

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty

2018

Love for Sale: Book Review of Marcia A. Zug, *Buying a Bride: An Engaging History of Mail-Order Matches*

Jeanne L. Schroeder

Benjamin N. Cardozo School of Law, schroedr@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Jeanne L. Schroeder, *Love for Sale: Book Review of Marcia A. Zug, Buying a Bride: An Engaging History of Mail-Order Matches*, 39 *Cardozo Law Review* 1429 (2018).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/457>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

LOVE FOR SALE: BOOK REVIEW OF MARCIA A.
ZUG, *BUYING A BRIDE: AN ENGAGING HISTORY OF
MAIL-ORDER MATCHES*

Jeanne L. Schroeder[†]

TABLE OF CONTENTS

INTRODUCTION	1429
I. COLONIAL HISTORY	1431
II. THE WESTERN EXPANSION	1434
III. CHANGING TIMES	1435
IV. RACE AND XENOPHOBIA	1436
V. MODERN TIMES	1439
VI. POST-MODERNISM	1441
VII. HISTORY AND ANTHROPOLOGY	1442
VIII. FROM STATUS TO CONTRACT	1445
IX. THE DIALECTIC OF FREEDOM AND ALIENATION	1449
CONCLUSION.....	1454

INTRODUCTION

In *Buying a Bride*, Marcia Zug explores the history and law of “mail-order brides,” which has been a feature of the American experience since its inception. This little-understood phenomenon is often conflated with, and reviled as, human trafficking. Zug is, however, a staunch defender. Although clear-eyed about its exploitative potential, she argues that it has often been a means for women to increase their financial, social, and legal autonomy.

[†] Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, New York City.

Feminist legal scholars will find this book important because Zug shows how mail-order marriage led directly to the adoption of laws giving women independent economic rights and the western states granting female suffrage before the East followed suit. It is also significant for critical race scholars because Zug chronicles the crucial way that anxieties about race, ethnic purity, and immigration affected the dominant attitude towards the practice from the colonial era until today.

Zug's title intentionally reflects the offensive terminology of critics. "[R]ather than shying away from the association with female commodification, I decided to confront it By referring to the women in this book as 'mail-order brides,' I signal my intention to address these criticisms and explicitly challenge the assumption that such women are exploited."¹

She discusses several institutions that seem facially quite diverse. What she believes they have in common is that they all involve "a marriage resulting from some form of advertisement or other public request, soliciting women to enter into a marriage with a previously unknown man and typically travel a significant distance to complete this union."²

Zug has a number of responses to those who condemn mail-order marriages. First, they conflate different things. Yes, historically, some European women were kidnapped and forcibly transported to American colonies, and yes, today, human trafficking is a real crime sometimes fostered by fraudulent advertisements over the Internet. However, Zug argues that these are distinct from the practices she discusses.

Second, those who argue that mail-order marriages encourage the commodification of women expressly or implicitly assume an idealized norm of marriage as a romantic union between equals having the goal of personal self-fulfillment. Zug, in contrast, emphasizes that marriage has traditionally been, first and foremost, an economic relationship with the interconnected goals of establishing a household and carrying on the family line. Although we moderns may try to repress this inconvenient fact, our foremothers and many of our contemporary foreign sisters, could not and cannot afford to be so squeamish.

Third and most importantly, critics view mail-order marriages from an ahistorical and culturally myopic perspective. Traditionally, women had relatively little choice in their career and marriage prospects—partners being imposed by family, custom, and lack of alternatives. Women, both in the past and in many countries now, enter into mail-order marriages in large part to escape these strictures. That is,

¹ MARCIA A. ZUG, *BUYING A BRIDE: AN ENGAGING HISTORY OF MAIL-ORDER MATCHES* 7 (2016).

² *Id.* at 7–8.

mail-order marriage can *increase* feminine agency.

I would go further. It is not so much that mail-order marriages commodify women. Rather, history, anthropology, and psychoanalytical theory suggest that woman is the ur-commodity. Historically, societies structure themselves, and the masculine subject creates himself, through the possession and exchange of women by men (albeit, often aided and abetted by women who accept the status quo). Through mail-order marriages, individual women seek to interfere with this dynamic by becoming active participants in the bargaining process. Tellingly, according to Zug, American public opinion only turned against mail-order marriage in the late nineteenth century when the development of mass-circulation publication and personal ads enabled women to not merely *accept* solicitations but to *actively solicit* partners themselves. This was the tipping point of too much female agency.

Neither Zug, nor I, should be misunderstood as ignoring the problems of mail-order marriage let alone arguing that it is superior to other historical or contemporary ways of finding spouses and establishing households. For myself, I am in a companionable love-based marriage consistent with the modern romantic ideal and would not have considered a mail-order marriage when I was single. But this is because we both are highly educated white women, reared in middle-class families in late twentieth-century America, who had other economic opportunities than marriage. Zug reminds us that women like us are the empirical exceptions to the predominant rule.

