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The "Threat" of Marriage Fraud: A Story of Precarity, Exclusion, and Belonging

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THE "THREAT" OF MARRIAGE FRAUD: A STORY OF PRECARITY, EXCLUSION, AND BELONGING

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Migrants can obtain permanent residency in Canada under the family-reunification category set out in s. 12(1) of the Immigration and Refugee Protection Act (IRPA). Canadian citizens or permanent residents may apply to sponsor their non-citizen spouse, common law or conjugal partner, or other relatives to move to Canada pursuant to s. 117(1)(a) of the Immigration and Refugee Protection Regulations (IRPR). The bad-faith clause under s. 4(1) of the IRPR requires spousal-sponsorship applicants to prove to visa officers that, on a balance of probabilities, their relationship is "genuine" and not "entered into primarily for the purpose of acquiring any status or privilege under the [IRPA]". The bad-faith clause is meant to prevent so-called marriage fraud: the idea that migrants, hoping to take advantage of the family-reunification regime, trick vulnerable Canadians into marriage and then subsequently abandon them once they have obtained citizenship status. Drawing on the work of feminist, anti-racist, and anti-colonial scholars, this paper argues that the construction of marriage fraud as a threat to national security rationalizes an increasingly exclusionary spousal-sponsorship regime post 9/11. Focusing on this "threat" detracts from the insidious naturalization of the neo-liberal, hetero-patriarchal, and white settler–colonial values that animate the exclusionary nature of family class migration—values that pre-date the recent moral panic over marriage fraud. This paper concludes by sounding a cautionary bell: Canadians must be wary of the ongoing

reproduction and sedimentation of exclusionary values that give meaning to legal constructions of family because they reinforce and perpetuate experiences of precarity among migrants who live on the underside of global capitalism.

I. INTRODUCTION

Canadian immigration history is replete with examples of exclusionary policies enacted in the name of national security.[1] As early as 1872, Canada's immigration regime sought to exclude migrants that the state identified as potential security risks.[2] While the individuals and groups labelled as risks have shifted over time, the emphasis on

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1 See Sharryn J Aiken, "Manufacturing 'Terrorists': Refugees, National Security, and Canadian Law" (2000) 19:3 Refuge 54 at 54. For examples of how "national security" has been used to justify the policing of minorities more broadly within Canadian society, see: Gary William Kinsman, Dieter K Buse & Mercedes Steedman, eds, *Whose National Security?: Canadian State Surveillance and the Creation of Enemies* (Toronto: Between the Lines, 2000).

2 See Aiken, *supra* note 1 at 60–61. Aiken provides a comprehensive overview of the evolution of the "security risk" in Canada's immigration regime. The earliest articulation of the amorphous "security threat" appeared in an 1872 amendment to the *Immigration Act,* which provided that "[t]he Governor in Council may, by proclamation, whenever he deems it necessary, prohibit the landing in Canada of any criminal, or other vicious class of immigrants, to be designed by such proclamation." In 1910, Parliament added s. 41 to the *Immigration Act,* which added to the list of prohibited classes: "any person other than a Canadian citizen [who] advocates in Canada the overthrow by force or violence in the Government of Great Britain or Canada, or other British Dominion, Colony, possession or dependency, or the overthrow by force or violence of constitutional law or authority". The scope of section 41 was widened during the "Red Scare", and in the inter-war period the *Immigration Act* provided government officers with broad discretionary powers to exclude individuals on the grounds of national security.

security has remained constant.[3] This is particularly apparent in the years following the collapse of the World Trade Center Towers in 2001, as anti-immigrant sentiments gained significant traction in North American discourse.[4] Arguably, this trend accelerated with President

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3 See *ibid* at 61–62 (summarized and quoted in this note). Aiken argues that in the wake of the "Red Scare" and increasing labour unrest following World War I, Canada used the *Immigration Act* to bar entry or deport "anarchists and revolutionaries" who were primarily suspected communists and union organizers. During World War II, Canada's immigration regime provided government officers with broad discretionary powers to exclude "enemy aliens" on the grounds of national security. In the post-war period, fear of Soviet infiltration was the primary security concern guiding immigration policy. In the 1960s, Aiken argues that "[t]he driving force behind measures of national security and immigration control. . . was the Anglo-Saxon fear that the influx of foreigners threatened the nation's 'racial purity' and/or political fabric." In 1977, Parliament established the Royal Commission of Inquiry into Certain Activities of the RCMP, better known as the McDonald Commission, which investigated allegations that the Royal Canadian Mountain Police subjected many groups, including civil dissidents, to surveillance, infiltration, and "dirty tricks" under the guise of protecting "national security." The McDonald Commission's second report condemned the overly broad interpretation of "threats to the security of Canada" in the context of immigration screening. Aiken argues that Parliament failed to act on the recommendations of the McDonald Commission, and the safety and security of Canada continued to feature prominently in Canada's admissibility requirements.

4 See e.g. Muhammad Safeer Awan, "Global Terror and the Rise of Xenophobia/Islamophobia: An Analysis of American Cultural Production since September 11" (2010) 49:4 Islamic Studies 521. At 525, Awan argues that "[i]n the wake of 9/11 attacks, due to the myth-making capabilities of the American corporate media, new 'fears of the other' or the immigrant, have been systematically induced in the minds of the American public." This is particularly true for Muslim immigrants, who are often conflated with the threat of terrorism.

Trump's political ascendency, imbuing xenophobia with an unbefitting air of legitimacy.[5]

Thus, it is no coincidence that Canada's cardinal immigration law, the *Immigration and Refugee Protection Act* (*IRPA*),[6] emphasizes national security concerns.[7]

Commenting on the rise of islamophobia in the United States, Ghazali notes that "the events of 9/11 were used as an excuse to greatly magnify the hostility toward Muslims and cloak it in pseudo-patriotism." Abdus Sattar Ghazali, *Islam & Muslims in the Post-9/11 America* (Modesto: Eagle Enterprises, 2008) at 19, cited in *ibid* at 525.

5 See e.g. Sabrina Siddiqui, "Anti-Muslin rhetoric 'widespread' among candidates in Trump era – report", *The Guardian* (22 October 2018), online: <www.theguardian.com/us-news/2018/oct/22/anti-muslim-rhetoric-widespread-among-candidates-trump-era>; Meg Wagner, Brian Ries & Veronica Rocha, "Supreme Court upholds travel ban", *CNN Politics* (27 June 2018), online: <www.cnn.com/politics/live-news/supreme-court-travel-ban/h_a32feeafac5231eeded28002e2b2de9d>; Willa Frej, "Trump Retweets Inflammatory Islamophobic Videos", *Huffington Post* (29 November 2017), online: <www.huffingtonpost.ca/entry/trump-retweets-british-far-right_n_5a1e9cd9e4b0cb0e917caaa1>.

6 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

7 See Robert M Russo, "Security, Securitization, and Human Capital: The New Wave of Canadian Immigration Laws" (2008) 2:8 Intl J Humanities & Soc Sciences 877 at 881. Russo comments that *IRPA* ultimately emphasized national security and public safety, rather than increasing efficiency and refugee protection measures as initially intended. He further explains that in the aftermath of the attacks on 11 September 2001, the government quickly promoted the proposed reforms as Canada's much needed response to the perceived impending threat of terrorists. See also Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005). According to Pratt, "[t]he government, far from countering the fear-laced expressions of anti-immigrant, anti-refugee sentiments that followed the attacks, mobilized and affirmed this fear, further entrenching the

Enacted three months after 9/11, the *IRPA* proposes to be "tough on those who pose a threat to Canadian security."[8] In the immediate aftermath of the attacks, mainstream American media accounts constructed Canada as a "terrorists' haven" because the "enemy" could easily infiltrate the state's supposed open-border policies.[9] Critics

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associations between crime-security and fraud and new immigrants and refugees." Together, the *Anti-Terrorist Act*, SC 2001, c 41 and *IRPA* comprise Canada's two-pronged contribution to the "War against Terrorism." *Ibid* at 3.

8 See Canada, Department of Foreign Affairs and International Trade, *Canada's Actions since the September 11 attacks: Fighting Terrorism—a Top Priority* (Ottawa: DFAIT, 2003), archived online: <web.archive.org/web/20030924050538/www.dfait.gc.ca/can-am/menu-en.asp?act=v&mid=1&cat=10&did=1684>, cited in Erin Kruger, Marlene Mulder & Bojan Korenic, "Canada after 11 September: Security Measures and 'Preferred' Immigrants" (2004) 15:4 Mediterranean Quarterly 72 at 77. For further analysis on how the *IRPA* was designed to counter "security threats", see: Audrey Macklin, "Borderline Security" in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383. Macklin explains at 384 that: "[t]he *Immigration and Refugee Protection Act* casts a wide net over non-citizens rendered inadmissible on security grounds, expands the detention power over designated security risks, and reduces access to independent review of Ministerial security decisions."

