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**WHAT IS LOVE?: EXPLORING THE ROLE OF  
VIRTUAL COMMUNICATION TECHNOLOGY IN  
AUTHENTICATING TRANSNATIONAL RELATIONSHIPS  
FOR IMMIGRATION TO THE UNITED STATES**

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**INTRODUCTION**

Long-distance marriages were once characterized by letter-writing, with weeks or months passing before another communication from one’s partner would arrive. With the advent of virtual communication technologies,

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including telephone calls, instant messaging, and e-mails, this communication has become instantaneous. Furthermore, Skype and virtual reality allow for face-to-face, real-time contact. As this technology advances, more and more people will inevitably conduct their marriages virtually.

Despite the use of virtual communication technology to help individuals create and maintain authentic relationships online, courts, regulators, and legislators have not recognized this technology in the immigration and marriage context. Instead, they have required couples to actually reside together and used physical separation as proof of fraudulent marriages. This is especially problematic for immigrants, as one of the primary ways immigrants obtain lawful presence and citizenship in the United States is through marriage. However, these marriages must be authentic in the eyes of the state, and U.S. courts have consistently refused to recognize the authenticity of marriages in which the couple communicates over the Internet.

This lack of recognition of virtually conducted marriages can be traced to the U.S. government's historic treatment of immigration as a system of exclusion, family separation, and policing of fraud as well as the institution of marriage. Because marriage is a path to citizenship and both immigration and marriage are such heavily policed institutions, the U.S. government is disincentivized to expand its definition of what constitutes a "real" marriage. Regardless, this lack of recognition penalizes couples who conduct their relationship in an increasingly common format—physically apart and online. Despite the flexibility of some courts to allow periods of physical separation, the U.S. immigration system still overwhelmingly privileges relationships in which couples live together over relationships that make extensive use of virtual communication technology to bridge physical separation.

The immigration system's treatment of this technology starkly contrasts with how the child custody system has embraced it to allow for parents to create virtual visitation plans. While the immigration system has largely been silent or antagonistic towards virtual communication technology, courts have encouraged its use in child custody to maintain meaningful connections between parents and children who live apart. Not only do courts make use of this technology in the child custody system, they recognize its ability to foster emotional closeness.

In Section I of this Comment, I discuss virtual communication technology's capacity to bridge physical distance. In Section II, I explore scholarship on the ability of this technology to maintain and facilitate new forms of intimacy. In Section III, I review how courts, federal agencies, and Congress have treated physical separation for immigrant couples applying for permanent residency and citizenship through marriage. I assert that although some courts interpret the law in this area more expansively, generally the authenticity of a marriage between an immigrant and U.S. citizen is

questioned more searchingly if there are periods of physical separation in their relationship. In Section IV, I examine some of the policy motivations behind the immigration system and how they can provide context for this area of the law. In Section V, I compare the immigration system's treatment of virtual communication technology to the child custody system's treatment of the same technology. I argue that differences between the two systems provide insight into why immigration has been less receptive to this technology. In Section VI, I provide recommendations for how the immigration system can better recognize the validity of relationships that are conducted online.

## I. VIRTUAL COMMUNICATION TECHNOLOGY'S USAGE AND CAPABILITIES

Virtual communication technology can be defined as “any technology people use to communicate with each other when they can't be face to face.”<sup>1</sup> This broad definition includes technologies like email, text message, video chat services (like Skype and FaceTime), and phone calls. For the purposes of this Comment, non-instantaneous communications like letters are excluded from this definition. Although letters do allow people to communicate while physically apart, their production does not involve the use of technology, and their non-instantaneous nature changes how they impact relationships. For example, text messages allow for constant back-and-forth communication between partners who are physically separated, which facilitates a different connection than letters that can take weeks to arrive.

This technology has revolutionized the way people interact with one another and has become widespread globally. It has opened doors for instant communication between people who are located thousands of miles apart. For example, Skype was one of the pioneering technologies that allowed users to make cheap voice calls, video calls, and chat, all over an online platform.<sup>2</sup> In less than ten years since its inception in 2003, global users reached 300 million.<sup>3</sup> Since Skype was popularized, more and more technologies have entered the market that facilitate virtual communication, including WhatsApp, Viber, Google+ Hangouts, and ooVoo, among others.<sup>4</sup> Furthermore, as of 2019, it is

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<sup>1</sup> Cheryl A. Frost, *What is Virtual Communication Technology?*, TECHWALLA, <https://www.techwalla.com/articles/what-is-virtual-communication-technology> [https://perma.cc/B2S2-HR7Z] (last visited Nov. 9, 2019).

<sup>2</sup> Ken Yeung, *Skype is 10 Years Old, and in the Past Decade It's Helped Transform the Way That We Communicate*, TNW (Aug. 29, 2013), <https://thenextweb.com/Microsoft/2013/08/29/skype-is-10-years-old-and-in-the-past-decade-its-helped-transform-the-way-that-we-communicate> [https://perma.cc/K3BE-KGM3].

<sup>3</sup> *Id.*

<sup>4</sup> *See id.* (discussing how WhatsApp and similar companies have emerged as competitors to Skype).

estimated that over five billion people globally have mobile devices.<sup>5</sup> As of 2018, the median rate of social media usage is over 50 percent.<sup>6</sup> It should be noted that mobile technology is more common in the developed world, and among young people and well-educated people.<sup>7</sup> Still, all of these statistics show that virtual communication technology has become commonplace, and therefore much of human communication now lives virtually.

Virtual communication technology will only advance in the future, especially with the advent of virtual reality. Virtual reality can be defined as “a technology by which computer-aided stimuli create the immersive illusion of being somewhere else . . . .”<sup>8</sup> Using an apparatus like a headset, virtual reality promises to remove the screen barrier of current virtual communication technology and allow participants to enter into a virtual world.<sup>9</sup> In this virtual world, people can interact with digital versions of other people.<sup>10</sup> They can see other people’s gestures and expressions, mimicking the sense of being in the same physical space.<sup>11</sup> These technological advances only make it more likely that people will communicate virtually and be able to conduct full relationships while physically separated.

## II. VIRTUAL COMMUNICATION TECHNOLOGY’S IMPACT ON COUPLE RELATIONALITY

In order to adequately assess immigration law’s preferencing of couples who reside in the same physical space, the assumption behind that prioritization must first be addressed – the assumption that the intimacy and authenticity of a couple’s relationship are exclusively negatively impacted when that relationship exists primarily online. This assumption speaks to broader questions about how technology, specifically virtual interaction technology, has affected the way couples relate to one another.

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<sup>5</sup> Laura Silver, *Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally*, PEW RES. CTR. (Feb. 5, 2019), <https://pewresearch.org/global/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally> [<https://perma.cc/V2WB-8RFD>].