Consequently, Zug admirably does not deny but confronts the traditional subordination of women. What she does do is interfere with a common (but far from universal) feminist narrative of woman as passive victim.

I. COLONIAL HISTORY

Zug starts with the British settlement of Jamestown in the early seventeenth century. Unlike the religiously inspired northern colonists who arrived in family groups, the southern colonies tended to attract single males, many of whom expected to stay for a short time and return home.³ Consequently, the government sought to import British women to encourage more permanent settlements.

Here, Zug upbraids Marilyn French for claiming that colonial Virginia was populated through the kidnapping, terrorism, and rape of English women.⁴ Zug acknowledges that early attempts to pay recruiters to find settlers led to abductions—of *both* men and women. Zug argues

³ *Id.* at 12.

⁴ *Id.* at 29.

that this was quickly discontinued as a failed experiment to be replaced by other recruitment techniques. Consequently, “French’s inaccurate description confuses instances in which Englishwomen were kidnapped with the willing immigration of the Jamestown brides” and “refuses to acknowledge the possibility that the women came willingly or that becoming a mail-order bride could be a rational or even wise decision.”⁵

The Virginia Company offered financial incentives to women to move to Virginia. “Tobacco wives” were offered passage, clothing, food, supply, and shelter.⁶ But, more importantly for Zug’s story, the women who immigrated were given economic opportunities that were not available in Great Britain. They were granted greater property and inheritance rights than they would have in England where a *femme covert* lost control of her property and right to contract upon marriage. In some cases female colonists were granted land by the state and were paid comparable wages to men.⁷ Most female colonists were from “modest backgrounds” who would most likely have had to go into service at home and postpone marriage for many years while they worked to earn funds to support a household.⁸ In other words, these women, *like male colonists*, were making rational decisions given their economic and legal opportunities. Were the opportunities available in Virginia great? Probably no. Were they better than those available in Britain? Probably yes.

Although Zug describes this as the first example of mail-order wives, significantly, women who accepted the offer to immigrate were not required to marry at all, let alone marry any specific man. That is, they received the financial incentives regardless of their eventual marital status. Just having a (white) feminine presence in Virginia was considered positive. And, indeed, some female immigrants chose not to marry. If a woman did wish to marry, she had considerable choice of partners, as men continued to substantially outnumber women. Zug’s analysis of the case law for breach of promise—the cause of action “when one party breaks off an engagement and the jilted party believes that he or she has been unfairly treated and harmed by the loss of the intended marriage”⁹—is telling. In England they were almost always brought by women against men. “[I]n the Virginia colony, this situation was reversed.”¹⁰

Zug illustrates her point by contrasting the two radically different experiences France had in introducing Frenchwomen to its two western

⁵ *Id.*

⁶ *Id.* at 21.

⁷ *See id.* at 23–24.

⁸ *Id.* at 22–23.

⁹ *Id.* at 26.

¹⁰ *Id.*

colonies—New France (i.e., Canada) and Louisiana. In Canada, in order to counter the sexual imbalance of colonists, the government created the institution of *les filles du roi* (“the king’s daughters”). Frenchwomen were offered financial incentives, including substantial dowries. Although initially targeted to rural women who presumably would be more willing to face the hardships of colonial life, surprisingly, applicants came from cities as well as villages, and from all classes, including the nobility.¹¹ As an indication of the bargaining power these women had, although under French law a wife would ordinarily lose control of her dowry (in this case supplied by the State) upon marriage, in Canada “more than 82 percent of the women signed marital contracts ensuring they retained at least some of their separate property after marriage.”¹²

The king’s daughters came to Canada, not because they were looking for love, but for practical economic reasons. “Nevertheless, because the filles du roi had the opportunity to get to know their potential husbands [i.e., as opposed to at home in France where families typically arranged marriages], they actually had a greater chance of marrying for love than did most seventeenth-century Frenchwomen.”¹³

The success of the king’s daughters must be contrasted to the woeful French experience in Louisiana. An early program similar to the king’s daughters proved unsuccessful because recruiters blatantly lied about the conditions of the Southern colonies.¹⁴ Reportedly, the women were also treated abysmally, often raped in transit, and as a result, refused to marry and ended up “living in misery.”¹⁵ Word of the truth leaked back to France, dooming the effort.

France responded in the worst possible way—transporting female prisoners to Louisiana.¹⁶ In Zug’s words:

The compulsory immigration of Frenchwomen was unconscionable, but what happened to many of the women before they departed for Louisiana is equally horrific. Some were forcibly married to male prisoners bound for the colony, while others were chained and marched across France as a warning to other potential criminals. Hundreds died on these treks. In 1719, 150 female prisoners rioted to avoid the march and forced immigration to Louisiana. Six of them were shot, a dozen more were wounded, and the rest spent the winter starving, ill clothed, and housed in freezing conditions. In the spring, the survivors were shipped to the colony. In total, approximately 7,000 women were deported to the colony, but most never made it.

¹¹ *Id.* at 37–38.