9 See Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007) at 242. See also Colin Freeze, "Canada tarred again as safe haven for terrorists", *The Globe and Mail* (26 April 2002), online: <www.theglobeandmail.com/news/national/canada-tarred-again-as-haven-for-terrorists/article4134106/>. This fear mongering continues to this day. See e.g. John R Schindler, "Canada and the Emerging Terror Threat From the North", *The Observer* (17 December 2015), online: <observer.com/2015/12/canada-and-the-emerging-terror-

have observed that since 2001, the Canadian imaginary has conflated this so-called enemy with immigrants from certain countries, leading to calls for increased securitization and surveillance at the border.[10] In a time where xenophobia is on the rise around the world,[11] there could not be a more critical moment to interrogate the ways in which Canadian laws produce and sustain systemic discrimination against migrants who come to this country hoping to build a better life.

The *family-reunification* category codified under s. 12(1) of the *IRPA* is one pathway to citizenship in Canada. Known more commonly as the spousal sponsorship program, the family class system permits Canadian citizens or permanent residents to sponsor their non-citizen spouse, common law, or conjugal partner, as well as other relatives, to migrate to Canada pursuant to s. 117(1)(a) of the *Immigration and Refugee Protection*

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threat-from-the-north/>. In Schindler's article, he warns that "nobody really knows how many terrorists are lurking in Canada." Throughout the article, Schindler refers to the "threat" posed by America's northern border as the radical Jihadists (which he often refers to simply as "Muslims") who have flocked to Canada because of the government's historically open approach to immigration and its weak border security practices.

10 See Kruger, Mulder & Korenic, *supra* note 8 at 72–87. See also Thobani, *supra* note 9.

11 See e.g. John Cassidy, "It's Time to Confront the Threat of Right-Wing Terrorism", *The New Yorker* (16 March 2019), online: <www.newyorker.com/news/our-columnists/its-time-to-confront-the-threat-of-right-wing-terrorism>. Cassidy documents the correlation between the rise of white nationalism and the violent massacres perpetrated by white supremacist terrorists in recent years.

Regulations (*IRPR*).[12] If an immigration officer approves the sponsorship application, the migrant spouse obtains permanent residency.[13]

A spousal-sponsorship application must satisfy the *bad-faith* clause under s. 4(1) of the *IRPR*. Applicants must prove to visa officers that, on a balance of probabilities,[14] their relationship is "genuine" and not "entered into primarily for the purpose of acquiring any status or privilege under the [*IRPA*]."[15] The task of the visa officer

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12 *Immigration and Refugee Protection Regulations*, SOR/2002-227. The *IRPA* grants broad regulatory power to the Minister so that many of the substantive rules are contained within regulations and can be created without recourse to Parliament. See Lorne Waldman, *Canadian Immigration & Refugee Law Practice* (Toronto: LexisNexis Canada, 2018) at 17.

13 See Chantal Desloges, Cathryn Sawicki & Lynn Fournier-Ruggles, *Canadian Immigration and Refugee Law: A Practitioner's Handbook*, 2nd ed (Toronto: Edmond, 2017) at 207.

14 In *Gonzalez v Canada (Minister of Citizenship and Immigration*), 2014 FC 201 at para 15, the Federal Court clarified that "[t]o say the burden of proof was upon the applicant is not the same as saying there was a presumption that the marriage was entered into for immigration purposes." Minor inconsistencies do not necessarily lead to the conclusion of *bad faith*.

15 This requirement is codified in s. 4(1) of the *IRPR*: "For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or (b) is not genuine." Neither the *IRPR* nor the *IRPA* defines "genuine", but in *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 834 [*Sandhu*], the Federal Court adopted the Immigration Appeal Division of the Immigration Refugee Board's statement that: "[g]enuineness of the marriage may

is to determine "what was going on in the applicant's head, or arguably, heart."[16] Ultimately, a Canadian immigration officer exercises their discretion to approve or refuse the application.[17]

The bad-faith clause responds to the so-called threat of marriage fraud: a narrative advanced by politicians across the spectrum[18] that migrants, hoping to

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often be assessed through external manifestations and may be evidenced by the degree of interaction and consequent knowledge demonstrated by the [couple]." Genuineness will be returned to in Part IV of this paper.

16 See *Gill v Canada (Minister of Citizenship and Immigration)*, [2012] IADD No 624 [*Gill*] at para 19, as cited in *Sandhu*, *supra* note 15 at para 14. Desloges, Sawicki & Fournier-Ruggles, *supra* note 13, provide the following examples of the type of evidence that may be required. When assessing the genuineness of a marriage, the visa officer will evaluate whether a wedding actually took place by reviewing photographs, certificates and other documents (*ibid* at 222); if the couple is common-law, the officer will review documentation proving cohabitation, and in some instances, conduct interviews, and occasionally surprise home visits (*ibid* at 222). Conjugal relationships, on the other hand, are an exception that only apply when marriage or common law partnerships are not possible (*ibid* at 214). Evidence must be provided that shows significant commitment, notwithstanding that the couple did not get married, and do not cohabitate (*ibid* at 214). This may include: "insurance policies or estates showing that they have named each other as beneficiaries; documents showing that they hold joint ownership of possessions; and documents showing that they hold joint expenses or shared income" (*ibid* at 214).

17 See Vic Satzewich, "Canadian Visa Officers and the Social Construction of 'Real' Spousal Relationships" (2014) 51:1 Can Rev Sociology 1 at 4.

18 The Harper government's anti-marriage-fraud campaign video is still on the Government of Canada's website. See it here: Government of

take advantage of s. 12(1), trick vulnerable Canadians into marriage and then abandon them once they have obtained citizenship status. The data proving that this phenomenon is prevalent, let alone on the rise, is ambiguous at best. Concrete evidence put forward by lobbyist groups, politicians, Canada Border Services Agency (CBSA) and Immigration, Refugees and Citizenship Canada (IRCC)[19] fails to provide a consistent picture.[20] On one hand, groups like the Canadians Against Marriage Fraud, former Immigration Minister Jason Kenney, and the IRCC suggest that there are thousands of victims in Canada—even as many as 1,500 defrauded each year.[21] On the other hand,

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Canada, "Marriage Fraud: Stories From Victims" (date modified: 8 June 2018), online: *The Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/news/video/marriage-fraud-stories-victims.html>.

19 Citizenship and Immigration Canada (CIC) was renamed IRCC in late 2015 by the Liberal government.

20 See Megan Gaucher, *Keeping it in the Family: The (Re-) Production of Conjugal Citizens through Canadian Immigration Policy and Practice* (PhD Dissertation, Queen's University, 2013) [unpublished] at 208–09 [Gaucher, *Keeping it in the Family*].

21 Canadians Against Marriage Fraud alleges that 1,500 Canadians fall victim to marriage fraud each year. See Zosia Bielski, "Many Canadians who sponsor a foreign spouse find themselves jilted", *The Globe and Mail* (30 April 2009), online: <www.theglobeandmail.com/life/relationships/many-canadians-who-sponsor-a-foreign-spouse-find-themselves-jilted/article570171/>. Former Immigration Minister Jason Kenney claimed that there were thousands of victims in Canada. See Jason Kenney, "Speaking Notes at an Event to Announce Changes to Spousal Sponsorship" (News Conference to Announce Changes to Spousal Sponsorship, Mississauga, 2 March 2012), online: <www.canada.ca/en/immigration-refugees-

reports from the CBSA suggest that these numbers are inflated. Between 2008 and 2010, there were 200 cases reported, only seven of which resulted in charges.[22] Similarly, between 2010 and 2014, there were 392 referrals made to CBSA, resulting in seven charges laid, with only three concluding with a guilty finding.[23] The exaggerated numbers are misleading due to the difference between *reported* incidences of marriage fraud and *proved* cases of marriage fraud.[24]

Politicians have not explained the inconsistent evidence of marriage fraud in legislative proceedings. Rupaleem Bhuyan, Anna C Korteweg, and Karin Baqi found that members of Parliament regularly ask representatives of the IRCC to share the rates of fraud in light of recent attention to the issue. [25] While avoiding

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citizenship/news/archives/speeches-2012/jason-kenney-minister-2012-03-02.html>. IRCC has reportedly stated that 1,000 fraudulent marriages are reported per year. See Raveena Aulakh, "Fastest Way to Get Into Canada—marriage", *The Star* (16 July 2010), online: <www.thestar.com/news/canada/2010/07/16/fastest_way_to_get_to_canada_marriage.html>.