<sup>6</sup> Jacob Poushter, Caldwell Bishop & Hanyu Chwe, *Social Media Use Continues to Rise in Developing Countries but Plateaus Across Developed Ones*, PEW RES. CTR. (June 19, 2018), <https://pewresearch.org/global/2018/06/19/social-media-use-continues-to-rise-in-developing-countries-but-plateaus-across-developed-ones> [<https://perma.cc/U2J9-GUQZ>].

<sup>7</sup> Silver, *supra* note 5.

<sup>8</sup> Peter Rubin & Jess Grey, *The WIRED Guide to Virtual Reality*, WIRED (Mar. 8, 2020, 7:00 AM), <https://www.wired.com/story/wired-guide-to-virtual-reality/> [<https://perma.cc/YR2C-QBCB>].

<sup>9</sup> *See id.* (discussing the development and future prospects of virtual reality).

<sup>10</sup> Elizabeth Shockman, *How Advances in Virtual Communication Technology Will Change How We Work and Communicate*, PUB. RADIO INT’L (Mar. 14, 2016, 8:45 AM), <https://www.pri.org/stories/2016-03-14/how-advances-virtual-reality-will-change-how-we-work-and-communicate> [<https://perma.cc/6DCQ-9DWG>].

<sup>11</sup> *Id.*

Few scholars have written on this topic (79 of over 11,000 articles published in couple and family therapy journals between 1996 and 2010 were about technology),<sup>12</sup> but those who have agree that virtual interaction technologies can help strengthen romantic partnerships. Most obviously, this technology allows couples separated by physical distance to communicate with one another. Internet technology can approximate real-life interactions, with users delivering similar verbal cues as they would in person.<sup>13</sup> Beyond approximation, some scholars have found that technological advances can enhance intimacy in relationships.<sup>14</sup> Online technologies allow for more frequent communication on different platforms, from texting to calling to Skype.<sup>15</sup> More frequent communication facilitates greater self-disclosure about one's daily life and emotions, which in turn builds stronger commitment to one another and satisfaction in the relationship.<sup>16</sup> Furthermore, computer users are less inhibited in their online interactions, which encourages greater intimacy.<sup>17</sup> While some may argue that intimacy requires shared space and cohabitation, these scholars have found evidence that suggests physical distance and emotional closeness are not mutually exclusive.

The results of these studies, indicating that online relationships have the potential to be even more intimate than in-person relationships, undermine the immigration system's assumption that these relationships are any less able to be "real." Virtual communication technology has changed the way relationships are conducted, allowing for intimacy to develop and be maintained beyond the confines of occupying the same physical space. In other words, virtual relationships can be just as authentic as relationships in which couples live together. Additionally, because of the inherently transnational nature of immigrants' relationships with U.S. citizens, many of these relationships might have to rely on technology to maintain any sort of relationship at all.

A study on Filipino seamen's wives demonstrates these findings in practice. Prepaid phone cards have made mobile communication widely accessible in the Philippines, allowing wives to communicate frequently with their husbands abroad via cell phones.<sup>18</sup> Compared to the previous method of

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<sup>12</sup> Katherine M. Hertlein, *Digital Dwelling: Technology in Couple and Family Relationships*, 61 FAM. REL. 374, 374 (2012).

<sup>13</sup> *Id.* at 377.

<sup>14</sup> *See id.* at 380 ("Participation in online activities can enhance intimacy and feelings of closeness between partners . . .").

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.* (asserting that enhanced intimacy from participating in online activities is due in part to online communications being less inhibited than face-to-face communications).

<sup>18</sup> *See* Roderick G. Galam, *Communication and Filipino Seamen's Wives Imagined Communion and the Intimacy of Absence*, 60 PHIL. STUD.: HIST. & ETHNOGRAPHIC VIEWPOINTS 223, 235–36 (2012) (contending that prepaid phone cards have made mobile phone calls more affordable, and therefore have improved communication between spouses).

sending letters, phones are easier, faster, and help couples adjust better to separation.<sup>19</sup> The constant cell phone communication enables seamen to maintain a presence in the family, even when they are not physically available.<sup>20</sup> Furthermore, text messaging preserves intimacy in these relationships because it allows spouses to express their affection for each other through words.<sup>21</sup> The spread of mobile communication technology means that seamen not only can remain involved in the daily lives of their families, but also can strengthen and build their relationships.<sup>22</sup> Although phones might facilitate real-time conflict between spouses, it has also allowed couples to create a space of “imagined communion” where their relationship and intimacy continue to grow.<sup>23</sup>

For members of the Caribbean diaspora, in which family members are spread throughout the world, technology is a powerful tool to stay connected to one another and maintain intimate relationships. Among these communities, social media is used to provide caregiving transnationally.<sup>24</sup> For example, when there is a familial crisis, social media provides a web of extended kinship networks that can easily be tapped to come up with a solution.<sup>25</sup> Platforms like Facebook also open up new avenues for familial connection. For example, giving family members abroad access to personal photo albums allows them to experience events vicariously for which they might not have been physically present, even if everyone lived in the same physical space.<sup>26</sup> Although these findings did not specifically apply to spousal relationships, they still provide evidence that relationships maintained cross-nationally can flourish online and even find new forms of expression.

Of course, distance and intimacy mediated through a screen can negatively impact a relationship. Traveling to see one another is resource-intensive, and physical distance can impact the intimacy and familiarity couples have with one another.<sup>27</sup> However, as both the examples of Filipino

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<sup>19</sup> *Id.* at 236.

<sup>20</sup> *Id.* at 238.

<sup>21</sup> *Id.* at 250.

<sup>22</sup> *Id.* at 254–55.

<sup>23</sup> *Id.* at 224, 247, 254–55.

<sup>24</sup> See Dwaine Plaza & Amy Below, *Social Media as a Tool for Transnational Caregiving Within the Caribbean Diaspora*, 63 SOC. & ECON. STUD. 25, 38 (2014) (noting that many families in the study used a “transnational multi-generational care model” of electronic communication).

<sup>25</sup> *Id.* at 38–39.

<sup>26</sup> See *id.* at 41 (highlighting an example in which an uncle living in Trinidad could see photos of his nephew in Canada at social events that the uncle could not have appropriately attended—even if living in Canada—on account of underage drinking and drug use).

<sup>27</sup> See generally Stephen J. Betchen, *Four Problems with Long Distance Relationships*, PSYCHOL. TODAY (June 14, 2015), <https://www.psychologytoday.com/us/blog/magnetic-partners/201506/4-problems-long-distance-relationships> [<https://perma.cc/X5GX-YYG6>]

seamen and the Caribbean diaspora show, distance is not determinative. These examples reinforce that online relationships can be just as “real” as the relationships that are maintained in the same physical space. In fact, they can create new ways of relating to one another that are just as intimate as the bonds formed in real life.