¹² *Id.* at 39.

¹³ *Id.* at 41.

¹⁴ *Id.* at 52.

¹⁵ *Id.* at 54.

¹⁶ *Id.* at 55.

The majority died on the forced marches and perilous sea voyage. Only 1,300 actually arrived in the colony, of whom only 178 remained alive in 1721.¹⁷

This gynocide overtakes even the horrors that Marilyn French invokes. Nevertheless, Zug argues that we must distinguish the Louisiana experience of exploitation and kidnapping of female prisoners from voluntary mail-order marriage in New France and America.¹⁸

II. THE WESTERN EXPANSION

Zug tells a parallel story about the settlement of the American West in the nineteenth century. The California gold rush of 1849 led to a highly skewed sex ratio (even after including indigenous women). There were numerous recruitment movements to persuade women to relocate from eastern cities and mill towns that suffered from a deficit of both eligible single men and jobs. The successful ones emphasized employment opportunities, subsidized transportation costs, and promised greater social equality.

Most interestingly from a legal perspective, in order to encourage female migration, western states adopted progressive legislation giving married women “control over their separate property”¹⁹ and liberalizing divorce law.²⁰ The federal government adopted the Donation Land Act covering the Oregon Territory that not only allowed married couples to “claim twice the land available to single men,”²¹ but also “dispensed with the normal rules of coverture and guaranteed that half the claimed land would become the separate estate of the wife.”²² The Homestead Act went further, allowing single women to claim land in their own right (although few other than engaged women and families with unmarried daughters were in a position to do so).²³ A generation later, western states, starting with Wyoming in 1869, granted female suffrage as a way of encouraging female immigration. “By 1915, women had suffrage in every western state save Texas and New Mexico. In contrast, not a single eastern state had granted the right to women.”²⁴

Once again, although Zug refers to this as “mail-order marriage,”

¹⁷ *Id.* at 57 (footnotes omitted). Opera lovers will remember the last scene of Puccini’s *Manon Lescaut* in which the titular anti-heroine, transported with other courtesans to Louisiana, expires in the desert outside of New Orleans.

¹⁸ *Id.* at 61.

¹⁹ *Id.* at 80.

²⁰ *Id.*

²¹ *Id.* at 85.

²² *Id.*

²³ *Id.* at 86.

²⁴ *Id.* at 141.

and the potential for marriage was advertised as one attraction for female immigrants, women were *not* required to marry. In fact, women who moved west generally did not marry quickly and sometimes not at all because of the availability of other economic alternatives. As Zug states concerning the “Mercer girls” who settled in the Oregon Territory, they “left their homes and families and traveled thousands of miles in order to gain greater command and independence over their economic, social, and political destinies.”²⁵ Zug emphasizes that they did not find—or expect—perfection. But, like all entrepreneurs (and male settlers), they took a calculated risk in an attempt to improve their position.

III. CHANGING TIMES

The public attitude towards mail-order marriages changed when the custom evolved from generalized solicitation of women to address sex-ratio imbalances, to individualized solicitation.

Once western states achieved their demographic objectives they had little interest in continuing to promote mail-order marriage and quickly stopped extolling its benefits and began emphasizing its dangers. Meanwhile, eastern support for mail-order marriages had always been tenuous, and without the West’s population concerns, these states saw little reason to promote mail-order marriages.²⁶

In the meantime, other social changes were occurring. During the Civil War, women were encouraged to correspond with soldiers, including those they did not know, as a patriotic duty.²⁷ This was abetted by new “modern” media, i.e., newspapers and personal ads. Individual soldiers took out ads looking for pen pals, often holding out the possibility of marriage after the war.²⁸

The war’s carnage created a demographic imbalance in the eastern United States, the opposite of that which had led to the earlier mail-order marriage, i.e., a surfeit of single women. Moreover, once the genies of correspondence between unrelated women and men, and personal ads were out of the bottle, they could not be put back in.

Nevertheless, marital advertisement outside of the military context, although common, was never completely socially acceptable because it enabled women to take control of their own courtship away from their families. Consequently, although the press was happy to collect the revenues from the ads, it tended to run articles emphasizing the dangers

²⁵ *Id.* at 93.

²⁶ *Id.* at 133.

²⁷ *Id.* at 134.

²⁸ *Id.* at 135.

of fraudulent marriage offers.²⁹

This new practice led to a number of pro-female legal changes. The tort of seduction was expanded so that the woman, and not her father, could be a plaintiff.³⁰ The remedies for breach of promise were expanded to include punitive and exemplary damages.³¹ Common law marriages were now recognized and protected in most states.³²

IV. RACE AND XENOPHOBIA

Zug's story is an American one and, as such, it is as much about race as sex. Her relatively sunny account of mail-order marriage is overshadowed by the fact that it was often driven by racial and ethnic hatred.

White male settlers in both Jamestown and New France initially married indigenous women. Indeed, the French encouraged this on the theory that it would lead to the assimilation of Indians to European ways.³³ But the opposite was the case.