22 See The Canadian Press, "Marriage fraud targeted by Canada border agency", *CBC News* (1 November 2011), online: <www.cbc.ca/news/politics/marriage-fraud-targeted-by-canada-border-agency-1.1003652>.

23 See House of Commons, Standing Committee on Citizenship and Immigration, *Minutes of Proceedings and Evidence*, 41-2, No 15 (4 March 2014) at 1543 (Mr Geffrey Leckey (Director General, Enforcement and Intelligence Operations Division, CBSA)).

24 See Gaucher, *Keeping it in the Family*, *supra* note 20.

25 See Rupaleem Bhuyan, Anna C Korteweg & Karin Baqi, "Regulating Spousal Migration through Canada's Multiple Border Strategy: The

giving any tangible evidence, IRCC's responses reproduce two assumptions: (1) that fraud is real and can be accurately detected and (2) that visa officers require more resources to improve their capacity to detect fraud.[26] This cyclical logic masks the fact that no problem has been proved with any degree of certainty in the first place. Although touted as an issue of national concern, it is difficult to know whether, and to what extent, this threat actually exists.

Drawing on the work of feminist, anti-racist, and anti-colonial scholars, this paper argues that the construction of marriage fraud as a threat to national security rationalizes an increasingly exclusionary spousal-sponsorship regime post 9/11. Focusing on this threat detracts from the insidious naturalization of the neo-liberal, hetero-patriarchal, and white settler–colonial values that animate the exclusionary nature of family class migration —values that pre-date the recent moral panic over marriage fraud. We must be wary of the ongoing reproduction and sedimentation of such values, because they reinforce and perpetuate experiences of precarity among migrants who live on the underside of global capitalism.[27]

Gendered and Racialized Effects of Structurally Embedded Borders" (2018) 40:4 Law & Pol'y 346 at 354.

26 See *ibid.*

27 The use of the term *precarity* throughout this paper is informed by the work of Judith Butler. See Judith Butler, *Frames of War: When is Life Grievable?* (London: Verso, 2009) at 25: all life is "precarious" because it "can be expunged at will or by accident…[its] persistence is in no sense guaranteed." In this sense, "precariousness" describes "the fact that one's life is always in some sense in the hands of the other. It

This paper will be structured as follows. The first section sets the foundation by explaining how stories around terrorist threats and national security have been used to justify heightened scrutiny of prospective immigrants in the years since 9/11. The second section situates the purported threat of marriage fraud within this climate of fear by demonstrating how it resulted in intensified securitization of Canada's borders. The third section evaluates how the exclusionary nature of spousal sponsorship reveals the underlying neo-liberal, hetero-patriarchal, and white settler–colonial assumptions of Canada's immigration system. The fourth section turns to how these theoretical underpinnings manifest in tangibly precarious conditions for migrants who are deemed undesirable by the Canadian state. The final section calls for a subversive retelling of this story, rendering visible the divisive, authoritarian, and exclusionary settler state practices that operate under the guise of national security and maintain global relations of inequality and oppression.

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implies exposure both to those we know and to those we do not know." *Ibid* at 14. Importantly, although all lives are equally defined by precariousness, it does not follow that all lives are equally *precarious*; indeed, for Butler, *precarity* is unequally distributed, leaving some bodies more vulnerable to violence than others. Although political orders are designed to address the needs, Butler deploys the term *precarity* to designate the "politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death." *Ibid* at 25. These populations live in the vanguard of war, neoliberalism, and climate crises, and are denied the social value and recognition that is ascribed to others. Such populations are at "heightened risk of disease, poverty, starvation, displacement, and of exposure to violence without protection." *Ibid*.

In embarking on this project, I am mindful of how Canada's nation-state continues to occupy Indigenous land, and how notions of national identity have historically been predicated on the Othering of migrants of colour *and* Indigenous peoples. In the words of Indigenous scholar Andrea Smith, "a liberatory vision for immigrant rights is one that is based less on pathways to citizenship in a settler state, than on questioning the logics of the settler state itself."[28]

II. DISCOURSES AROUND TERRORISM AND NATIONAL SECURITY IN THE POST-9/11 ERA

In order to understand the panic surrounding marriage fraud, we must first situate it within a cultural moment where white settler societies have become increasingly hostile to migrants of colour, and Muslims in particular. In the aftermath of the 9/11 attacks, mainstream media identified the "enemy" as the "radical Muslim" who was seen as "anti-Western, fanatic, and uncivilized in nature."[29] In contrast, Western settler nation-states, like America and Canada, were framed as bastions of liberalism, democracy, freedom, and the rule of law.[30] Edward Said explains this

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28 See Andrea Smith, "Foreword" in Harsha Walia, *Undoing Border Imperialism* (Oakland: Institute for Anarchist Studies, 2013) at 2.

29 See Thobani, *supra* note 9 at 218.

30 See *ibid* at 222. In reality, the forcible displacement of migrants at greater rates than ever before is by virtue of a global political economy driven by Western colonialism and capitalism: Walia, *supra* note 28 at 54. For example, people from Afghanistan and Iraq compose the world's largest recent refugee populations. Harsha Walia points out that "[w]ith decades of foreign intrusion, including the US and NATO occupations that began in 2001, these two countries have been subject

dichotomy, observing that the West constructs its own sense of identity out of stories premised on the "ineradicable distinction between Western superiority and Oriental inferiority."[31]

The War on Terror is symptomatic of this Western-centric worldview. Countries in the West invade the Middle East under the assumption that Eastern countries pose a threat because "they detest our freedoms, they detest our society, they detest our liberties."[32] Migrants from these countries, in turn, come to embody this perceived assault on Western values and freedoms.

Importantly, in the post-9/11 era, the climate of fear and distrust is pervasive, directed indiscriminately at Muslims and other groups marked by difference. Critical race and feminist scholar Sunera Thobani points out that:

> [i]f the figure of the Muslim is today being used to represent the most potent threat to

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to the destruction of their infrastructure, privatization of their economies, interference in their governance, and military missions that have killed and tortured over one million people": *ibid.* Thus, the migrants are displaced from a context devastated by western interventions, which may be described as imperialist, extending and imposing Western rule over the Middle East "colonies": *ibid* at 41–42.

31 See Thobani, *supra* note 9 at 228, quoting Edward Said, *Orientalism: Western Conceptions of the Orient* (London: Penguin, 1978).

32 Canada's Chief of Defence Staff described the "opponent" in Afghanistan as "detestable murderers and scumbags, I'll tell you that right up front. They detest our freedoms, they detest our society, they detest our liberties." Daniel Leblanc & Shawna Richer, "He's Armoured, But He's Not Thick", *The Globe and Mail* (30 July 2005), cited in Thobani, *supra* note 9 at 235.

> national security, the racialization of the categories 'Muslim' and 'immigrant' means that all people of colour who 'look' like 'Muslims' (that is, who are Black and Brown), are being constituted as part of this danger, regardless of their legal status.[33]

It is within this context that Western stories of threat frame deviations from whiteness as something to be feared; something that challenges Canada's own national identity as a freedom-loving democracy. Thus, the heightened anxieties around the *Radical Muslim* within the (white) national psyche post 9/11 increased suspicion of *all* racialized migrants.

III. SECURING CANADIAN BORDERS AGAINST THE "THREAT" OF MARRIAGE FRAUD

Concerns about marriage fraud emerge within this wider moral panic about "keeping borders safe and secure" from the Other who seeks to "penetrate" North America's "vulnerable shores."[34] In 2009,[35] then Immigration Minister Jason Kenney launched an aggressive campaign aimed at cracking down on marriage fraud, arguing that ". . . [it] poses a significant threat to our immigration

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33 *Ibid* at 246.

