v. Cleveland, 56 F. Supp. 890 (D. Utah 1944), *aff'd*, 329 U.S. 14 (1946).

198. Brief of Petitioners, *supra* note 196, at 25.

199. *Id.*

200. *Id.*

indulged" with his wife.[201] With this example of foregone premarital sex, the brief brilliantly gestured at its key argument: Practitioners of plural marriage believed in the traditional boundary between the genus of licit and the genus of illicit sex, as well as the full powers of the marriage cure. Polygamy, in other words, should rightly be part of the genus of moral sex, not its antithesis.

Barnes argued his case before the Supreme Court in October 1945. At the time of his argument, Justice Jackson was away at Nuremberg, so the Court requested that Barnes reargue the case upon Jackson's return.[202] Based on his experience in the initial argument, Barnes realized that the meaning of "immoral purpose" was ripe for further study. In the time between his arguments, therefore, he conducted a "thorough investigation" into the history and meaning of the "other immoral purpose" language of the Mann Act.[203] The Sugar House Press in Salt Lake City published the fruits of his research as a pamphlet.

Barnes's scientific proclivities melded perfectly with the science-like foundations of the *ejusdem generis* principle. Ever the naturalist, Barnes crafted a careful legal analysis of the relationship between polygamy and "immoral purposes" under the Mann Act and, in particular, of the elements of the genus of immoral sex. Barnes's basic argument, bolstered by diagrams of various genera, was quite simple: Polygamy could not be an "immoral purpose" because it was a form of marriage.[204] By "immoral purposes," Barnes observed, lawmakers intended to include practices that "belong to the genus prostitution"—that is, "the exhibition of women in the nude, or in sexual concourse with animals, and sexual perversions such as tribadism, pederasty, irrumation, flagellation, masochism, sadism, mixoscopia, frottage and cunnilinguism."[205] Moreover, Barnes continued, engaging Judge Hough and the Supreme Court's opinion in *Bitty* as he expanded his typology, "[a] mistress is a private prostitute; a concubine is a secondary wife."[206] He quickly explained the distinction by adverting to conventional understandings of the

201. *Id.* at 13.

202. *See* BARNES, *supra* note 33, at 5.

203. *Id.*

204. In this respect, Barnes's diagrams provide an instructive comparison with those drawn some decades later by Gayle Rubin. Despite their different ideological perspectives, both Barnes and Rubin offer schematic views of marriage's sociolegal powers to define sexual licitness and, thus, to marginalize alternate models of sex and intimacy. *See* Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* THE LESBIAN AND GAY STUDIES READER 3, 13 (Henry Abelove et al. eds., 1993).

205. BARNES, *supra* note 33, at 31.

206 *Id.*

family: "The first [the mistress] despises children; the second [the concubine] lives for them. The first seeks luxury and ease; the other lives for faithfulness, virtue, children and a home. They represent, in fact, the basic difference between prostitution and marriage; pleasure for a consideration and domesticity with children."[207]

Having located the concubine in the "category marriage" and the mistress in the "genus 'prostitution,'" Barnes insisted that polygamy rightfully had to exist within "the genus *marriage*."[208] After all, if marriage was the core of the genus of moral sex, polygamy was just more of that morality. To support his point, Barnes, ever the good natural scientist, endeavored to map out the respective genera. Just as a bear, of the genus *ursus*, and a skunk, of the genus *mephitis*, should not be confused although they both belong to the order *carnivora*, he argued, so too marriage and prostitution should not be confused even though they both belong to the order "use of sex."[209] With this, Barnes at last diagramed in full the order of "use of sex," with its distinct genera: genus "marriage" and genus "prostitution." The genus "marriage" was composed of the following elements: marriage, monogamy, polygamy, wife, wives, husband, children, home, love, sacrifice, concubine (in the sense of wife), wedlock, matrimony, wedding, nuptials, partner, spouse, helpmate.[210] By contrast, the genus "prostitution" was composed of:

> prostitution, carnality, debauchery, harlotry, libertinage, lubricity, wenching, whoredom, concubinage (in the sense of mistress), debauchee, trollop, phyrne, slut, street-walker, strumpet, trull, cyprian, courtezan, adulteress, bawd, jade, jezebel, delilah, bitch, aspasia, conciliatrix, bona roba, chere amie, whore, lorette, mackerell, mistress, procuress, punk, quean, rig, satyr, whore-monger, badnio, badhouse, brothel, bawdy house.[211]

All forms of marriage including polygamy, in other words, inhabited a genus of moral sex, not a genus of immoral sex.