Pocahontas, who converted to Christianity and moved to England with her husband John Rolfe, was the exception. The norm was that white men who married Indians tended to abandon the colonies and join their wives' people.³⁴ This was not only religiously offensive to the colonial authorities, it threatened to undermine the success of the enterprise and lead to the "adulteration" of the "whiteness and purity of the children."³⁵ In addition, once the French and the English began allying with different Indian ethnic groups, intermarriage could be a security risk.³⁶ Consequently, the attempts to recruit European women to the "New World" was to a large part driven by the fear that intermarriage was leading to what the French called the "*ensauvagement*" of the Europeans.³⁷

Zug's account of the western movement of Caucasian women in

²⁹ *Id.* at 127–28, 147–49.

³⁰ *Id.* at 151–52.

³¹ *Id.* at 152.

³² *Id.* at 152–53.

³³ Indian women were often eager to marry Europeans, especially in Canada. There was a sexual imbalance resulting in a paucity of native grooms. But more importantly, Indian wives could serve as translators and cultural liaisons "enabl[ing] them to boost their prestige and authority within the tribe." *Id.* at 32.

³⁴ As David Brooks notes, even in the eighteenth century, "[a]s time went by, the settlers from Europe noticed something: No Indians were defecting to join colonial society, but many whites were defecting to live in the Native American one." David Brooks, *The Great Affluence Fallacy*, N.Y. TIMES (Aug. 9, 2016), http://www.nytimes.com/2016/08/09/opinion/the-great-affluence-fallacy.html?_r=0.

³⁵ ZUG, *supra* note 1, at 50 (internal quotation marks omitted).

³⁶ *Id.* at 32–33.

³⁷ *Id.* at 31.

the nineteenth century reveals a similar racial animosity. Initially, some white male settlers cohabited with Indian women (although this practice was not encouraged as it was in the early colonies).³⁸ When the significant numbers of white women did immigrate, however, courts started refusing to recognize these common law marriages, disinheriting Indian women and mixed-race children. “[T]he Oregon territorial government passed a law voiding solemnized marriages between whites and all other racial groups”³⁹

Nevertheless, mail-order marriage did allow African American women as well as Caucasians to improve their economic and legal status, allowing them “to escape the South and its crushing racial restrictions” by moving west.⁴⁰ For example, the “Busy Bee Club, a group, founded in 1885 by six African American women, seeking to increase female immigration . . . placed matrimonial advertisements in numerous eastern papers and then supplied interested women with one-way tickets paid for by [Tucson’s] bachelors.”⁴¹

If racism encouraged official support for mail-order marriage in early American history, it was also a factor in the increasingly negative view among the white majority population starting in the second half of the nineteenth century. Alarm over the influx of laborers led first to the de facto prohibition of Chinese women as presumptive prostitutes and then the outright ban of all Chinese immigration under the Chinese Exclusion Act.⁴² Although initially other Asians could enter the United States, after the Gentlemen’s Agreement of 1905, the only Japanese who were eligible to enter the country were the wives and children of Japanese men who were already here. As anti-miscegenation laws prohibited them from marrying non-Asian women, Asian American men sought to bring Asian women into the country.⁴³ This led to the practice of “picture brides,” i.e., the solicitation of potential wives from Japan, Okinawa, and Korea through photos and letters.⁴⁴

Unlike the white “mail-order brides” in Virginia, New France, and the American West, these women had no choice but to marry specific men. Picture brides could not immigrate unless they were already married to their suitors. Consequently, they married men they never met by proxy. If a picture bride changed her mind upon meeting her husband, she risked being deported back home to the very situation she

³⁸ In addition, sexual violence by white settlers against the native population was rife. *Id.* at 66–68.

³⁹ *Id.* at 86.

⁴⁰ *Id.* at 141.

⁴¹ *Id.* at 142.

⁴² *Id.* at 158.

⁴³ *Id.* at 159–60.

⁴⁴ *Id.* at 160–64.

was desperate to escape.⁴⁵

As the accounts of many picture brides indicate, then as now with dating websites, prospective grooms often engaged in fraudulent inducements, sending old photographs and exaggerating or lying about their professions and wealth.⁴⁶ Nevertheless, Zug defends the practice as autonomy-enhancing, given the alternatives. Most of these women were making conscious, if perhaps poorly informed, decisions to leave grinding poverty, toil, and the prospect of arranged marriages. Despite their often unhappy marriages, many women made the most of the greater economic opportunities and political freedom available in the United States, becoming successful businesswomen and community leaders. Their financial success enabled them—once they were established as permanent residents—to divorce at rates higher than native-born American women.⁴⁷

Japanese immigration was ended in 1924, but hostility towards mail-order marriage was driven by more generalized xenophobia. Immigration from Europe became more restricted, and it became increasingly hard for even highly skilled single women to convince the immigration authorities that they were not either prostitutes or undesirables “likely to become a public charge” or “LPC.”⁴⁸ However, the Quota Act, which severely restricted immigration from eastern and southern Europe, did not apply to wives. Like Asian women before them, European woman turned to mail-order marriages as a means of achieving their goal of immigration.⁴⁹