34 See Walia, *supra* note 28 at 54.

35 See Megan Gaucher, *A Family Matter: Citizenship, Conjugal Relationships, and Canadian Immigration Policy*, (Vancouver: UBC Press, 2018) at 122 [Gaucher, *A Family Matter*]. According to Gaucher, the issue of marriage fraud did not receive much attention before the government's policy position was identified in 2010.

system."[36] After conducting a series of town hall meetings across the country, Kenney became a spokesperson for the cause.[37] Under his leadership, the government of Canada released numerous videos that shared victim's stories and warned Canadians that the danger of marriage scams was on the rise.[38] He claimed that this "abuse of the system" has victimized thousands of innocent Canadians, who were "being lied to and deceived."[39] Where the sponsor is complicit in the operation, Kenney argued that marriage fraud amounts to human smuggling.[40] Kenney also warned that the livelihood of all Canadians are implicated; marriage fraud takes its toll on "our taxpayer benefits such as health care" and other social services, including welfare.[41]

Although the Liberal government repealed one of the legislative changes enacted by the former Harper government, which will be elaborated on later in this article, the former Immigration Minister under Prime Minister Justin Trudeau, Ahmed Hussen, was sure to emphasize that the Liberal government was "doubly

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36 Kenney, *supra* note 21.

37 See Steven Meurrens, "Addressing Concerns About Marriage Fraud", *Policy Options Politiques* (9 November 2017), online: <policyoptions.irpp.org/magazines/november-2017/addressing-concerns-about-marriage-fraud/>.

38 See Kenney, *supra* note 21.

39 See *ibid*. See also Christina Gabriel, "Framing Families: Neo-Liberalism within Canadian Immigration Policy" (2017) 38:1 Atlantis 179 at 187.

40 See Kenney, *supra* note 21.

41 *Ibid*.

committed" to combatting the threat of marriage fraud like its predecessor.[42] Indeed, much of Kenney's anti-marriage-fraud campaign remains on the government's website. For example, it still cautions Canadians to "think carefully before marrying someone and sponsoring them to come to Canada" because "[s]ome people think marriage to a Canadian citizen will be their ticket to [citizenship]."[43]

This section will show how the fear around marriage fraud legitimized stricter enforcement of Canada's borders, traceable in two broader transformations to the spousal-sponsorship program. First, legislative changes were enacted, including a widened *bad faith* clause, a five-year sponsorship restriction, and a conditional permanent resident provision. Second, procedural changes were implemented, including specialized training and the expansion of anti-fraud units beyond Canada's borders. As will be explained at the end of this section, while these changes took place to the spousal-sponsorship program, the government expanded its security and surveillance mechanisms targeting

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42 See Kathleen Harris, "Liberals 'doubly committed' to tackling marriage fraud while ending 2-year spousal residency rule", *CBC News* (28 April 2017), online: <www.cbc.ca/news/politics/liberal-immigration-marriage-fraud-1.4090694>.

43 Government of Canada, "Protect Yourself from Marriage Fraud" (last modified 1 May 2020), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/services/protect-fraud/marriage-fraud.html>.

migrants applying under all immigration classes, both here and abroad.

A. LEGISLATIVE RESPONSES

In 2010, under the direction of Kenney, IRCC increased the number of marital, common-law, or conjugal relationships that could be excluded on the grounds of *bad faith*. Before 2010, visa officers denied applications under the bad-faith clause only where the relationship was both disingenuous *and* entered into primarily for immigration purposes.[44] In 2010, the IRCC changed the wording of the provision to a disjunctive test; now, either element can compromise an application and there is no need for both. In other words, an application can be rejected if it was genuine but entered into primarily for immigration purposes, or if it was disingenuous but not entered into primarily for immigration purposes. Since the onus is on the applicant to prove that the relationship was entered into in good faith on a balance of probabilities, an applicant must now negate both elements to have a successful application.[45]

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[44] See e.g. *Gill v Canada (Citizenship and Immigration)*, 2007 CanLII 62947 (Immigration Appeal Division), as cited by Stephen Green & Alex Stojicevic, Chair, National Citizenship and Immigration Law Section of the Canadian Bar Association, "Regulations Amending the Immigration and Refugee Protection Regulations (Bad faith), Canada Gazette, Part I" (3 April 2010), online: *The Canadian Bar Association* <www.cba.org/CMSPages/GetFile.aspx?guid=6b689ddd-0057-4f42-90aa-4e69da411349> [Green & Stojicevic]. The Immigration Appeal Division found that although it appeared the applicant entered into marriage with the appellant primarily for immigration reasons, it was nonetheless a genuine relationship of permanence.

[45] See Desloges, Sawicki & Fournier-Ruggles, *supra* note 13 at 222.

Writing on behalf of the National Citizenship and Immigration Section of the Canadian Bar Association, Alex Stojicevic criticized the change, arguing that a disjunctive test may be prejudicial to cultures that practice arranged marriages where immigration prospects are an important factor to be considered.[46] As well, it may be illogical, potentially targeting couples who choose to marry in order to stay together, with a genuine intention to be with one another permanently.[47]

The next year, along with creating a tip line to report citizenship fraud,[48] Kenney's department introduced two regulations that further tightened spousal sponsorship as a pathway to Canadian citizenship. First, he introduced a five-year sponsorship restriction for sponsored spouses, beginning on the day they are granted permanent residence, as a way to deter the "revolving door" of family status migrants coming to Canada.[49] Second, he introduced the controversial *conditional permanent residence* (CPR)

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46 See Green & Stojicevic, *supra* note 44 at 3–4.

47 See *ibid.*

48 See Gloria Suhasini, "A new tip line to report citizenship fraud" (15 September 2011), online: *Canadian Immigrant* <canadianimmigrant.ca/news/a-new-tip-line-to-report-citizenship-fraud>.

49 See Steven Meurrens, "Sponsorship bar and conditional permanent residency in effect" (9 February 2013), online: *Canadian Immigrant* <canadianimmigrant.ca/immigrate/sponsorship-bar-and-conditional-permanent-residency-in-effect>.

provision,[50] which instituted a two-year co-habitation requirement for newcomers sponsored by their spouses.

The CPR provision was subsequently repealed by the Liberal government because it fuelled widespread concern that forcing spouses to cohabitate for two years exacerbated vulnerabilities among victims of domestic abuse. Although the CPR had an exception for spouses who were subject to abuse or neglect, critics argued that it nonetheless deterred individuals from coming forward because, not only were they in fear that they would lose their permanent-residence status, they also were greatly reliant on their sponsors due to vulnerabilities such as language proficiency, isolation, and financial dependence.[51] Since they are more likely to come to Canada as dependent spouses[52] and because women are

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50 See the Liberal government's official statement on the repeal, where they emphasize their commitment to family reunification and prevention of gendered sexual violence. Government of Canada, "Notice – Government of Canada Eliminates Conditional Permanent Residence" (28 April 2017), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/news/notices/elminating-conditional-pr.html>.

51 See Gaucher, *A Family Matter*, *supra* note 35 at 144.

52 "In 2017, the sponsored spouses, partners and children category was composed of 57% women and 43% men." Hon Ahmed Hussen, Minister of Immigration, Refugees, and Citizenship Canada, "2018 Annual Report to Parliament on Immigration" (last modified 26 February 2019), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2018/report.html#message>.

more likely to be subject to abuse,[53] this was seen to have a disproportionate impact on female migrants.

That being said, the problem of vulnerability among spouses who are subject to abuse still exists, notwithstanding the repeal of the CPR provision. As will be expanded on below, the government still does not provide any socio-economic support to sponsorship recipients. Without access to a social safety net, abused spouses remain deeply reliant on their sponsors for financial and social support in a time of significant alienation and cultural transition.

B. PROCEDURAL RESPONSES

Along with these legislative measures, the government enacted several changes to the way in which spousal-sponsorship applications are processed. In 2012, Kenney announced that visa officers[54] would complete "supplementary marriage-fraud identification training",

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53 See e.g. Government of Canada, "Family violence: How big is the problem in Canada?" (last modified 31 May 2018), online: *Government of Canada* <www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/problem-canada.html>.

54 See Government of Canada, "Inventory: Foreign Service Development Program" (last modified 16 June 2020), online: *Government of Canada Jobs* <emploisfp-psjobs.cfp-psc.gc.ca/psrs-srfp/applicant/page1800?toggleLanguage=en&poster=1200120>. The immigration officers who process and decide applications are stationed within Canadian embassies, high commissions, and consulates in other countries. They are Canadians who work abroad, employed through the Foreign Service Development Program.

the specifics of which the government never revealed to the public.[55]

However, in 2015, immigration lawyer Steven Meurrens obtained a three-page training guide through an access-to-information request.[56] Titled "Evidence of Relationship", the guide contained *red flags* that visa officers ought to look out for. Examples of supposed *red flags* included "university-educated Chinese nationals marrying non-Chinese", "sponsor is uneducated, with a low-paying job or on welfare", and couples who had "no diamond rings".[57] Predictably, the guide caused an uproar in the media, with many alleging that racist, classist, and cultural stereotypes pervade training for border officials.