Not surprisingly, the Supreme Court, following its 1878 decision in *Reynolds v. United States*, rejected Barnes's meticulous categorization, as well as his argument that *Caminetti* interpreted the Mann Act too broadly. If, in many ways, the social and legal meanings of marriage and life outside of marriage

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207. *Id.* at 31-32.

208. *Id.* at 34-36.

209. *Id.* at 46.

210. *Id.* at 47.

211. *Id.*

had shifted from 1878 to 1946, the Court found none of the changes relevant to the case before it. Writing for the Court, Justice Douglas began with *Bitty*. "Because of the similarity of the language" in the Immigration Act and the Mann Act, Douglas observed, *Bitty* had become "a forceful precedent for the construction of the Mann Act."[212] Moreover, the Court noted, in defining the genus of sexual immorality, the Act prohibited transporting a woman across state lines for "prostitution or debauchery, or for any other immoral purpose." Even if "[p]rostitution, to be sure, normally suggests sexual relations for hire," the Court noted, "debauchery ha[d] no such implied limitation."[213] *Caminetti*, then, remained good law: "[T]he Act, while primarily aimed at the use of interstate commerce for the purposes of commercialized sex, [wa]s not restricted to that end."[214]

In light of the scope of the genus of immorality, the Court concluded, polygamy was surely not excluded. Such practices had "long been outlawed in our society," and "[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity."[215] Though polygamous practices "have different ramifications, they are in the same genus as the other immoral practices covered by the Act."[216] Only one form of marriage—monogamous marriage—defined what forms of sexual conduct fell within the genus of moral sex.

Though it did not carry the day, Barnes's work did find its way to Justice Murphy's dissent in *Cleveland*, albeit not by name. Murphy bemoaned the Court's extension of its jurisprudence applying the Mann Act to "individuals whose actions have none of the earmarks of white slavery."[217] Moreover, Murphy proposed a robust genus of marriage—robust enough to include polygamy, even if it was not "morally the equivalent of monogamy."[218] In fact, according to Murphy, there were four types of marriage: "(1) monogamy; (2) polygyny, or one man with several wives; (3) polyandry, or one woman with several husbands; and (4) group marriage."[219] Even if "the contemporary world condemn[s] the practice [of polygamy] as immoral and substitute[s] monogamy in its place," the dissent argued, "marriage, even when it occurs in

212. Cleveland v. United States, 329 U.S. 14, 16-17 (1946).

213. *Id.* at 17.

214. *Id.* at 18.

215. *Id.* at 18-19.

216. *Id.* at 19.

217. *Id.* at 25 (Murphy, J., dissenting).

218. *Id.*

219. *Id.*

a form of which we disapprove, is not to be compared with prostitution or debauchery or other immoralities of that character."[220] If only in dissent, then, *Cleveland* highlighted the multiple potential meanings of marriage and the possibility that particular forms of intimacy—such as polygamy—could inhabit an ambiguous space between the genera of moral and immoral sex.

B. Wyatt v. United States

Although Justice Murphy's arguments only appeared in dissent, their publication nonetheless suggested (once again) the absence of uniform social or legal consensus on either the meaning of marriage or the content of the genus of sexual illicitness. Once again, this both reflected and reinforced larger sociocultural changes: Although the legal status of polygamy did not inspire widespread social agitation, the visibility of diverse views on acceptable forms of intimacy and sex increased following the Second World War.[221] From its inception, the Mann Act had forced judges and lawmakers to confront the complexities inherent in the categories that they wished to consider simple: marriage and sexual immorality. Although the Supreme Court was not ready to embrace the pluralistic vision of marriage offered (in slightly different forms) by Claude T. Barnes and Justice Murphy, a 1960 case on the Mann Act forced the Court to acknowledge, as a matter of doctrine, both the limits of the marriage cure and the multiple meanings of marriage.

In *Wyatt v. United States*, the Supreme Court faced the same dangerous underside to the marriage cure that Congress had confronted when it passed the 1917 amendments to the 1907 Immigration Act: the instrumental use of

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220. *Id*. at 26. Murphy also denounced the Court's reliance on *Bitty*. He argued that the "immoral purpose" language in the 1907 Immigration Act could not have referred to polygamy because there was a separate provision of the Act that explicitly excluded polygamists. Thus, he concluded, if the Immigration Act "or the interpretation given it in the *Bitty* case, is to be any authority here, the conclusion to be drawn is inconsistent with the result reached by the Court today." *Id*. at 27.