Unfortunately, early feminism was another source of anti-immigration attitudes, generally, and mail-order marriages, specifically. Women’s rights advocates worried that foreign-born women were more traditional than Americans and would not support progressive pro-female legislation.⁵⁰ Early feminists also argued that mail-order marriages were “death sentences to individuality and progress” because these women “submissively accept[ed] unknown husbands without friendship, romance, love, or any of those backgrounds which we have grown to regard as essential to marriage.”⁵¹ Zug thinks that this, once again, ignores that these women were asserting their agency in choosing economic and marital prospects that they believed were superior to those available at home.

⁴⁵ *Id.* at 164–65.

⁴⁶ *Id.* at 165–66.

⁴⁷ *Id.* at 166–68.

⁴⁸ *Id.* at 171.

⁴⁹ *Id.* at 174–80.

⁵⁰ In contrast, native-born American women lost their citizenship and suffrage (in those states where women could vote) if they married a non-citizen. *Id.* at 181–82.

⁵¹ *Id.* at 183 (internal quotation marks omitted).

V. MODERN TIMES

The most controversial section of Zug's book concerns her analysis of contemporary practices. Mail-order marriage "virtually disappeared in the 1950's"⁵² as "the idea of marriage as an equal partnership" became the norm.⁵³ Nevertheless, it has recently made a comeback. "There are currently more than four hundred international marriage broker agencies," most of which employ websites that women can use for free, but men are charged "substantial fees."⁵⁴

The standard view of these websites is negative. Some feminists consider mail-order marriages to be a form of trafficking by definition.⁵⁵ Others argue that the women who enter into these are subject to domestic abuse.⁵⁶ The popular press presents the common stereotype that men who seek them are losers who reject modern marriage of equals and seek to control docile, traditional women.⁵⁷

One final objection to mail-order marriage is the belief that it commodifies something that should not be commodified and therefore exploits women. As marriage historian Nancy Cott has written, "American rhetoric and popular culture . . . put love and money on opposite sides of the street. Mercenary or cold-blooded motives for marrying [are] labeled crass, unethical, and destined for disastrous fate."⁵⁸

Zug argues that things are much more complicated. First, she disposes of the trafficking accusation by arguing that this expansive definition lumps "legitimate" websites with abusive ones. She also argues that those who argue that mail-order brides are often abused make questionable use of statistics. The best argument is that there is some evidence that immigrant women are abused at a higher rate than native-born Americans. However, there is no evidence that *mail-order* brides are disproportionately abused when compared to other immigrants. Indeed, there is some evidence to the contrary.⁵⁹ Zug suggests that since, by definition, mail-order brides have immigrated lawfully, they have more opportunity to leave their husbands, report abuse, and seek legal protection than undocumented immigrants who might feel trapped in an abusive relationship.⁶⁰

Second, she argues that the ideal that romantic love should be a

⁵² *Id.* at 188.

⁵³ *Id.*

⁵⁴ *Id.* at 189.

⁵⁵ *Id.* at 198–99.

⁵⁶ *Id.* at 191–93.

⁵⁷ *Id.* at 190–91.

⁵⁸ *Id.* at 215 (internal quotation marks omitted).

⁵⁹ *Id.* at 194–95.

⁶⁰ *Id.* at 193–96.

necessary consideration in choosing marriage partners is extremely recent. “[I]t was not until the late twentieth century that a majority of American women finally indicated that love outweighed all other considerations in choosing a partner.”⁶¹ And the American obsession with romance in marriage may partially account for the high divorce rate in contemporary times.

Third, Zug discusses studies that suggest that neither the American men nor the foreign women in these relations easily conform to the stereotype of domineering misogynist chauvinists and passive women. Although the men surveyed do tend to say that they are seeking more “traditional” women who will accept “the male protector/provider role,”⁶² they also accept the fact that their wives will want to work outside the house. These men tend to feel “disempowered in relation to elites” and “[c]onsequently, for many of these struggling men, the appeal of a mail-order marriage is not that it introduces them to women they can dominate, but that it connects them with sympathetic partners who have experienced similar struggles.”⁶³ In addition, because American women still tend to either marry economic equals or marry up despite their increased economic and educational achievements, there is a shortage of single women willing to marry men without college education, particularly in the African American community.⁶⁴ In contrast, highly educated women in some countries believe that they are disadvantaged in the local marriage market because of traditional values. Marriage broker websites can, therefore, address these demographic mismatches.