The *red flag* targeting Chinese applicants was no surprise for those who followed the anti-marriage fraud campaign. Kenney's department was very explicit about how applications from certain countries, namely India and China, should be viewed with heightened suspicion. It was alleged that Indian and Chinese applicants were more likely to be part of sophisticated networks of organized marriage fraud. Singling out India specifically, in Citizenship and Immigration Committee meetings, Kenney referred to a "wall of shame" at the Canadian visa office in the Indian city of Chandigarh, comprised of accumulated forged documents, including fake death certificates and

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55 Gaucher, *A Family Matter*, *supra* note 35 at 145.

56 See Nicholas Keung, "Immigration guide for Detecting marriage fraud called 'racist and offensive'", *Toronto Star* (19 May 2015), online: <www.thestar.com/news/immigration/2015/05/19/immigration-guide-for-detecting-marriage-fraud-called-racist-and-offensive.html>.

57 *Ibid.*

university diplomas.[58] Yet, scholar Megan Gaucher points out that both the government and the IRCC failed to prove that marriage fraud is higher in these countries and that this level of suspicion is warranted.[59] Indeed, the government provided minimal empirical data to support this claim.[60]

Nonetheless, the application process became increasingly intensive in India and China. The differential treatment of applicants from certain countries led one immigration officer to observe: "[c]ase assessment is entirely dependent on the area in which you're located. When I was in London, cases were rarely refused. When I was stationed in Delhi, couples were considered guilty until proven innocent."[61] Anti-fraud units were established in New Delhi and China, and all applicants had to be interviewed abroad to quell concerns about marriage fraud. Here we see what Rupaleem Bhuyan, Anna C Korteweg, and Karin Baqi speak of when they argue that threats of fraud operate as a device that extends the frontier of Canadian border control beyond Canada's territory.[62] By fixating on China and India and establishing enforcement mechanisms beyond Canadian borders, immigration officers detect and intercept what are perceived as undesirable migrants before they even enter Canada.[63]

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58 See Gaucher, *Keeping it in the Family*, *supra* note 20 at 225.

59 See *ibid* at 226–27.

60 See *ibid.*

61 Gaucher, *A Family Matter*, *supra* note 35 at 150.

62 See Bhuyan, Korteweg, & Baqi, *supra* note 25.

63 See *ibid.*

As we have seen, the purported threat posed by marriage fraud justified a series of restrictive measures that tightened spousal sponsorship as a pathway to citizenship. However, it is important to point out that this part of the immigration regime was already exclusionary. The recent crackdown on marriage fraud is only the most recent example in a long history of legislative measures aimed at protecting a certain version of the Canadian family.

Although Canada's immigration regime has historically purported to prioritize family reunification, certain types of families have been afforded easier passage than others: namely, families that emulate, in organization and socio-economic background, the Canadian nuclear family.[64] As Gaucher argues, family reunification "is about the state producing and reproducing a desirable familial form through the provision of citizenship."[65] In the next section, this paper will expand on how family class migration is deeply informed by biases that allow for the inclusion of some people over others.

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64 See Cindy L Baldassi, "DNA, Discrimination and the Definition of Family Class: *M.A.O. v. Canada (Minister of Citizenship and Immigration)*" (2007) 21 J L & Soc Pol'y 5 at 29–30. An obvious example is Canada's history of prohibiting or restricting the entry of migrant families from specific countries or racial backgrounds. See *ibid* at 6. See e.g. Agnes Calliste, "Race, Gender and Canadian Immigration Policy: Blacks from the Caribbean, 1900–1932" (1993–94) 28:4 Journal of Canadian Studies 131; Beverley Baines, "When is Past Discrimination Un/Constitutional? The Chinese Canadian Redress Case" (2002) 65:2 Sask L Rev 573 at 585.

65 Gaucher, *A Family Matter*, *supra* note 35 at 19.

IV. NEO-LIBERALISM, HETERO-PATRIARCHY, AND WHITE SETTLER–COLONIALISM

The fears surrounding marriage fraud expose three underlying forces that give meaning to ideas around Canadian citizenship. First, consistent with the wider neo-liberal ideology that animates Canada's immigration law, the intensified scrutiny of spouses reflects an active effort to exclude migrants who are seen as potential financial burdens on the welfare state. Second, the normative logic guiding the genuineness assessment of marital, common law, and conjugal relationships reinforces white hetero-patriarchal ideas of marriage and marriage-like relationships. Third, by only recognizing marriages solemnized through formalistic law here and abroad, the assessment process evinces a continued propagation of settler–colonial ideas in the construction of the desirable migrant subject. I will deal with each in turn.

A. NEO-LIBERALISM

As Abu-Laban and Gabriel observe, under neo-liberal logic, "the 'best' immigrants are those whose labour-market skills [would] enhance Canada's competitive position in a world economy."[66] Migrants deemed "self-sufficient" and "highly skilled" are actively sought after.[67]

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66 Yasmeen Abu-Laban & Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity and Globalization*, (Peterborough, ON: Broadview Press, 2002) at 62, cited in Gaucher, *A Family Matter*, *supra* note 35 at 62.

67 See Gabriel, *supra* note 39 at 181. Ironically, economic-class migrants include both "the principal applicant *and* spouses and dependents of the applicant if they migrate together." But since "the principal

Meanwhile, migrants who are viewed as needy are not only given less priority, but also targeted as security concerns who merit stricter conditions.[68] Given that sponsored spouses are explicitly thought of as dependants, family class migrants are considered an undesirable group due to the potential financial drain on the welfare state. There is an assumption "that 'dependent' family members lack skills and are unproductive, and that people of the 'wrong' origins make excessive use of the family reunification program."[69]

The spousal-sponsorship regime prevents family class migrants from becoming the fiscal responsibility of the state in two ways. First, it disincentivizes participation in the program because applicants are subject to the undertaking requirement. The undertaking amounts to a "de facto privatization of basic social security"[70] by ensuring that the full financial responsibility of the incoming migrant rests on the sponsor. As alluded to in the introduction, under the *IRPR*, a sponsor must undertake to become financially responsible for spouses for a duration

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applicant is the public face of this category", the stigma of dependents is overshadowed by the primary applicant's perceived "human capital and ability to contribute to Canada's global competitiveness." *Ibid*.

68 See Chizuru Nobe-Ghelani, "Inner Border Making in Canada: Tracing Gendered and Raced Processes of Immigration Policy Changes Between 2006 and 2015" (2017) 77 Can Rev Soc Policy 44 at 47.

69 Gillian Creese, Isabel Dyck & Arlene Tigar McLaren, "The 'Flexible' Immigrant? Human Capital Discourse, the Family Household and Labour Market Strategies" (2008) 9:3 J Intl Migration & Integration 269 at 270 as cited by Gabriel, *supra* note 39 at 181.

70 Gabriel, *supra* note 39 at 182.

of at least three years.[71] This means that the sponsor ensures that the family members are supported so that they will not require social assistance from the government. If social assistance payments are made, the sponsor agrees to repay the government in full. Once this undertaking is in force, the sponsor cannot revoke it for any reason, including relationship breakdown, abuse, or fraud. If sponsors are deemed to have defaulted on their undertaking, they will not be allowed to sponsor other family members until they have repaid the government.

The second way that the spousal-sponsorship regime prevents unwanted costs on the welfare state is by requiring sponsors, who immigrated to Canada themselves, to disclose any dependents in their initial immigration application. That way, immigration officials can assess the risk of any future financial liability before even granting the primary applicant citizenship. Section 117(9)(d) of the *IRPR* provides that the failure of a sponsor to disclose a dependent at the time they applied for permanent residency will result in those undisclosed dependents being excluded from the family class in the future.[72] The obligation to disclose begins at the time the application is filed and continues until permanent residence is granted.

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71 However, if they also sponsor dependent children, it could be as long as ten years or until they turn twenty-two, whatever comes first. See *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 132(1)(b).

72 See *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436. This provision has been upheld as intra vires and constitutional by the Federal Court of Appeal.

Although aiming to deter misrepresentation, this requirement prevents permanent residents from acting as a sponsor even where their non-disclosure was innocent or unintended. An applicant's intentions or reasons for non-disclosure are irrelevant under s 117(9)(d).[73] This has at times produced absurd results. In *Munganza v. Canada (Minister of Citizenship and Immigration)*,[74] the applicant did not disclose his wife and child because he thought they had died in a civil war. Consequently, the wife and child could not apply under the family class pursuant to s. 117(9)(d) of the *IRPR*.[75] The only available recourse that applicants have to overcome the overly broad and harsh effects of this provision is to apply for consideration on humanitarian and compassionate grounds.[76]

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73 See Desloges, Sawicki & Fournier-Ruggles, *supra* note 13 at 217.