### III. CURRENT LEGAL LANDSCAPE

The immigration system in the United States is a dense web of federal statutes, administrative law, and common law. I do not attempt to summarize all of it in this section, but rather provide a cursory overview of the mechanisms by which someone can attain citizenship through marriage. At multiple points in the process, marriages are interrogated to see if they are “shams,” and physically residing together is seen as evidence (and for some courts, a prerequisite) to prove a relationship’s authenticity. Throughout my research, I did not encounter any cases, guidance, policy statements, statutes or regulations that discussed virtual communication technology and how that impacts the use of cohabitation as evidence in immigration proceedings.

For most applicants, there are two stages in the application for U.S. citizenship through marriage: application for permanent residency as a spouse to U.S. citizen, and if that application is successful, then a second application for naturalization to become a U.S. citizen. Some spouses of U.S. citizens employed abroad can become naturalized without having previously been permanent residents.<sup>28</sup>

#### A. Legal Treatment of Permanent Residency Through Marriage

For the first stage, immigrants are expected to file a Form I-130, Petition for Alien Relative, in addition to Form I-485 Application to Register Permanent Residence or Adjust Status (if the spouse is already in the United States and partnered to a U.S. citizen).<sup>29</sup> Form I-130 is intended to “establish [a U.S. citizen or permanent resident’s] relationship to an eligible relative who wishes to come to or remain in the United States permanently.”<sup>30</sup> As

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(explaining that time and money resources can wear on long-distance relationships, that high familiarity is important for relationship success, and that long distance can impact the level of intimacy in a relationship).

<sup>28</sup> See 8 U.S.C. § 1430(b), 1430(d) (outlining paths to citizenship not requiring permanent residence for spouses of U.S. government employees, employees of certain organizations, and surviving immediate family members of deceased members of the armed forces).

<sup>29</sup> *Bringing Spouses to Live in the United States as Permanent Residents*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/family/family-us-citizens/bringing-spouses-live-united-states-permanent-residents> [https://perma.cc/5LPM-J9E5] (last updated Feb. 2, 2018).

<sup>30</sup> *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-130> [https://perma.cc/RUC9-HEXA] (last updated Oct. 26, 2020).

evidence to show the “bona fides” of a marriage, the U.S. Citizenship and Immigration Services (USCIS) mentions that applicants can present a “lease showing joint tenancy of a common residence, meaning [the spouses] live at the same address together.”<sup>31</sup> Although there is no requirement to live together to obtain permanent residency, there is an assumption that living together makes a relationship more likely to be authentic.

Some courts and adjudicative bodies have been receptive to the possibility that real marriages can involve long periods of physical separation. In *Matter of Lenning*, the Board of Immigration Appeals stated that “where the parties enter into a valid marriage, and there is nothing to show that they have since obtained a legal separation or dissolution of that marriage, a visa petition . . . should not be denied solely because the parties are not residing together.”<sup>32</sup> Although the Board ultimately denied the visa petition in that case, its reasoning still provides the opportunity for non-cohabitating couples to successfully have their marriages legally recognized as authentic.<sup>33</sup> This holding acknowledges that living together is not the linchpin that determines whether a marriage is a sham.

The court in *Boansi v. Johnson* took the *Lenning* reasoning further, criticizing the government for relying too heavily on the couple living apart as evidence that the marriage was fraudulent.<sup>34</sup> In this case, Dr. Boansi (a Ghanaian national) married Ms. McNeil (an American citizen).<sup>35</sup> After marriage, Dr. Boansi tried to find a job near Ms. McNeil, but he ended up securing a job apart from her.<sup>36</sup> Because she did not want to be away from her sick father and Dr. Boansi saw his job as temporary, they decided to live apart but visit each other on their time off.<sup>37</sup> The court admonished the government for ignoring these legitimate reasons for living apart, and said the government “den[ie]d Dr. Boansi’s applications because he and his wife had an unusual living arrangement.”<sup>38</sup> Like *Lenning*, the court’s reasoning demonstrated that it was thinking about marriages holistically, recognizing that couples can sustain authentic marriages while living apart.

However, many courts have also affirmed the government’s assumption that separate living situations is evidence of a sham marriage. In *Reynoso v. Holder*, the court concluded that the Board of Immigration

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<sup>31</sup> *Id.*

<sup>32</sup> *Matter of Lenning*, 17 I. & N. Dec. 476, 477 (1980).

<sup>33</sup> *Id.* at 479.

<sup>34</sup> *See Boansi v. Johnson*, 118 F. Supp. 3d 875, 881 (E.D.N.C. 2015) (finding that the government “paid little attention to the couple’s rationale for living apart or any other evidence submitted in support of the couple’s legitimate marriage,” resting its decision instead on “insinuation and inference.”).

<sup>35</sup> *Id.* at 877.

<sup>36</sup> *Id.* at 878.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 881.



Appeals correctly determined that a couple's marriage was not entered in good faith.<sup>39</sup> As evidence, the court pointed out the fact that "there were no contemporaneous documents evidencing [the couple's] cohabitation."<sup>40</sup> The court also pointed to testimonial inconsistencies about the exact timeline of cohabitation.<sup>41</sup> Similarly, in *Abuya v. Sessions*, testimonial inconsistencies about when the couple lived together led the court to determine that substantial evidence supported that their marriage was fraudulent.<sup>42</sup> Furthermore, despite some courts' recognition that living apart does not categorically preclude the existence of a genuine marriage, even these courts recognize that it can damage a couple's case. In *Boansi*, the court explicitly said that "parties who do not reside together may be held to a higher standard."<sup>43</sup> This additional burden on couples who live apart shows that the court sees these couples as inherently less likely to be real. If courts viewed physically separated couples and couples who resided together in the same light, there would be no reason to treat them differently for the purposes of immigration decisions.

### *B. Legal Treatment of Naturalization Through Marriage*

Although living together is important for obtaining permanent residency through marriage, there is strong statutory language that makes it particularly crucial for successful naturalization. To become naturalized as a U.S. citizen, generally applicants must be "resid[ing] continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing [their] application ha[ve] been living in marital union with the citizen spouse."<sup>44</sup> This citizen spouse must have "been physically present in the United States for periods totaling at least half of that time and ha[ve] resided within the State or the district of the Service in the United States in which the applicant filed his application for at least three months."<sup>45</sup> Like the application for permanent residency, there is a strong assumption in the naturalization process that residing in the same place is evidence that a relationship is real.

The statutory definition of the "in marital union" requirement for naturalization through marriage has been contested. The Department of Homeland Security (DHS), in one of its regulations promulgated pursuant to the Immigration and Nationality Act, defined marital union as "actually

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<sup>39</sup> *Reynoso v. Holder*, 711 F.3d 199, 213 (1st Cir. 2013).