Most radically, Zug invokes the work of Professor Robin West who argues that it is the romantic concept of marriage that “encourages women to provide their services for free and devalues women and the work they do”⁶⁵ In West’s analysis, women are encouraged to think of the good of others and not their own maximization and thereby lose “the sense of *integrity* necessary to at least liberal conceptions of individualism.”⁶⁶ Zug suggests that, based on this analysis, a mail-order bride may be better off than a woman marrying in the hope of being loved. “A mail-order bride who makes her sacrifices and performs caregiving for her husband and family as part of a contractual understanding is empowered by her actions in a way the ‘loving’ altruistic wife is not.”⁶⁷

Finally, to tie this last chapter to her earlier ones, Zug implicitly

⁶¹ *Id.* at 216.

⁶² *Id.* at 212.

⁶³ *Id.* at 200–04, 211.

⁶⁴ *Id.* at 174–80.

⁶⁵ *Id.* at 217.

⁶⁶ ROBIN WEST, *CARING FOR JUSTICE* 121 (1999).

⁶⁷ ZUG, *supra* note 1, at 218.

accuses critics of modern mail-order marriages of cultural blindness. Mail-order marriages may not look like a partnership of equals to American academics. However, the brides surveyed believe that their grooms' attitudes are *more* egalitarian than those of their countrymen. In other words, Zug is arguing, once again, that these women are making a rational choice to expand their agency based on the opportunities they believe are otherwise available to them.⁶⁸

To drive home this point, in her conclusion, Zug introduces us briefly to one of the unexpected consequences of marriage equality—the development of all-male mail-order marriage websites. Regrettably, there are many countries where homosexuality is illegal or, at least, dangerous. Consequently, some gay foreign men—like women before them—see marriage to a stranger not as a romantic panacea, but as a practical alternative.

VI. POST-MODERNISM

This is not a theoretical book, but it raises theoretical questions. Zug is well aware that her relatively positive account of mail-order marriage may be offensive to some American feminists concerned about the commodification of women. But Zug critiques this position as implicitly assuming that women *start* from the position of freedom and are *then* subordinated.

This assumption is problematic for two reasons. First, as Zug argues, it is incorrect as a historical and anthropological fact. Second, as I shall argue, it implicitly adopts the classical liberal proposition that the subject begins as the free individual within the state of nature who is then oppressed by society.

Zug's analysis arguably fits better into Continental or speculative political theory than within the classical liberal paradigm that dominates American thinking. Liberalism takes individuation and freedom as givens. This means that society is a constraint and, therefore, a problem to be explained and justified. Speculative theory, in contrast, seeks to understand how individuation and freedom can be created within and through society. Liberalism's hypothetical state of nature is not, in fact, natural let alone empirical. It is a logical construct or thought experiment. Freedom can only become concrete and positive within society.

Of course, the speculative position is not the silly one that all societies are free. As I shall discuss, historically, most human beings *have* been constrained by society. From a Hegelian perspective, Western society only developed to a stage where freedom was beginning to

⁶⁸ *Id.* at 221–23.

become actualized in the late eighteenth and early nineteenth centuries when modern property and contract relations and constitutional representative government were replacing feudalism. Moreover, from the position of structuralist anthropology and Lacanian psychoanalysis, women are the primal commodity.

The question from the speculative feminist position is, therefore, not how does society commodify women. It is how do women create a society in which we can *decommodify* ourselves. Zug argues that, ironically, mail-order marriages enable women to achieve some degree of agency, individuation, and practical freedom by taking an active role in controlling their pre-existing commodification.

VII. HISTORY AND ANTHROPOLOGY

Zug emphasizes that the decisions women make in accepting mail-order marriage invitations must be examined in the context of the alternatives available in their time and culture. A related point is made by legal historian Mark Weiner in a somewhat different context.

In *The Rule of the Clan*,⁶⁹ Weiner defends the modern liberal state from attacks from libertarianism, which assumes that freedom and rights pre-exist law. He argues that the State does not merely protect the liberal⁷⁰ ideals of individual rights and equality, it *creates* them.

Weiner rejects *one* of liberalism's founding presuppositions: the free individual in the state of nature as a historic fact. Wiener's examination of traditional societies across history show that they share a single broad organizational structure that belies their facial diversity. He defines the "clan" as "legal structures and cultural values of societies organized primarily on the basis of kinship . . ."⁷¹ "[C]ompared with modern liberal states, communities governed by the rule of the clan possess a markedly diminished conception of individual freedom . . . because under their legal principles people are valued less as individuals per se than as members of their extended families."⁷²

"Natural" man is not free. Moreover, history shows that when states fail, society quickly devolves back into clan-like organization.⁷³ If we were to fail to "maintain and nurture robust state institutions

⁶⁹ MARK WEINER, *THE RULE OF THE CLAN: WHAT AN ANCIENT FORM OF SOCIAL ORGANIZATION REVEALS ABOUT THE FUTURE OF INDIVIDUAL FREEDOM* (2013).

⁷⁰ He uses the term "liberal" to "refer to people committed to the values of individualism and the principles of liberal democratic government, regardless of party affiliation." *Id.* at 8.

⁷¹ *Id.*

⁷² *Id.* at 9.