Murphy was critical of the expansion of the reach of the Mann Act. Just the year before *Cleveland*, he dissented from a per curiam opinion holding that the Mann Act applied to defendants who transported a woman only within the District of Columbia. *See* United States v. Beach, 324 U.S. 193, 196 (1945) (Murphy, J., dissenting). Murphy chastised his colleagues for forgetting that "[w]e are dealing here with a statute known and referred to by Congress . . . as the 'White-slave traffic Act.' . . . The Congressional debates and committee reports on the legislation make it plain that the Act was designed and intended solely to prevent 'white-slave' traffic . . . ." *Id*. It was not intended to apply to "voluntary prostitution." *Id*. at 199. On Justice Murphy, see SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS (1984).

221. *See* D'EMILIO & FREEDMAN, *supra* note 79, at 261-74.

marriage by individuals seeking to avoid legal penalties. James Ivey Wyatt was indicted under the Mann Act for transporting Mary Kathleen Byrd across state lines for the purposes of prostitution.[222] After the indictment, Wyatt and Byrd married.[223] At trial, when Byrd was ordered to testify on behalf of the prosecution, both she and Wyatt objected, claiming marital privilege.[224] Wyatt was convicted and appealed on the ground that Byrd's testimony was admitted in error; she was, after all, his wife.

Writing for the Court, Justice Harlan affirmed Wyatt's conviction. Harlan's opinion at last makes plain what judges and lawmakers had long suggested in the context of interpreting and crafting the immoral purpose provisions: Marriage, not individual women, needed to be protected from the amorphous threat of illicit sexual practices. It "cannot be seriously argued," Harlan opined, "that one who has committed this 'shameless offense against wifehood,' should be permitted to prevent his wife from testifying to the crime by invoking an interest founded on the marital relation or the desire of the law to protect it."[225] "Wifehood," then, not Byrd, was Wyatt's victim. And Harlan made his claim yet more specific: "Where a man has prostituted his own wife," he wrote, "he has committed an offense against both her and the marital relation."[226]

Wives could be prostituted, and their formal status within marriage did not cure the prostitution. Marriage, as the victim, could not cure the immorality at the core of Wyatt's actions. Quite the contrary: Marriage could be threatened and weakened by its contact with powerful immoral sexual practices. By 1960, in other words, the Supreme Court had explicitly used the immoral purpose language of the Mann Act to construct marriage as at once capable of offering people a powerful curative power but, simultaneously, capable of being victimized by people's illicit sexual relations. As in *Cleveland*, the Court's opinion in *Wyatt* reinforced that simply marrying did not guarantee entry into the privileged genus of moral sex.

IV. ILLICIT SEX AND THE DEFENSE OF MARRIAGE

The immoral purpose provisions of the 1907 Immigration Act and the 1910 Mann Act are not the most obvious historical antecedents of the Supreme Court's opinion in *Lawrence v. Texas*. Doctrinally, *Lawrence* overturned *Bowers*

222. Wyatt v. United States, 263 F.2d 304, 305 (5th Cir. 1959), *aff'd* 362 U.S. 525 (1960).

223. *See* Wyatt v. United States, 362 U.S. 525, 526 (1960).

224. *Wyatt*, 263 F.2d at 308.

225. *Wyatt*, 362 U.S. at 527 (citations omitted).

226. *Id.* at 529.

v. Hardwick, not *United States v. Bitty*. *Lawrence* is generally understood as a case about the particular rights of same-sex couples, couples who were definitively neither the intended nor the unintended targets of the immoral purpose provisions of the 1907 and 1910 Acts. Moreover, as a matter of constitutional law, the history of the immoral purpose provisions illuminates Congress's power—its immigration power and commerce clause power, respectively—to pass legislation regulating certain forms of sexual behavior. Through interpreting these statutes, then, the Supreme Court defined a sphere of constitutionally regulable sexual conduct. In contrast, by repudiating *Bowers*, *Lawrence* defined not a sphere of regulable conduct, but rather a sphere of intimate activity that is, as a matter of substantive due process, beyond the reach of state regulation.