<sup>40</sup> *Id.* at 204.

<sup>41</sup> *Id.* at 207.

<sup>42</sup> *Abuya v. Sessions*, 873 F.3d 650, 654–55 (8th Cir. 2017).

<sup>43</sup> *Boansi*, 188 F. Supp. 3d at 880.

<sup>44</sup> 8 U.S.C. § 1430(a).

<sup>45</sup> *Id.*

resid[ing] with his or her current spouse.”<sup>46</sup> They also stipulated, in that same regulation, that spouses can still be naturalized if “the applicant and spouse live apart because of circumstances beyond their control, such as military service in the Armed Forces of the United States or essential business or occupational demands, rather than because of voluntary legal or informal separation.”<sup>47</sup> Informal separations are “evaluated on a case-by-case basis to determine whether it is sufficient enough to signify the dissolution of the marital union.”<sup>48</sup> Although the DHS recognizes that couples can be physically apart and still be considered “in marital union,” the general rule still defines marital unions as relationships in which the couple resides together.

Courts have also weighed in on the statutory marital union requirement, and some courts have chosen to interpret the Immigration and Nationality Act’s “in marital union” requirement and its exceptions more expansively. The court in *In re Olan* asserted that this requirement means that couples must “liv[e] in the status of a valid marriage.”<sup>49</sup> In this case, a couple lived together continuously, but had a two and a half month gap where petitioner’s spouse left the home after a fight, continued to periodically visit, but did not fully return to live at their shared home.<sup>50</sup> The court did not see this temporary separation as an issue because it interpreted “marital union” as a status that transcends two people physically being in the same place.<sup>51</sup>

In *Paiva v. Curda*, the court interpreted DHS’s regulations around the “in marital union” requirement and its exceptions to allow physically separated couples to still apply for naturalization.<sup>52</sup> The case addressed the denial of a naturalization application for a permanent resident after a couple, including one U.S. citizen and one permanent resident, informally separated.<sup>53</sup> The government claimed that DHS’s case-by-case evaluation of informally separated couples only applied to couples living under the same roof.<sup>54</sup> The court disagreed with the government’s interpretation and viewed DHS’s language more expansively, reasoning that it applies to any informal separation, not just informal separations where the couple still lives together.<sup>55</sup> It also explicitly noted that “real marriages—meaning nonfraudulent ones—may involve situations where the spouses do not live together, whether for informal separations with the intention to remain

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<sup>46</sup> 8 C.F.R. § 319.1(b)(1) (2020).

<sup>47</sup> *Id.* § 319.1(b)(2)(ii)(C).

<sup>48</sup> *Id.* § 319.1(b)(2)(ii)(B).

<sup>49</sup> 257 F. Supp. 884, 890 (S.D. Cal. 1966).

<sup>50</sup> *Id.* at 887–89.

<sup>51</sup> *See id.* at 891 (holding that the marital union is a bond that does not dissolve with physical separation).

<sup>52</sup> 162 F. Supp. 3d 1056, 1058–59, 1066 (C.D. Cal. 2016).

<sup>53</sup> *Id.* at 1058–59.

<sup>54</sup> *Id.* at 1060–61.

<sup>55</sup> *Id.* at 1066.

validly married . . . or for involuntary separations where the couple is validly married but one spouse is deployed in the military or working abroad.”<sup>56</sup> Furthermore, “there are surely many variations of sleeping and living arrangements that are appropriately considered ‘living in marital union.’”<sup>57</sup> Here, the court recognizes that married couples’ partnerships take many forms, and physical separation does not preclude an authentic relationship. As in *Paiva*, the court in *United States v. Onabanjo* did not see the statutory residence requirement as absolute. They saw the residency requirement as a general rule that applied to most couples, but was subject to certain exceptions for periods of separation.<sup>58</sup>

Other courts have been more restrictive with how they interpret the INA’s “in marital union” language. In *United States v. Maduno*, the court stated that short periods of temporary separation (like going on vacations) are allowed, and the couple can still be considered living in marital union.<sup>59</sup> However, the couple in *Maduno* was physically separated for years, and the court thought this period of separation precluded them from fulfilling the INA’s statutory requirement.<sup>60</sup>

Likewise, the court in *United States v. Moses* said that “[i]t is clear that ‘living in marital union’ indicates that the couple live together in a marital state.”<sup>61</sup> Rejecting the rule in *Olan*, the court said that marital union requires more than just a marital status.<sup>62</sup> The court recognized that there are exceptions to the requirement of residing together, but varying testimony in the case showed that different INS officials do not always recognize these exceptions.<sup>63</sup> One INS assistant director for examinations testified that physical separation would lead to additional questions, but not preclude naturalization.<sup>64</sup> Another INS examiner testified that if the applicant had informed her that he did not currently live with his spouse, she would have told him he did not qualify for naturalization, without any further questioning.<sup>65</sup>

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<sup>56</sup> *Id.* at 1067.

<sup>57</sup> *Id.*

<sup>58</sup> See 351 F.3d 1064, 1067 (11th Cir. 2003) (holding that the district court erred in not considering the applicability of exceptions in DHS’s regulation on the INA’s “in marital union” requirement).

<sup>59</sup> 40 F.3d 1212, 1216–17 (11th Cir. 1994).

<sup>60</sup> *Id.* at 1217.

<sup>61</sup> 94 F.3d 182, 185 (5th Cir. 1996).

<sup>62</sup> *Id.* at 186.

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* (testifying that “a separation ‘would raise a question that we’d have to look into’ to establish ‘whether there was a legal separation, which would raise the bar under that section; if it was an informal separation, what was the reason for the separation . . . in an effort to determine that the marriage was bona fide.’”).

<sup>65</sup> *Id.*

Both testimonies, and ultimately the court, relied on the assumption that lack of cohabitation meant that a relationship was less likely to be real.

In *Li Dang Ding v. Gulick*, physical residence together was decisive. Shioura, a U.S. citizen, married Ding, a Chinese national, allowing Ding to gain permanent residency.<sup>66</sup> In August 2004, Shioura moved to Hawaii for a new job.<sup>67</sup> Ding moved to Hawaii, but returned to live in California in fall 2005.<sup>68</sup> The court acknowledged that Ding went to Hawaii for multiple trips that lasted months, but concludes that those trips were visits because Ding resided in California.<sup>69</sup> The court did not find their joint ownership of property, their child, and their shared names on documents compelling.<sup>70</sup> Instead, the court fixated on the INS requirement that the couple “actually resided together” and interpreted that requirement as physically being in the same place.<sup>71</sup>

Much like how physical separation is treated in the permanent residency context, there is a strong presumption in the naturalization context that living apart will make a court less likely to recognize the validity of a couple’s relationship. There is regulatory language that requires “actually resid[ing]” together, with some exceptions for voluntary and involuntary separations.<sup>72</sup> Courts seem to look at cases holistically, placing varying levels of importance on physical separation as evidence. Despite this flexibility, there still seems to be an underlying assumption that couples are less likely to be in real relationships if they do not physically reside together.