74 *Munganza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1250 [*Munganza*].

75 In *Munganza*, *supra* note 73, the Federal Court at para 13 states: "I am prepared to accept that the applicant was not aware that his wife and children were still alive when his application for permanent residence was filed. This situation has no effect on the application of paragraph 117(9)(d) of the Regulations. The Regulations are clear: paragraph 117(9)(d) does not make any distinction with regard to the reason for which there was no mention of the non-accompanying family members in the application for permanent residence. What is important is that result of the non-disclosure was that these members were not examined by an immigration officer. In this case, it is true that the applicant could not disclose what he did not know, but the wording of the Regulations is clear and unequivocal; subjective knowledge regarding a false statement or non-disclosure is contemplated in the Regulations."

76 See *Deheza v Canada (Minister of Immigration, Refugees and Citizenship)*, 2016 FC 1262, cited in Desloges, Sawicki & Fournier-Ruggles, *supra* note 13 at 207.

By requiring the sponsor to enter into an undertaking and disclose their dependents, the state ensures that any costs associated with integration into Canadian society rests with the individual sponsor. Consequently, only those who are sufficiently financially secure may sponsor spouses. Indeed, the state ensures that this is the case by barring sponsorship applications from individuals who are on social assistance, in default of child or spousal support, already in default under *IRPA*, or who are undischarged bankrupts. The consequence of calibrating immigration policy to the needs of Canada's national economic project is that the border systemically deprives migrants who are perceived as indigent, or even potentially indigent, of equal access to Canadian citizenship. In the words of Nobe-Ghelani, such exclusionary border practices create two categories of migrants: those who are deserving of Canadian rights and entitlements, and those who are not. [77] Here, the undeserving migrant is one who poses a financial risk to the state.

Marriage fraud undermines the ability of the state to prevent the migration of individuals presumed to pose a financial risk. Sponsored spouses who abscond from their partners may not have the economic and social support that would otherwise be guaranteed by a sponsor. Thus, such spouses are viewed as more likely to amount to a long-term economic burden on the state.

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77 Nobe-Ghelani, *supra* 68 at 50.

B. WHITE HETERO-PATRIARCHY

The threat posed to the state by sponsored spouses is not just financial. A closer look at the application criteria for the spousal-sponsorship program reveals that Canadian immigration law facilitates the reproduction of white heteropatriarchy through the privileging of the conjugal, monogamous, nuclear family. As pointed out by Jamie R Wood, this family form operates to "cast other structures . . . as deviant, dangerous and unworthy of equal recognition."[78] Problematically, families that orient themselves around norms other than those of conjugality and monogamy—kinship formations that challenge heteropatriarchy—are excluded from this framework.

1. Conjugality

The assessment criteria that determines whether a relationship is genuine relies upon certain assumptions around what comprises the idealized family. One such assumption is that marriages and marriage-like relationships must be conjugal in nature.[79] The *IRPA* and *IRPR* do not define the word *conjugal*, but its central features derive from the Supreme Court of Canada decision in *M v. H*.[80] The Court provided a non-exhaustive list of indicia for conjugal relationships drawn from the decision

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78 Jamie R Wood, "Moving Beyond the Bedrooms of Our Nation: Redefining Canadian Families from the Perspective of Non-Conjugal Caregiving" (2008) 13:1 Appeal 7 at 11.

79 Under the spousal-sponsorship program, conjugality is a requirement for citizenship for spousal applicants. See Gaucher, *Keeping it in the Family*, *supra* note 20.

80 *M v H*, [1999] 2 SCR 3 at para 59, 171 DLR (4th) 577.

of the Ontario Court of Appeal in *Molodowich v. Penttinen*,[81] including shared shelter (sleeping arrangements), sexual and personal behaviour (fidelity, commitment, feelings toward each other), services (conduct and habit with respect to the sharing of household chores), social activities (their attitude and conduct as a couple in the community and with their families), economic support (financial arrangements, ownership of property), children (attitude and conduct concerning children), and societal perception of the couple.[82] According to Megan Gaucher, these relational attributes reflect how "conjugal relationships are measured against characteristics believed to be part of the ideal marriage",[83] or more specifically, "how judges imagine marriage ought to be."[84]

Under the *Molodowich* framework, what separates a conjugal/marital relationship from a mere economic partnership is the presence of emotional and physical intimacy, care, and fidelity—features that are fundamental to social constructions of the Western nuclear family.[85] By binding intimacy to citizenship, Anne Marie D'Aoust suggests that "technologies of love" play a role in regulating migration flows, disciplining those migrants

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81 *Molodowich v Penttinen*, [1980] OJ No 1904 (QL), 17 RFL (2d) 376 (ONSC) [*Molodowich*].

82 See Gaucher, *Keeping it in the Family*, *supra* note 20 at 63.

83 *Ibid*.

84 Brenda Cossman & Bruce Ryder,"What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18:2 Can J Fam L 269 at 290, as cited in *ibid*.

85 See Gaucher, *Keeping it in the Family*, *supra* note 20 at 68.

who do not embody Western narratives of romance and kinship. [86] Additionally, emphasis on care[87] reinforces social constructs of idealized domesticity, reproducing heteronormative and gendered divisions of labour within the household. Finally, the cherishing of fidelity inscribes monogamy as the naturalized kinship formation; as will be explained below, this comes at the exclusion of more radical conceptions of family and gender relations.

While same-sex couples are eligible to apply under the spousal-sponsorship regime,[88] only those couples that embody narrow racial, class, gender, and national ideals of

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[86] See Anne Marie D'Aoust, "In the Name of Love: Marriage Migration, Governmentality, and Technologies of Love" (2013) 7:3 Int'l Political Sociology 258 at 263–64.

[87] See Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development*, 2nd ed (Cambridge, MA: Harvard University Press, 1993). In this work, the feminist scholar introduces the concept of "an ethic of care" to describe the differential moral development among women that emphasizes attentiveness, responsibility, competence, and responsiveness in interpersonal relationships and conflict. Gilligan's work is critical of how, by reason of being feminized, "an ethic of care" is devalued. Instead, under her view, an "ethic of care" is a human strength which can and should be taught to, and expected of, everyone. However, in the context of assessing conjugality in spousal-sponsorship applications, "care" is likely not expected in the same way for both parties. Since patriarchal gender roles inform the viewpoint under which these assessments are made, the ability of a woman migrant to care for her sponsor would likely be more carefully scrutinized than vice versa. Given that the regime, through undertakings, reifies a relationship of economic dependency, sponsored spouses/partners are often embedded within a domestic hierarchy that reproduces an unequal, gendered division of labor.

[88] See Desloges, Sawicki & Fournier-Ruggles, *supra* note 13 at 236–38. This is subject to an important caveat: the marriage must be legal both in Canada *and* the applicant's home country.

conjugality satisfy the legal requirement of genuineness. Rahul Rao describes the mainstream acceptance of some queer relationships as "the ruse through which neoliberal capitalism pretends to become more inclusive."[89] Meanwhile, relationships that defy hegemonic understandings of conjugality are still relegated to the margins.

By predicating citizenship on the performance of conjugality, the sponsorship regime reproduces the nuclear family as the cornerstone to Canada's ideal kinship formation. This is reflective of how, according to Eithne Luibhéid and Lionel Cantú, the state ascribes membership to those whose sexual values correspond with national values.[90] Under this view, immigration control acts as a mechanism for "constructing, enforcing, and normalizing dominant forms of heteronormativity while producing figures as supposed threats."[91]

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89 See Rahul Rao, "Global Homocapitalism" (2015) 194 Radical Philosophy 38 at 44, 47.

90 See Eithne Luibhéid & Lionel Cantú, eds, *Queer Migrations: Sexuality, U.S. Citizenship and Border Crossings* (Minneapolis: University of Minnesota Press, 2005), as cited by Gaucher, *Keeping it in the Family*, *supra* note 20 at 40. Gaucher summarizes Luibhéid's argument as follows: "Luibhéid defines heteronormativity as 'a range of normalizing discourses and practices that seek to cultivate and privilege a heterosexual population while nonetheless insisting that heterosexuality is 'natural' and timeless rather than a product of economic, society, culture and political struggle' (2008, 296). For Luibhéid, immigration scholarship disregards connections between heteronormativity, sexuality and immigration, despite the fact that sexuality 'structures every aspect of immigrant experiences (2004, 227).'"