⁷³ In his words, "[t]he clan is a *natural* form of social and legal organization—it is far more explicable in human terms than the modern liberal state—and people quickly, reflexively turn to it in the want of an alternative." *Id.* at 7 (emphasis added).

dedicated to the public interest, ignoring our human impulse to create clanlike forms of legal organization, it [would] spell the end of individualism as we know it.”⁷⁴

Similarly, the great liberal principle embodied in the Declaration of Independence “that all men are created equal” is a counter-factual: as an empirical matter, different people have different capabilities. Nevertheless, for the liberal constitutional state to function, we must act and treat other people *as though* we were equal.⁷⁵ In other words, equality is a legal status, not a natural condition, and as such functions only insofar as we make an ethical commitment to it.

Within the clan, man—and even more strikingly, woman—is neither free nor an individual. She is subordinate to her function within the group—in the case of woman, reproduction and the embodiment of honor.⁷⁶ In the clan, there are no individual rights protected by law, only the honor of the family avenged by feud.⁷⁷ A woman has no individualism because her body is the receptacle of the family’s lineage and honor.⁷⁸ As Zug emphasizes, in traditional societies, women’s marital choices tend to be extremely restricted, which is why mail-order marriages can be seen as freedom-enhancing.

Weiner’s analysis brings to mind Claude Lévi-Strauss’s structuralist analysis of kinship systems set forth most succinctly in *The Elementary Structures of Kinship*. Lévi-Strauss emphasizes two important things: The first is that kinship systems structure how goods, ideas, and people are “exchanged” within a culture. The second is that kinship systems comprise “the exchange of women,” wherein family groups “give” women to another family to be a wife, and receive in exchange something of value (a dowry, for example). In other words, women are the proto-commodity.⁷⁹

Adopting the terminology of “[t]he founding father of legal history

⁷⁴ *Id.* at 16.

⁷⁵ As I have stated elsewhere:

A[n] . . . empirical study resulted in the initially surprising suggestion that people who live in developed market economies are significantly more altruistic, generous and trusting than people who live in traditional cultures. Economist Samuel Bowles offers a possible explanation for this finding that is similar to my thesis: “Markets teach us to behave decently to strangers Markets are an arena in which you encounter somebody you’ve never seen before and engage in mutually beneficial activity.”

Jeanne L. Schroeder, *Economic Rationality, Empathy, and Corporate Responsibility*, 70 GEO. WASH. L. REV. 875, 883 (2002) [hereinafter Schroeder, *Economic Rationality*] (footnotes omitted).

⁷⁶ WEINER, *supra* note 69, at 12.

⁷⁷ *Id.* at 18, 101.

⁷⁸ *See id.* at 113–14.

⁷⁹ CLAUDE LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* 478–82 (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., 1969).

and legal anthropology, Henry Sumner Maine,” Weiner argues that individual rights only come into being with the development of the state when contract supersedes status—the relations that characterize the clan.⁸⁰ Contract presumes formal equality and reciprocity that respects the independence of both parties. This is why contract is the dominant economic relation in liberal states founded on legal equality. I will return to this.

In contrast, the dominant exchange relation in pre-modern clan societies is gift. Gift might at first blush seem benevolent—indeed reflecting a feminine ethic of care—in our society in which it is the exception to the norm of contract. However, in traditional societies gift is a way for one man to assert dominance over another. Gift is unilateral. In gift societies, not only must the donee accept the gift, he is required to reciprocate with an equivalent or greater gift or suffer shame and ostracism.⁸¹ Consequently, gift is a form of forced exchange and, therefore, aggressive. Perhaps the most extreme example of this dynamic was the practice of potlatch or gift as a form of war through which a great man would seek to impoverish his rival through ever-increasing rounds of forced “generosity.”⁸² The anti-feminist aspect of gift-exchange clan societies becomes more apparent when one contemplates Lévi-Strauss’s point that the “gift” is often a woman.⁸³

The majority of Zug’s mail-order brides come from societies that are not fully modern in Maine’s contractual sense. Colonists in the seventeenth century and picture wives in the nineteenth were fleeing cultures still dominated by class and characterized by arranged marriages. Although arguably men in nineteenth-century America lived in a society dominated by contract, women’s rights to enter into contracts and own property were still limited. Consequently, because western jurisdictions granted women more economic equal rights, the decision to go from east to west was also a movement from status to contract.

⁸⁰ WEINER, *supra* note 69, at 10.

⁸¹ MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 3 (W.D. Halls trans., 1990); *see also* JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* 18–29, 63 (2004) [hereinafter SCHROEDER, *VENUS*]; 1 GEORGES BATAILLE, *THE ACCURSED SHARE: AN ESSAY ON GENERAL ECONOMY* 70–71 (Robert Hurley trans., 1988).

⁸² CYRIL S. BELSHAW, *TRADITIONAL EXCHANGE AND MODERN MARKETS* 22–26 (1965); MAUSS, *supra* note 81, at 37.