However, in all of these cases, regulations, and statutes, there was still no discussion of the ways in which individuals can foster genuine relationships with the help of virtual communication technology. Although courts are divided about how essential residing together is for demonstrating the authenticity of a marital relationship, they all operate under the strong statutory presumption that a relationship is less likely to be real if spouses do not live in the same place. Even courts that interpret the statutory requirements more expansively—having made decisions since virtual communication technology became commonplace—have not discussed this technology or pointed to the use of it as evidence of the authenticity of a marriage. It is possible that virtually conducted relationships have been addressed in administrative adjudications that do not lead to litigation, and therefore will not be memorialized in court opinions. Still, there is little formal legal recognition of how much virtual communication technology has revolutionized the way we communicate, how the intimacy of romantic

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<sup>66</sup> Civil No. 11-00070 SOM-BMK, 2012 WL 300475, at \*3 (D. Haw. Jan. 31, 2012).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at \*12.

<sup>70</sup> *Id.* at \*13.

<sup>71</sup> *Id.*

<sup>72</sup> 8 C.F.R. § 319.1(b)(1)–(2) (2020).

relationships can be created and maintained online, and how that should impact court and administrative agencies' determinations of which marriages are shams and which marriages are genuine.

#### IV. CONTEXTUALIZING THE MOTIVATIONS BEHIND THE IMMIGRATION SYSTEM'S INTERROGATION OF MARRIAGE

When discussing the immigration system's treatment of marriage, it is important to recognize that the state is not just narrowly trying to prove the authenticity of relationships; it is also trying to identify fraud against the state, police the institution of marriage, and police who enters the United States and has a claim to citizenship. Understanding these motivations helps explain the way the state interrogates relationships and why it would be hesitant to recognize virtual relationships as real relationships.

In the United States, marriage fraud is considered a crime.<sup>73</sup> More specifically, “[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than \$250,000, or both.”<sup>74</sup> Similarly, making false statements on immigration documents is punishable by up to 15 years in prison (or 25 years, if the false statement was used to facilitate terrorism).<sup>75</sup> Because of the possibility of lengthy prison time, it is clear that the state treats marriage fraud as a serious offense.

A brochure from U.S. Immigrations and Customs Enforcement (ICE) on marriage fraud further demonstrates the state's view of the interconnectedness of immigration, marriage, fraud, and crime.<sup>76</sup> The brochure provides a number to report suspected cases of marriage fraud to the Homeland Security Investigations Tip Line and includes a photo of a prison hallway juxtaposed against a church aisle set up for a wedding.<sup>77</sup> It also states that “[m]arriage fraud is not a victimless, innocent crime” and that it “trad[es] America's security for financial gain.”<sup>78</sup> According to ICE's brochure, marriage fraud “weakens our nation's security and makes us less safe” because “[t]errorists and other criminals can use marriage fraud as a

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<sup>73</sup> 8 U.S.C. § 1325(c); *see* 18 U.S.C. § 1546(a) (making it a crime to make false statements on documents required by immigration laws).

<sup>74</sup> 8 U.S.C. § 1325(c).

<sup>75</sup> 18 U.S.C. § 1546(a).

<sup>76</sup> HOMELAND SEC. INVESTIGATIONS, U.S. IMMIGR. AND CUSTOMS ENF'T, MARRIAGE FRAUD IS A FED. CRIME, 1–2 (Jun. 2016), <https://www.ice.gov/sites/default/files/documents/Document/2016/marriageFraudBrochure.pdf> [<https://perma.cc/9PJ6-G2Z6>]. It is meaningful to note that this brochure was released in June 2016, before the Trump administration took control of ICE.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> *Id.* at 2.

vehicle to enter the United States.”<sup>79</sup> This punitive, enforcement-focused language shows one of the lenses by which the U.S. government views couples entering the United States. In the eyes of the U.S. government, these couples are not simply trying to immigrate to the United States; they are also potential suspects of criminal fraud and terrorism.

Kerry Abrams, in her article “Marriage Fraud,” explains this policing of immigrating couples as a function of the substantial benefit that is received through marriage. Public benefits become tied to marriage because lawmakers believe the long-term, committed nature of a marriage makes that couple deserving of benefits.<sup>80</sup> If lawmakers think marital status by itself does not provide “an adequate proxy” for long-term commitment with respect to the benefit being provided, then the state will adopt more stringent tests to assess the validity of the marriage.<sup>81</sup> Because the immigration system confers lawful presence in the United States and couples are able to divorce relatively easily after getting a green card, marriage in the immigration context is more vulnerable to fraud; therefore, the state polices it more heavily than marriage in other contexts.<sup>82</sup>

Abrams also reasons that lawmakers see marriage fraud as harming the public, which motivates them to take state action to combat it.<sup>83</sup> In the eyes of the state, fraudulent marriages can harm the public by taking benefits away from the public that might have been used by someone else, and by allowing people into the country who otherwise would not have been eligible for entry.<sup>84</sup> Marriage also serves an assimilative function, and fraudulent marriages open the doors for less deserving immigrants who have not gone through that acculturation.<sup>85</sup> In other words, legitimatizing marriage serves a gatekeeping function to keep out immigrants who do not deserve citizenship in the eyes of the state. These theories of harm help contextualize why the state is so preoccupied with proving the authenticity of marriage.

Furthermore, U.S. immigration law has used definitions of marriage to exclude certain classes of immigrants based on their race, gender, and perceived moral character.<sup>86</sup> Immigration officials use a Western definition of marriage to make decisions about who can enter the country lawfully; those that fit that definition are allowed in, while those who do not are

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<sup>79</sup> *Id.*

<sup>80</sup> Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 37–38 (2012).

<sup>81</sup> *Id.* at 38.

<sup>82</sup> *Id.* at 38–39.

<sup>83</sup> *Id.* at 49.

<sup>84</sup> *Id.* at 54.

<sup>85</sup> *Id.* at 53–54.