But *Lawrence* does more than place same-sex sodomy outside the reach of state criminal law. In protecting the rights of individuals to engage in same-sex sex, *Lawrence* definitively unmakes the isomorphism between nonmarriage-illicit sex and marriage-licit sex. After all, John Geddes Lawrence and Tyron Garner were not married, nor could they have married within the United States. Nonetheless, the Court recognized their sexual union as entitled to constitutional protection. And it did so in an opinion whose prose signals not a grudging extension of constitutional protection to a particular erotic act, but rather a recognition of the licitness of a particular form of sexual intimacy. Justice Kennedy's opinion, after all, criticizes *Bowers v. Hardwick* for, among other things, misunderstanding "the extent of the liberty at stake"[227] in cases involving same-sex sodomy. According to *Lawrence*, "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[228] Instead, the opinion notes, the Constitution protects the right of any person to engage in "intimate conduct with another person" that "can be but one element in a personal bond that is more enduring."[229] No doubt, one can dispute whether or not Lawrence and Garner in fact understood their sexual encounter as part of an enduring personal bond. Whether or not his analysis fit the facts before him, though, Justice Kennedy's language, complete with a comparison to marriage, casts a patina of licitness on the sexual practices in question. In this respect, *Lawrence* marks the final repudiation of the core logic of *Bitty*—that licit sex had to occur within marriage and all sex outside of

227. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

228. *Id.*

229. *Id.*

marriage fell within the genus of illicit sex—just as surely as it marks the doctrinal rejection of *Bowers*.

Of course, before the Supreme Court decided *Lawrence*, the links between marriage and licit sex, and nonmarriage and illicit sex, had already substantially frayed in multiple legal contexts. On the marriage-licit side of the typology, for example, the widespread repudiation of marital rape exemptions had eroded the historical power of marriage to render licit sexual acts that would have been illicit between unmarried partners.[230] On the nonmarriage-illicit side, decades before *Lawrence*, courts began granting to unmarried couples reciprocal rights that had previously been granted only within marital relationships. In a post-*Marvin v. Marvin* era of palimony and contracts for cohabitation, sex outside marriage could no longer be labeled illicit in any simple sense.[231]

Likewise, internal to the constitutional jurisprudence of privacy, the isomorphism between marriage-licit sex and nonmarriage-illicit sex had unquestionably already begun to come undone before the Supreme Court decided *Lawrence*. In particular, the move from *Griswold v. Connecticut*[232] to *Eisenstadt v. Baird*[233] dealt a powerful blow to any legal claim to an indelible bond between nonmarital sex and sexual illicitness. Once the right to privacy extended beyond nonprocreative sex within the "sacred precincts of marital bedrooms," to encompass the sexual choices of unmarried individuals, the status of sex outside of marriage clearly had begun its migration over the illicit-licit divide.[234] Thus, within this doctrinal context, Nan Hunter has argued that *Lawrence* "tied up the loose ends of th[e] project" of the "delinking of sex and marriage" begun by *Eisenstadt* and *Griswold*.[235]

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230. On the contemporary place of marital rape exemptions, see Hasday, *supra* note 73, at 1482-98. I certainly do not mean to suggest that marriage never functions as a cure today. The Kansas Court of Appeals, for instance, recently pointed out that "[g]enerally, sex acts, including sodomy, between a child and an adult are illegal, unless the child is married to the adult when the sex acts occurred." State v. Limon, 83 P.3d 229, 235 (Kan. Ct. App. 2004), *rev'd* No. 85,898, 2005 Kan. LEXIS 715 (Oct. 21, 2005).

231. Marvin v. Marvin, 557 P.2d 106, 109 (Cal. 1976) (recognizing a right to palimony because "[d]uring the past 15 years, there has been a substantial increase in the number of couples living together without marrying").

232. 381 U.S. 479 (1965).

233. 405 U.S. 438 (1972).

234. *Griswold*, 381 U.S. at 485.

235. Hunter, *supra* note 19, at 1112. Hunter argues that "*Lawrence* removes the last obstacle to the paradigm of consent, rather than the institution of matrimony, controlling the definition of when sex is presumptively legal." *Id.*

Insofar as *Lawrence* further untethers any exclusive link between licit sex and marriage, however, it is the legal—though not the narrowly doctrinal—legacy not only of *Eisenstadt v. Baird*, but also of *Hansen v. Haff* and subsequent cases interpreting *United States v. Bitty* and the federal immoral purpose provisions. Reading *Lawrence* in this latter, less traditional, context points to the ways in which marriage still exists in a peculiar relationship to the redefined categories of sexual licitness and illicitness. To be sure, gone are the days of *Bitty* when marital sex constituted the entirety of the genus of licit sex and nonmarital sex, akin to prostitution in its disregard for marriage's place at the top of the hierarchy of intimate relations, constituted the genus of illicit sex. But marriage still plays a role in policing a licit-illicit line.