91 See Gaucher, *supra* note 20 at 40.

2. Monogamy

As we have seen, monogamy is a crucial element in the assessment of whether a marital, common law, and conjugal relationship is genuine. This means that the spousal-sponsorship regime prohibits polyamory. Since the spousal-sponsorship regime requires that the marriage be legal under Canadian law,[92] spouses of polygamous or bigamous relationships, which are explicitly prohibited due to their criminalization under ss. 293 and 290 of the *Criminal Code*,[93] are inadmissible.

Polygamy has been seen as a familial arrangement that undermines the institution of marriage, the Canadian family, and society at large.[94] Some feminists would agree with this characterization, arguing that women are disenfranchised in such relationships and Canada should not endorse them within its borders.[95] Admittedly, to the extent that they reinforce gendered hierarchies, some polygamous familial formations can be extremely

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92 See the definition of marriage under s. 2 of the *IRPR*.

93 *Criminal Code*, RSC 1985, c C-46. As will be explained below, provisions in the *Zero Tolerance for Barbaric Cultural Practices Act*, SC 2015, c 29, specifically target polygamy as an inadmissible union within the spousal-sponsorship program.

94 See Gaucher, *Keeping it in the Family*, *supra* note 20 at 49–50.

95 See e.g. West Coast LEAF, "Polygamy Reference [2010]" online: *West Coast LEAF* <www.westcoastleaf.org/our-work/polygamy-reference-2010/>. This details West Coast Leaf's submission as an intervener to the BC Supreme Court's Polygamy Reference.

exploitative, especially where there are "issues with lack of consent, and abuse of women and children."[96]

However, we should not be so quick to dismiss or essentialize non-monogamous familial relations. Polygamous relationships are not inherently problematic and in fact, may be emancipatory in certain contexts. For example, some feminists have argued that polygamy presents a possible remedy to the inequitable division of household labor by "[providing] a 'sisterhood' within marriage, [generating] more adults committed to balancing work/family obligations, and [allowing] more leisure time for each wife."[97] Elizabeth Joseph, a lawyer and polygamist wife in Utah, went so far as to describe her life as representing "the ultimate feminist lifestyle."[98]

Whether or not that's true, Michelle Chan points out that "[w]hile the practice of polygamy is certainly not without problems, neither is the practice of monogamy."[99] Indeed, feminists have long critiqued monogamy as a central feature of the nuclear family, which perpetuates

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96 See Gillian Calder, "Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage in Canadian Family Law" (2009) 21:1 CJWL 55 at 80.

97 Adrienne D Davis, "Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality" (2010) 110:8 Colum L Rev 1955 at 1972.

98 *Ibid* at 1973. John Tierney, Op-Ed, *The New York Times* (11 March 2006) online: <select.ny-times.com/2006/03/11/opinion/11tiemey.html>, as cited by Michelle Chan, "Beyond Bountiful: Toward an Intersectional and Postcolonial Feminist Intervention in the British Columbia Polygamy Reference" (2011) 16 Appeal 15 at 23.

99 Davis, *supra* note 97 at 1973.

"inequality, gender roles, gender hierarchy, and male power."[100] Beyond that, monogamy far from guarantees a successful relationship: as of 2008, "43.1% of Canadian marriages are expected to end in divorce before the couple reaches their 50th wedding anniversary."[101] It seems hypocritical to base Canada's immigration policy around the idea that monogamy is the only way to achieve domestic bliss when that ideal is not a reality for many Canadian families.

Decrying polygamy and upholding monogamy as the idealized alternative also reflects how the social construction of family in Canada is laden with racist assumptions. Critical race legal scholar Adrien Katherine Wing notes that "in the twenty-first century, polygamy continues to exist in many parts of the world, particularly countries where women of color live."[102] Though neutral on its face, the exclusion of polygamous spouses disproportionately impacts applicants of colour, while also buttressing a national identity built upon Euro-Western value systems. Nowhere is this more explicit than the *Zero Tolerance for Barbaric Cultural Practices Act,* enacted by

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100 See Jyl Josephson, "Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage" (2005) 3:2 Perspectives on Politics 269 at 270.

101 See Tavia Grant, "Statistics Canada to top tracking marriage and divorce rates", *The Globe and Mail* (20 July 2011), online: <www.theglobeandmail.com/news/national/statistics-canada-to-stop-tracking-marriage-and-divorce-rates/article4192704/>.

102 See Adrien Katherine Wing, "Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century" (2001) 11:2 J Contemp Leg Issues 811 at 812.

the Harper government in 2014.[103] The spousal-sponsorship program was already anchored in monogamy by allowing a permanent resident to sponsor only one spouse, but the Bill took this one step further by adding the practice of polygamy as a new ground of inadmissibility. Then Immigration Minister Chris Alexander stated that "[w]e intend [on] sending a very clear message to anyone coming to Canada that such practices are unacceptable."[104]

Sherene Razack observes that Westerners point to Eastern practices of polygamy as backwards and barbaric patriarchal violence, which in turn, constructs Western civilization as progressive and free from gender oppression.[105] Thus, the exclusion of polygamous relationships from Canada's spousal-sponsorship regime is not only related to the continued centrality of the nuclear family; it arises from discourses that reinforce "the dichotomy between a civilized, Western 'Us' and a barbaric, non-Western 'Them'."[106]

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103 *Zero Tolerance for Barbaric Cultural Practices Act*, *supra* note 93.

104 See The Canadian Press, "Feds to ban 'barbaric' cultural practices" (5 November 2014), online: *Global News* <www.globalnews.ca/news/1654800/tories-to-ban-polygamous-immigrants/>.

105 See Sherene Razack, "Imperiled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages" (2004) 12 Fem Legal Stud 129, as cited by Chan, *supra* note 98 at 24.

106 *Ibid*; Chan, *supra* note 98 at 17.

By privileging monogamy and engaging in Orientalist discourses, the spousal-sponsorship regime neuters polygamy's potential to disrupt the (white) nuclear family as the naturalized kinship form. We are left with a further sedimentation of a white hetero-patriarchal institution at the centre of Canada's body politic, to the detriment of more radical imaginings of gendered and racial relations in society.

C. THE NATURALIZATION OF SETTLER–COLONIAL SOVEREIGNTY

The dissonance between policy and reality is also evident when considering the naturalization of settler–colonial sovereignty, and how it has informed immigration policy. By only recognizing state law as a means in which a marriage can be solemnized, Canada's spousal-sponsorship program reinforces the legitimacy of the colonial nation state by erasing the historical and contemporary existence of Indigenous laws. The *IRPR* require that foreign marriages be "valid both under the laws of the jurisdictions where it took place and under Canadian law."[107] Therefore, marriages that occur according to Indigenous law are not legal for the purposes of spousal migration.

In this way, Canada's spousal-sponsorship scheme fails to recognize the sovereignty of Indigenous legal orders around the world. Yet, this should not be surprising: the very idea of the Canadian state acting as an arbiter in determining if and under what conditions people migrate is predicated on the erasure of Indigenous law. Critical to the

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107 See the definition of marriage under s. 2 of the *IRPR*.

legitimacy of the claim that the "Crown acquired radical or underlying title to all the land"[108] is the displacement of Indigenous people *and their laws* from the historic landscape. This displacement is the basic premise of *terra nullius* ("nobody's land"),[109] which has been used to legitimize colonial expansion for centuries. Indigenous and critical race scholars have long contended that the driving force of Canada's nation-building project is the ongoing colonization of Indigenous land, people, and history.[110] Canada's spousal-sponsorship scheme is yet another example of how the Canadian state buttresses its own legitimacy by undermining Indigenous legal orders.

Obtaining citizenship through unregulated means undermines the authority of the settler state to assert sovereignty over the territory known as Canada. This raises larger questions about the legitimacy of the settler state and its control over, and proprietary relationship to, territory. Such questions cannot be meaningfully addressed within the parameters of this paper, but warrant further thought, research, and action.

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108 See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 12.

109 See *ibid* at para 69.

110 See Thobani, *supra* note 9; Aman Sium, Chandni Desai & Eric Ritskes, "Towards the 'tangible unknown': Decolonization and the Indigenous future" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1; Adam Joseph Barker, *Being Colonial: Colonial mentalities in Canadian Settler society and political theory* (MA Thesis, McMaster University, 2003) [unpublished].