<sup>86</sup> See Noga Firstenberg, *Marriage and Morality: Examining the International Marriage Broker Regulation Act*, 18 ASIAN AM. L.J. 83, 111–112 (2011) (asserting that definitions of marriage were essential components of developing immigration policy, and this policy was used to discriminate against immigrants because of their character and culture).

excluded.<sup>87</sup> This privileging of certain kinds of marriages is reflected in U.S. immigration regulations that emphasize children and joint ownership of property, which are unattainable or undesired for many marriages outside of the United States.<sup>88</sup>

The International Marriage Broker Regulation Act (IMBRA) is another example of the ways in which the state enhances scrutiny of marriages that fall outside of normative definitions of marriage. IMBRA adds regulatory burdens to marriages that are facilitated by international marriage brokers.<sup>89</sup> The intention of the legislation is to prevent potentially exploitative relationships, but IMBRA also can be tied to the historical restrictions preventing Asian women from immigrating to the United States.<sup>90</sup> Asian women make up a large percentage of international marriage broker marriages and have historically been sexualized and seen as deviant; IMBRA reinforces those perceptions by making it more difficult for them to come to the United States. Preserving the sanctity of a white, Western definition of marriage and exerting moral judgment on those who fall outside of those boundaries are more reasons why the state polices the validity of marriage in the immigration context so heavily.<sup>91</sup> Both IMBRA and the privileging of certain components of marriage, like the joint ownership of property, reinforce the immigration system's efforts to exclude and engage in gatekeeping.

Stephen Lee, in his article “Family Separation as Slow Death,” argues that the immigration system is characterized by separation.<sup>92</sup> Instead of acting as a tool for transnational families to reunite, U.S. immigration laws are committed to keeping families apart.<sup>93</sup> Lee asserts that this rule of separation can be supported by the long wait times that families face before they get visas to reunite, the stringent enforcement of immigration laws, narrow opportunities for adjustment of status, and the application of anti-money laundering laws to immigrants trying to send money to their families abroad.<sup>94</sup> Lee's argument adds further context to the motivations behind the immigration system; although the state technically allows families to reunite, the way its rules are applied instead reflects a motivation to separate families and maintain their separation.

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<sup>87</sup> *Id.* at 112.

<sup>88</sup> *Id.* at 118–19.

<sup>89</sup> *Id.* at 84.

<sup>90</sup> *Id.* at 84–85.

<sup>91</sup> *Id.* at 85.

<sup>92</sup> See Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2322 (2019) (“[O]ur immigration system is pervasively organized around the principles of family separation.”).

<sup>93</sup> See *id.* at 2323 (“[A] holistic examination of the broader immigration system shows that the exception of family separations operates much more like the rule . . .”).

<sup>94</sup> *Id.* at 2323–24.

Beyond the immigration system, marriage is an institution that has traditionally emphasized cohabitation, and the corresponding assumption of consummation, which acts to validate the marriage. Many opponents of same-sex marriage have espoused this traditional conjugal view of marriage, which defines marriage as “beg[inning] by commitment and sealed by sexual intercourse” that is rooted in the goal of procreation.<sup>95</sup> These opponents assert that the state’s historical interest in regulating marriage stems from this traditional view.<sup>96</sup> Courts have also validated this relationship between the legitimacy of marriage, consummation, and cohabitation.<sup>97</sup> Some courts have gone further and invalidated marriages that have not been consummated.<sup>98</sup> Applied to the immigration context, when the state polices the boundaries of marriage and ties it to cohabitation, whether that is through statutory requirements or higher burdens of proof, it is also reinforcing the traditional entangling of marriage legitimacy, cohabitation, and consummation.

The background considerations that animate the marriage and immigration systems help explain how courts make decisions about the authenticity of relationships. Because marriage conveys immense immigration benefits and marriage fraud is seen as a serious crime, courts and administrative agencies are motivated to vigorously interrogate relationships. Marriage in the immigration context is characterized by enforcement and restriction, not the desire to expand the pool of people who are eligible for benefits. Furthermore, the American immigration system, both historically and presently, has been organized around the principles of immigrant exclusion and family separation. In this kind of environment, the state is disinclined to view virtual relationships as real. Despite the ability of virtual communication technology to foster authentic connections, the state is incentivized to ignore or deemphasize this ability because of its competing concerns.

## V. VIRTUAL COMMUNICATION TECHNOLOGY’S IMPACT ON CHILD CUSTODY PROCEEDINGS

In child custody and parental visitation, courts and state legislatures have embraced virtual communication technology as a way to keep both

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<sup>95</sup> Andrew Forsyth, *Defining Marriage*, 97 SOUNDINGS: AN INTERDISC. J. 297, 298 (2014).

<sup>96</sup> *See id.* (arguing that linking marriage to children’s welfare is what motivates the state’s recognition of marriage as a public good).

<sup>97</sup> *See, e.g., Eldredge v. Eldredge*, 43 N.Y.S.2d 796, 797 (Sup. Ct. 1943) (“[T]he mere fact that a party agrees to and does enter into the marriage contract of itself implies a representation on his or her part that he or she will consummate the marriage by cohabitation . . .”).

<sup>98</sup> *See, e.g., Moussa v. INS*, 302 F.3d 823, 826 (8th Cir. 2002) (“Immigration law does not recognize the validity of a proxy marriage which has never been consummated . . .”); Lawrence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1093 (2002) (pointing to court decision language that suggests “marriage without sex is a sham.”).



parents in contact with their children when one parent chooses to relocate. Courts and state legislatures still do not draw an equivalence between the quality of virtual and physical visitation, but they are much more explicitly receptive than the immigration system of the possibility of connection being fostered online. These differences can be explained by the motivations behind both systems and what is at stake. While child custody is supposed to prioritize the best interests of the child,<sup>99</sup> the immigration system has no similar mandate to prioritize the best interests of the families impacted by its policies.

*McCoy v. McCoy* is often acknowledged as a groundbreaking case because of its incorporation of virtual communication technology in visitation plans.<sup>100</sup> In this case, the parents had joint custody, and the father had 66 days total visitation time.<sup>101</sup> The mother wanted to move to California from New Jersey for a job that would have a more stable salary, medical benefits, and fewer travel hours.<sup>102</sup> As part of the visitation plan, the mother proposed using webcams to allow the father to keep in touch with their child on a daily basis.<sup>103</sup> Although the court did not draw an equivalence between virtual contact and physical contact,<sup>104</sup> it described the webcam solution proposed by the mother as a “creative and innovative” way to “enhance visitation.”<sup>105</sup> In this case, the court saw virtual contact as lesser than physical contact, but it also recognized the potential of virtual communication technology as a medium for maintaining the closeness of familial relationships.

Other courts have also been receptive of the possibility of maintaining parental bonds online if one parent relocates with the child. In *McGuinness v. McGuinness*, the court criticized the lower court for not considering alternative visitation to accommodate for parental relocation.<sup>106</sup> It elaborated that “[p]hysical separation does not preclude each parent from maintaining significant and substantial involvement in a child’s life, which is clearly desirable. There are alternate methods of maintaining a meaningful

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<sup>99</sup> See, e.g., *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (“The chancellor in exercising his jurisdiction upon petition . . . acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a ‘wise, affectionate, and careful parent’ . . . and make provision for the child accordingly.”) (citation omitted).