Recall Justice Kennedy's opinion. On the one hand, the opinion compared Lawrence and Garner to a married couple by way of explaining why their relationship was entitled to constitutional protection: Just as marriage is about more than sex, so too are relationships between same-sex partners.[236] In this respect, the Court drew upon marriage's traditional abilities to signal sexual licitness. But this is not the only role that marriage plays in *Lawrence*. Recall too the opinion's brief meditation on the nature of the relationship between Lawrence and Garner and its contrast with various forms of illicit sexual relations. Their relationship was licit, at least in part, because it did not involve acts of sex in public, prostitution or "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[237] In other words, it was not a marriage in form or function.

In this respect, then, *Lawrence* turns the marriage cure on its head. Marriage, after all, has generally been the vehicle for moving a relationship from the genus of illicit sex into the genus of licit sex. Think back to John Bitty and Violet Sterling: Had they been married, Bitty could never have been charged with bringing Sterling into the country for an immoral purpose because their marriage would have located their relations squarely within the genus of licit sex. Likewise, the unmarried adults seeking to obtain contraceptives in *Eisenstadt* could have married and brought themselves within the logic of *Griswold*. In contrast, by explicitly pointing to its nonmarital nature, *Lawrence* suggests that the relationship between John Geddes Lawrence and Tyron Garner was licit and entitled to constitutional protection at least in part because it made no claim to being a marriage.[238] Of course, Lawrence and

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236. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

237. *Id.* at 578.

238. In the context of the legal regulation of interracial sexual relationships, nonmarital interracial sex gained some measure of constitutional protection before marital interracial sex did. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184

Garner could not have been prosecuted for attempting to marry (as John Bitty was prosecuted for his relationship with Violet Sterling). Although their attempts to marry would not have been illicit in that sense, their choice to eschew claims to legal marriage nonetheless played a part in the Court's construction of the licitness of their union. Justice Kennedy's analysis suggests that Lawrence and Garner's relationship was licit not *in spite* of its nonmarital status but, rather, at least in part, *because of* its nonmarital status.

With *Lawrence*, the Court did more than simply delink sex and marriage in a continuation of the project it began with *Eisenstadt*. The Court also completed the project it began with *Hansen v. Haff*, granting licit status to nonmarital sexual relationships that could not become legal marriages precisely because the relationships in question existed outside of the framework of marriage and made no claim to the sociolegal trappings of marriage.[239] Like Lawrence and Garner, Inger Hansen and her lover could not have availed themselves of the marriage cure as a route to sexual licitness. Hansen's lover was already married, and their marriage would have run afoul of the monogamy requirement just as surely as Lawrence and Garner's marriage would have run afoul of the cross-sex requirement. Moreover, the Supreme Court deemed the love affair between Hansen and her lover outside the reach of the immoral purpose provision of the Immigration Act precisely because it was not concubinage—that is, it did not present itself as marriage-like. Through different bodies of law, therefore, the Supreme Court recognized each relationship as licit precisely because it differed from marriage in its manifestations—Hansen's relationship was sporadic and clandestine, Lawrence's relationship was "private." Because of their nature, marriage could no more cure the illicit nature of these relationships than these relationships could threaten marriage.

But marriage is not completely out of harm's way. Just as early-twentieth-century lawmakers understood marriage as a powerful cure for illicit sex even as they feared that certain relationships could threaten marriage, so too do today's lawmakers imagine marriage as simultaneously powerful and powerless. Consider, for example, the 1996 Defense of Marriage Act (DOMA), which defines marriage for purposes of federal law as a union between a man and a woman and also stipulates that no state can be forced to recognize a

(1964). Importantly, though, *McLaughlin* did not deem nonmarital interracial sex licit. *See McLaughlin*, 379 U.S. at 196. I explore the relationship between this history and *Lawrence* in another essay. *See* Ariela R. Dubler, *What Happened to* McLaughlin v. Florida*?*, 106 COLUM. L. REV. (forthcoming 2006) (comparing *Lawrence* to *McLaughlin* as cases that extended constitutional protection to certain forms of sex without extending to the couples the right to marry).