Within the confines of this project, a story worth telling still emerges: the desire to protect colonial sovereignty, neoliberalism, and white hetero-patriarchy illuminates why marriage fraud constitutes such a threat in the Canadian imaginary—it not only imposes a cost on the state; it also disrupts the nation's own story about itself by denaturalizing what is seen as objective truths regarding the conjugal family and Canadian sovereignty over its borders.

As Sara Ahmed points out, "[t]hese narratives or scripts do not, of course, simply exist 'out there' to legislate the political actions of states. They also shape bodies and lives."[111] The next section departs from the theoretical, in the hope of portraying how these systems operate in tangible and violent ways in everyday life for migrants living in the borderlands.

V. COLLATERAL HARMS OF EXCLUSIONARY APPROACHES TO SPOUSAL MIGRATION

This paper has aimed to demonstrate that Canadian citizenship is predicated on one's ability to perform *spousal-hood* according to Western notions of neo-liberalism, white hetero-patriarchy, and settler colonial identity. Framing certain people as threats to justify their exclusion reinforces conditions of precarity amongst non-status women in Canada.

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111 See Sara Ahmed, *The Cultural Politics of Emotion*, 2nd ed (Edinburgh, UK: Routledge, 2014) at 145.

Migrant women who find their way to Canada, and for whom spousal-sponsorship applications have not been successful, may have no choice but to remain here in the shadows, dodging the watchful gaze of immigration officials in order to avoid forcible return to localities afflicted by political, social, and economic unrest. This section will focus on the plight of non-status migrant women, who live in constant fear of deportation, to further delineate how constructions of the ideal citizen compromise the livelihoods of those who exist in the margins. In doing so, I hope to further problematize why people denied status are labelled threats to national security.

In an open letter to Prime Minister Justin Trudeau, the Non-Status Women's Collective of Montreal asks that the government live up to its promise to "take immediate steps to reopen Canada's doors, and . . . make reuniting families a top priority."[112] For these women, "who live and work in the shadows, invisible and excluded",[113] precarity characterizes everyday existence. As Peter Nyers observes, "[f]or non-status immigrants, the borderline is not just at physical entry points at ports, airports, and land crossings. Rather, the border exists wherever and whenever they try to claim the rights of social citizenship."[114] There is no

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112 See Non-Status Women's Collective of Montreal, "Open Letter from the Non-Status Women's Collective of Montreal" (10 January 2016), online: *Solidarity Across Borders* <www.solidarityacrossborders.org/en/open-letter-from-the-non-status-womens-collective-of-montreal>.

113 *Ibid*.

114 See Peter Nyers, "Community without Status: Non-Status Migrants and Cities of Refuge" in Diana Brydon & William D Coleman, eds,

infrastructure in place to ensure that non-status women are able to meet their basic needs and those of their children.[115] For example, non-status migrants have restricted access to social services, including public education, healthcare, food banks, and subsidized housing.[116]

Not only do they live under the constant fear of deportation and without access to social services, non-status migrant women do not have the ability to participate in the regulated workforce. Jobs open to non-status women have been described as dead-end jobs that are rife with problematic labor conditions.[117] As Roxana Ng notes:

> They are available on short-term, temporary, or even on an emergency basis. Working hours are also extremely irregular, ranging from a temporary, on-call basis in domestic and kitchen work to shift work in factories and hotels. Very few of them . . . are protected by labour standard legislation and union contracts. Fringe benefits . . . are not provided.[118]

Thus, even if they are able to work, that work is precarious and not amenable to the cultivation and

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Renegotiating Community: Interdisciplinary Perspectives, Global Contexts (Vancouver: UBC Press, 2008) 123 at 129.

115 See *ibid* at 129–30.

116 *Ibid* at 127, 130.

117 Roxana Ng, "Managing Female Immigration: A Case of Institutional Sexism and Racism" (1992) 12:3 Can Women Studies 20 at 22.

118 *Ibid.*

sustenance of a life lived with dignity. Moreover, language and job training programs, which may facilitate the ability to integrate into Canada's labour market, not only risk exposure to immigration authorities, they are also expensive, and therefore inaccessible to those who are already economically insecure.

Non-status migrants also cannot access the justice system because to do so may risk deportation.[119] This is especially problematic in situations of domestic and sexual violence. Non-status women who report abuse face additional problems, as summarized by Susan McDonald:

> Fear of deportation, cultural biases, communication barriers, education and economic barriers, medical problems, relocation of partners, host country perceptions, and distrust or fear of the legal system.[120]

According to some anti-racist feminists, racialized migrant women may view the family as a safe place from the harsh realities of Canadian society, despite the presence of violence in their lives.[121] This only exacerbates the vulnerability of non-status migrant women in Canada.

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119 See *ibid.*

120 See Susan McDonald, "Not in the Numbers: Domestic Violence and Immigrant Women" (1999) 19:3 Can Women Studies 163 at 163.

121 See Leslie Nichols & Vappu Tyyska, "Immigrant Women in Canada and the United States" in Harald Bauder & John Shields, eds, *Immigrant Experiences in North America*: *Understanding Settlement and Integration* (Toronto: Canadian Scholars' Press, 2015) 258 at 259.

Problematically, migrant women have indicated that abuse either began or intensified upon immigration.[122]

Although not all non-status people are equally vulnerable, a common characteristic is the absence of social, civil, and political rights that are entitlements of permanent residence and citizenship. As we have seen, non-status women are relegated to the margins of society, with precarity as a way of life. Given what we know about which migrants are more likely to be selected—those who more readily fit the mold of the *desirable migrant*—it is important to consider how the denial of sponsorship further reinforces socio-economic inequities that are already in place.

This is not to say that non-status women should be viewed as passive victims. As evident by the Non-Status Women's Collective of Montreal, they have agency and provide an important voice of resistance to Canada's exclusionary nation-state building project. Arguably, it is their ability to draw into question the logics of the Canadian state and imagine alternative and more equitable futures that makes them perceived as a threat in the first place. However, the realities of precarity are inconsistent with the state's foregrounding of the threat posed by migrants to national security. If anything, it is *their lives* that are threatened by myths, like marriage fraud, that further justify exclusionary attitudes, policies, and communities.

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122 *Ibid* at 258.

VI. REIMAGINING BORDERS AND BELONGING

The provision of citizenship "is about the state producing and reproducing a desirable familial form",[123] which in turn is "definitive of the state itself."[124] Borders are the means by which Canada can curate its population and sustain "the dichotomy between a civilized, Western 'us' and a barbaric, non-Western 'Them'."[125] Thus, it is perhaps unsurprising that marriage fraud, viewed as an undermining of the border and of the Canadian family, is seen as a national threat—notwithstanding the lack of empirical evidence suggesting that anyone is in any danger. Marriage fraud not only interferes with the state's ability to decide which bodies it will grant access to and economically support, it also constitutes a broader challenge to social organization through the nuclear family and the legitimacy of the sovereign state.

In the context of the War on Terror, framing marriage fraud in the discourse of threat and national security stokes public fears and anxieties about migrants, which in turn, justifies more exclusionary border practices. And, troublingly, the emotive power of fear inoculates Canadian border practices from allegations of racism, even though officer practice manuals show cause for concern. The state can justify its targeted actions by pointing to its campaign to protect citizens from migrants hoping to scam the system. Canadians feel safer, as does the future of liberty and freedom in Canada's democracy. This story

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123 See Gaucher, *A Family Matter*, *supra* note 35 at 19.

124 *Ibid* at 8.

125 See Chan, *supra* note 98 at 17.

leaves little room for questioning the broader effort to exclude migrants that the state deems both undesirable and threatening to national security.

We must retell the stories that are taken as inherent truths; in our context, these stories include those that monger fear around the supposed threat posed to western society by marriage fraud and more broadly, the Other. According to Donna Haraway, "the power to survive" arises "on the basis of seizing the tools to mark the world that marked them as other."[126] These tools are the "stories . . . that reverse and displace the hierarchical dualisms of naturalized identities."[127] Perhaps by speaking to the insidious violence of the innocent and freedom-loving West that threatens the daily lives of those in the margins, we can thereby subvert "the structure and modes of reproduction of 'Western' identity."[128] In so doing, we can unsettle the white sensibility of who belongs and who does not. This paper is trying to do just that.

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126 See Donna Haraway, "A Cyborg Manifesto" in Susan Stryker & Stephen Whittle, eds, *The Transgender Studies Reader* (New York: Routledge, 2006) at 112.

127 *Ibid.*

128 *Ibid.*