<sup>100</sup> Elisabeth Bach-Van Horn, *Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?*, 21 J. AM. ACAD. MATRIM. L. 171, 174 (2008).

<sup>101</sup> *McCoy v. McCoy*, 764 A.2d 449, 451 (N.J. Super. Ct. App. Div. 2001).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 451–52.

<sup>104</sup> See *id.* at 454 (“Every time a custodial parent moves to a distant location, the ability of the noncustodial parent to exercise visitation rights is adversely affected” and it is “obvious” that “defendant’s relationship will be substantially altered by the move . . .”).

<sup>105</sup> *Id.* at 454.

<sup>106</sup> See *McGuinness v. McGuinness*, 970 P.2d 1078, 1074–83 (Nev. 1998) (“In denying Teresa’s motion, the district court failed to seriously consider the possibility of reasonable, alternative visitation and focused on the fact that a move would render the current joint custody arrangement impossible.”).

relationship, including telephone calls, e-mail messages, letters, and frequent visitation.”<sup>107</sup> Similarly, the court in *Burke v. Burke* agreed with the lower court’s assessment of one parent’s suggestion of virtual visitation as a “unique, forward thinking and viable communication alternative.”<sup>108</sup>

However, courts have not been universally receptive of virtual visitation. In *Nighswander v. Sudick*, the court denied the mother’s relocation request to California.<sup>109</sup> The court emphasized the importance of the father’s physical presence with his children, stating that:

Even with telephone and e-mail support to the visitation schedule, the nature of Mr. Nighswander’s parenting relationship with his children will transform if they move to California. He will no longer be able to periodically meet and confer with their teachers. He will no longer be able to attend parent orientated events, recitals, plays, assemblies, and other school and extracurricular events . . . .<sup>110</sup>

Likewise, the court in *Marshall v. Marshall* rejected the use of webcams for visitation and did not see virtual communication technology as capable of fostering the same sorts of familial bonds as physically being together.<sup>111</sup>

State legislatures have also stepped in to codify the ability of parents to pursue virtual visitation. In 2004, Utah was “the first . . . state to legislate the authority of judges to include virtual visitation in divorce decrees.”<sup>112</sup> According to Utah’s statute, “[e]ach parent shall permit and encourage . . . reasonable and uncensored communications with the child, in the form of mail privileges and virtual parent-time if the equipment is reasonably available . . . .”<sup>113</sup> It also defines “virtual parent-time” as “parent-time facilitated by tools such as telephone, email, instant messaging, video conferencing, and other wired or wireless technologies over the Internet . . . .”<sup>114</sup> Although Utah allows for virtual parent-time, it does not draw an equivalence between virtual and physical contact, specifying that “[v]irtual parent-time is

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<sup>107</sup> *Id.* at 1077–78.

<sup>108</sup> *Burke v. Burke*, No. M2000-01111-COA-R3-CV, 2001 WL 921770, at \*6 (Tenn. Ct. App. Jan. 8, 2002).

<sup>109</sup> *Nighswander v. Sudick*, No. FA 97393793, 2000 WL 157905, at \*12 (Conn. Super. Ct. Jan. 26, 2000).

<sup>110</sup> *Id.* at \*8.

<sup>111</sup> *See Marshall v. Marshall*, 814 A.2d 1226, 1233 (Pa. Super. Ct. 2002) (“While the Internet undoubtedly has fostered a myriad of ways for people to maintain communication and while computer video cameras allow people to ‘feel’ closer even when separated by hundreds of miles, such technology cannot realistically be equated with day-to-day contact between parents and young children.”).

<sup>112</sup> *Bach-Van Horn, supra* note 100, at 181.

<sup>113</sup> UTAH CODE ANN. § 30-3-33(14) (West 2020).

<sup>114</sup> *Id.* § 30-3-32(3)(g).

designed to supplement, not replace, in-person parent-time.”<sup>115</sup> Still, the Utah legislature has explicitly recognized the ability of virtual communication technology to nurture parent-child relationships when individuals are physically separated from one another. Other states have also passed similar statutory language to allow for virtual visitation, including Texas and Wisconsin.<sup>116</sup> Like Utah, both Texas and Wisconsin have made sure to specify that virtual visitation does not replace any requirement of physical contact between the separated parent and child.<sup>117</sup>

For decades, legislatures and courts have grappled with the question of whether virtual communication technology can facilitate meaningful parent-child relationships in the context of virtual visitation. In this context, virtual communication technology is seen as a supplement, not a replacement, for physical contact; physical contact is still perceived as superior in quality to virtual contact. However, unlike in the immigration context, the state has at least recognized the importance and utility of these technologies to help maintain familial relationships. Virtual communication technology, within the framework of proving the authenticity of marriages for the purposes of immigrating to the United States, has largely been left unaddressed.

The reasoning behind why virtual communication technology has been accepted in the visitation context, but not in the immigration context, is a challenging question to disentangle. The differences in treatment could speak to the difference in policy implications, policy motivations and the parties involved. While virtual visitation aims to maintain parental bonds, the immigration system, as it is currently structured, maintains couple separation. Virtual visitation is motivated by the best interests of the child, whereas the immigration system is motivated by preventing fraud. Virtual visitation values parental freedom of movement, while the immigration system upholds family separation and immigrant exclusion. Virtual visitation regulates citizens, and the immigration system regulates non-citizens.

Child custody has an underlying motivation to keep parents physically with their children, ostensibly towards the goal of the best interests

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<sup>115</sup> *Id.*

<sup>116</sup> See TEX. FAM. CODE ANN. § 153.015(b) (West 2019) (“If a conservator of a child requests the court to order periods of electronic communication with the child under this section, the court may award the conservator reasonable periods of electronic communication with the child to supplement the conservator’s periods of possession of the child.”); WIS. STAT. § 767.41(4)(e) (2020) (“If the court grants periods of physical placement to more than one parent, the court may grant to either or both parents a reasonable amount of electronic communication . . .”).

<sup>117</sup> See TEX. FAM. CODE ANN. § 153.015(d) (West 2019) (“The availability of electronic communication under this section is not intended as a substitute for physical possession of or access to the child where otherwise appropriate.”); WIS. STAT. § 767.41(4)(e) (2020) (“Electronic communication with the child may be used only to supplement a parent’s periods of physical placement with the child. Electronic communication may not be used as a replacement or as a substitute for a parent’s periods of physical placement with the child.”).

of the child. Utah, Texas, and Wisconsin have all conditioned allowing virtual visitation on meeting the best interests of the child.<sup>118</sup> Furthermore, social science research suggests that robust and frequent parental involvement is important for the development of children.<sup>119</sup> Geographic distance can diminish this involvement by “reduc[ing] the frequency and duration of contact between the child and non-custodial parent.”<sup>120</sup> These developmental concerns are particularly acute for young children under 7, when bonds to parents are fragile and can more easily be damaged by prolonged periods of separation.<sup>121</sup> Courts and state legislatures, because they condition virtual visitation on the fact that it is a *supplement*, not replacement, for in-person visitation, share this presumption that physical contact is crucial to ensure the best interests of the child. However, the state will allow relocation and virtual visitation when they are holistically considered in the best interests of the child.<sup>122</sup> The state offers this flexibility for courts to determine what is best for the child, whether that is relocation, virtual visitation, or otherwise.