239. *Cf.* Franke, *supra* note 3 (arguing that Justice Kennedy's opinion in *Lawrence* imposed a marriage-like model on the relationship between Lawrence and Garner).

same-sex marriage validated by another state.[240] Consider, in particular, the potential double meaning of "defense" in this context and in the context of the so-called mini-DOMAs that many states have passed since 1996 defining marriage as cross-sex for the purposes of state law.[241] On the one hand, DOMA suggests that marriage can act as a powerful defense against the sociolegal harm of other forms of sexual intimacy. Marriage remains, the argument goes, "the core of civilization."[242] In fact, defending state laws limiting marriage to cross-sex couples, Senator John Cornyn of Texas quoted the exact nineteenth-century Supreme Court language invoked by the Court in *United States v. Bitty*. Marriage, he opined, remains "the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."[243] In particular, supporters of DOMA depicted marriage as "uniquely capable" of protecting children.[244] Children, in this view, existed in the "wreckage" of the "sexual revolution," and only marriage could remedy their social woes.[245]

On the other hand, if marriage remains this powerful force, DOMA simultaneously suggests that marriage itself needs defending. The Act, after all, was explicitly created "[t]o define and protect the institution of marriage."[246] In fact, DOMA's supporters argued that the Act was necessary to combat nothing less than an on-going "frontal attack on the institution of marriage."[247] Once again, then, lawmakers have depicted marriage itself as potentially vulnerable to the taint of illicit sexual practices—this time, the specter of states recognizing same-sex unions as marital. Once again, in other words, federal lawmakers have excluded certain couples from the rights of marriage in order

240. *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2000)).

241. For a state-by-state list of these laws, see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165-94 app. (2005).

242. *Hearing Before the S. Comm. on the Judiciary on S. 1740, A Bill To Define and Protect the Institution of Marriage*, 104th Cong. 22 (1996) (statement of Gary L. Bauer, President, Family Research Council) [hereinafter *Hearing on S. 1740*].

243. John Cornyn, *In Defense of Marriage*, NRO: NAT'L REV. ONLINE, July 12, 2004, http://www.nationalreview.com/comment/cornyn200407120921.asp (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)).

244. *Hearing on S. 1740*, *supra* note 242, at 1 (statement of Rep. Canady).

245. *Id.* at 20 (statement of Gary L. Bauer, President, Family Research Council).

246. Defense of Marriage Act, Pub. L. No. 104-199, § 1, 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. § 1738c (2000)).

247. *Hearing on H.R. 3396, Defense of Marriage Act, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 37 (1996) (statement of Rep. Barr).

to protect the powers of the very institution of marriage itself. Marriage can only defend if it is defended. Legal constructions of its power, therefore, only make visible marriage's persistent weakness as a sociolegal institution capable of providing order for all intimate relations.

CONCLUSION

In *Lawrence v. Texas* the Supreme Court situates its opinion within a particular historical narrative: the history of the enactment and repudiation of laws banning sodomy. *Lawrence*, however, is part of another body of legal history as well. It is part of the history of attempts by federal lawmakers and judges to define the respective genera of licit and illicit sex. Viewed from this perspective, *Lawrence* marks the latest intervention in a legal conversation that began when Congress enacted the 1907 Immigration Act and the 1910 Mann Act, each of which prohibited the movement of women across borders for "immoral purposes." Situating the case in this context makes sense of the role played by marriage in all three of the major opinions in *Lawrence*—a case in which no party made any legal claim to marriage, but Justices Kennedy, O'Connor, and Scalia all understood marriage to be implicated. The *Lawrence* Court, like the legislators and judges who crafted and interpreted the "immoral purpose" provisions, uses marriage to police the line between illicit and licit sex.

One hundred years ago, however, lawmakers and judges constructed an isomorphic relationship between marriage/nonmarriage and licit sex/illicit sex. The "marriage cure" transported sex across the illicit-licit divide. *Lawrence* marks the final repudiation of this logic: The Court moved a sexual relationship from the genus of illicit sex into the genus of licit sex noting precisely that the relationship made no claim to marriage. As was the case historically, this judicial move reflects the persistent status of marriage in the American sociolegal order as a legal institution understood to be simultaneously tremendously powerful and powerless. Marriage is at once powerful to confer legal privileges and to shield people from the dangers of sexual illicitness, and powerless to protect itself from the taint of those very illicit practices.