Unlike child custody, the immigration system has no mandate to keep in mind the best interests of the transnational couple. The immigration system, when trying to prove the authenticity of marriages, is organized around separation and motivated by the prevention of fraud. Starting from a goal of protecting the best interests of the parties is a very different starting point than ferreting out fraud. Furthermore, recognizing the viability of virtual contact in fostering relationships, in the child custody context, allows for children to maintain contact with a non-custodial parent who lives far away. The same recognition, in the immigration context, allows for more expansive access to citizenship, a benefit that has historically been exclusionary, and more opportunities for defrauding the state. In other words,

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<sup>118</sup> See UTAH CODE ANN. § 30-3-33(14) (West 2020) (“Each parent shall permit and encourage . . . virtual parent-time . . . taking into consideration: the best interests of the child”); TEX. FAM. CODE ANN. § 153.015(b)(1) (West 2019) (“[T]he court shall consider: whether electronic communication is in the best interest of the child . . . .”); WIS. STAT. § 767.41(4)(e) (2020) (“Granting a parent electronic communication with the child during the other parent’s periods of physical placement shall be based on whether it is in the child’s best interest . . . .”).

<sup>119</sup> See Kenneth Waldron, *A Review of Social Science Research on Post Divorce Relocation*, 19 J. AM. ACAD. MATRIM. L. 337, 359 (2005) (noting that “[a] review of the research on the effects of increased father involvement is unambiguous: a child does better in every aspect of adjustment that has been measured, both long-term and short-term, if there is active father involvement” and these conclusions likely also apply to mother involvement but mother involvement is much less studied).

<sup>120</sup> *Id.* at 357.

<sup>121</sup> *Id.* at 349.

<sup>122</sup> See *McCoy v. McCoy*, 764 A.2d 449, 454 (N.J. Super. Ct. App. Div. 2001) (recognizing the fact that relocation increases barriers to visitation for a non-custodial parent “alone may not be contrary to the best interest of the child, so long as an alternate visitation schedule can be created that continues and preserves the relationship between the child and the noncustodial parent.”).

the implications for recognizing virtual communication technology look very different for the immigration and child custody contexts. Also, the immigration system's "in marital union" requirement provides a statutory basis for requiring physical togetherness that the child custody system lacks.

The child custody system also values parents' freedom of movement, unlike the immigration system's emphasis on restriction of couples' movement. Although the interests of the child are paramount, courts have held that their decision-making around relocation should consider the freedom of movement for the custodial parent.<sup>123</sup> The immigration system does the opposite of valuing freedom of movement. Adjustment of lawful presence status in the United States allows undocumented immigrants to freely leave the country.<sup>124</sup> However, prolonged wait times for adjustment of status and the possibility of not being able to reenter the United States effectively trap many undocumented immigrants in the country, restricting their freedom of movement.<sup>125</sup>

### CONCLUSION AND RECOMMENDATIONS

Virtual communication technology has revolutionized the way people communicate, but immigration law has not caught up. The Internet has become a medium that can minimize the distance between loved ones, and both create and foster familial bonds. There is little doubt that a long-distance relationship maintained by virtual communication is any less real than a relationship between two people in the same physical place. The child custody system has integrated this technology into its relocation doctrines and statutes. However, there is little acknowledgement of these technologies when the state is trying to validate the marriages of immigrants who seek lawful presence in the United States.

This difference speaks to the different motivations behind the child custody and immigration systems. Addressing these differences goes beyond the scope of just virtual communication technology and speaks to the historic and current organizing principles of the immigration system. However, recognizing virtual communication technology in the immigration context can still be a small step towards making the system more inclusive. Below are a few recommendations for how this recognition can be accomplished.

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<sup>123</sup> See, e.g. *Holder v. Polanski*, 544 A.2d 852, 855 (N.J. 1988) (noting that "[o]ur problem is to balance [the rights of the noncustodial parent] with the right of the custodial parent to seek a better life for himself or herself in this or another state. As previously noted, the calculus for solving this problem includes the custodial parent's interest in freedom of movement as qualified by his or her custodial obligation, the State's interest in protecting the best interests of the child, and the competing interests of the noncustodial parent.").

<sup>124</sup> Lee, *supra* note 92, at 2355.

<sup>125</sup> *Id.* at 2352.

- **Incorporate virtual communication technology into immigration regulations:** There is still a lack of clarity around how periods of physical separation impact the “in marital union” requirement and how the authenticity of relationships is proven. A rulemaking that explicitly addresses how virtual communication technology can be proof of a valid marriage could provide additional clarity. Also, addressing virtual communication technology would be a recognition of how more and more modern relationships are being conducted online. Possible future pandemics and the current COVID-19 pandemic, characterized by closed borders and virtual communication, undoubtedly make this recognition even more important.
- **Amend the “in marital union” requirement:** As it exists and as it is interpreted by DHS, the “in marital union” requirement relies on an outdated definition of what it means to be married. As discussed, married couples can live apart, rely on virtual communication technology, and still be authentically married. Although DHS recognizes this possibility, its general rule still requires couples to “actually reside” with each other. Amending or eliminating these requirements will make the immigration system more inclusive of couples living apart and focused on family reunification, rather than family separation.
- **Additional social science research:** Although some research exists on geographic distance’s impact on long-distance couples, there is more that can be done. For example, researchers could explore the difference between technology that allows face-to-face contact (like Skype) and technology that relies on voice or written communication (like phone calls and instant messaging). Also, researchers could investigate the emergence of virtual reality and the impact it might have on transnational relationships.

Considering the current immigration system and the politics and discourse surrounding it, there is a low likelihood that any of these reforms would gain traction. The United States is experiencing a drastic contraction in immigration and an increasing virulence against immigrants. Rather than follow popular sentiment, these proposed reforms would turn the immigration system’s focus towards reuniting families, rather than separating them. They would recognize the dignity of immigrant relationships that do not adhere to the strict government definition of marriage that is tied to physical togetherness. Historically, marriage has been one of the few clear paths to citizenship in immigration law. Although this privileging of marriage has its own problems, the immigration system clearly sees at least some value in

allowing American citizens to bring their spouses to the United States. Ironically, by placing such an emphasis on cohabitation and relying on an outdated definition of romantic partnerships, the system is doing the exact opposite—keeping families apart.