⁸³ Although this is beyond the scope of this Essay, psychoanalytic theory posits that, even today, “masculine” personality is created through the hypothetical possession and exchange of an object of desire, associated with the feminine, by a community of masculine subjects. “Feminine” personality, in contrast, reflects an identification with the object of desire being exchanged. This difference between having (masculine) and being (feminine) is reflected in the verb forms of European (and perhaps other) languages. *See* JEANNE L. SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* (1998) [hereinafter SCHROEDER, *VESTAL*] (explaining this dynamic); SCHROEDER, *VENUS*, *supra* note 81 (same).

Although the story is not simple with respect to contemporary mail-order marriages, the brides tend to live in either more “traditional” societies where women’s roles are constrained, or in countries that have only relatively recently rejected Communism but have not adopted a liberal political system. In these cases, the women perceive that they do not have the same marital and economic choices available in America.

Consequently, it is not just that women achieve greater agency by being able to have a greater input into this process. The very fact that the commodification of women in marriage is made *more* express and *more* contract-like may itself be a step forward, as Zug suggests. Indeed, from a Hegelian perspective, it is not surprising that states and territories that encouraged mail-order marriage *also* granted women greater contract and property rights and even suffrage. That is, they recognized women as, if not quite equal subjects with men, nevertheless more subject-like.

VIII. FROM STATUS TO CONTRACT

As suggested, the Zug-Weiner analysis is arguably more consistent with the speculative tradition of Continental theory generally, and Hegelian political philosophy specifically, than with classical liberalism. To reiterate, in classical liberalism the free individual is deemed natural so the state is seen as the problem to be explained. In speculative theory, the question is how to *create* individualism and freedom. As an empirical matter, we are born as helpless infants within families, learn a collective language, become subject to laws, etc., and *nevertheless* experience ourselves as being unique. Speculative theory seeks to understand *these* phenomena. Individuality is an artifice: a human creation and a hard-won achievement.⁸⁴ The individual and the private law regime of rights are mutually constituting, each giving birth to the other.⁸⁵

Hegel’s *Philosophy of Right*⁸⁶ is, in the words of my colleague Arthur Jacobson, a *Bildungsroman* of personality.⁸⁷ It follows the *logical* development of the person from the simplest conception through the empirical citizen located in the modern constitutional state in the order of right he calls *Sittlichkeit*—usually translated into English as “ethical life.” I have discussed Hegel’s argument extensively elsewhere⁸⁸ and will

⁸⁴ BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 24 (1995).

⁸⁵ ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* 17 (1995).

⁸⁶ G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., HB. Nisbet trans., 1991) [hereinafter HEGEL, *PHILOSOPHY OF RIGHT*].

⁸⁷ Arthur Jacobson, *Hegel’s Legal Plenum*, in HEGEL AND LEGAL THEORY 97, 115 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1991).

⁸⁸ I do this most thoroughly in SCHROEDER, *VENUS*, *supra* note 81 and SCHROEDER,

only make a few points before moving on to the aspect of the theory that I believe is relevant to Zug's story.

The first is that Hegel does not reject the classical liberal notion of the autonomous individual in the state of nature as a *theoretical* model, as opposed to a *historic or empirical* fact. Indeed, he begins his *Philosophy of Right* by accepting a radical version of liberalism, that espoused by Immanuel Kant.⁸⁹ Hegel argues not that Kant is wrong, but that his theory is inadequate because it is logically incomplete as well as empirically inaccurate. The freedom that is the autonomous individual's essence cannot be actualized in the state of nature because it is abstract and negative.⁹⁰

To put this more strongly, to call the free person in the state of nature is a misnomer. He, or more accurately, it, is free because it is radically abstract, having no concrete characteristics that could limit it. This means that each abstract person is indistinguishable from each other. Abstract right is the most "primitive" means by which the liberal person can take on individuating characteristics that will enable it (now, he or she) to be recognized as a unique individual.⁹¹

For reasons that are beyond our present scope, Hegel believes that the abstract person can become concrete and freedom-positive only through relationships with others. The logically first and most "primitive" stage in this story is the creation of what I am calling the "subject"—the aspect of personality that is capable of bearing legal rights and duties—but which can also be thought of as an individual. This is achieved through what he calls "abstract right," i.e., private property and contract. Specifically, the abstract person creates concrete individuality (i.e., differentiation and individuation) through a regime of possession, enjoyment, and alienation of objects of desire.⁹²

Hegel argues that contract is necessary for the creation of subjectivity, equality, and concrete freedom because it is bilateral. That is, although contract is limiting in that it binds the parties to obligations, it is not imposed by one party over the other, as it is in gift.⁹³ Not only must each party bind herself (at least as a formal manner), she must respect the will of the counterparty to choose whether or not to bind himself.

Second, it is crucial that the subject is not the *historic* first stage in the development of personality. Rather it was historically the last—the

VESTAL, *supra* note 83.

⁸⁹ SCHROEDER, VESTAL, *supra* note 83, at 29.

⁹⁰ HEGEL, PHILOSOPHY OF RIGHT, *supra* note 86, at 46–49; BRUDNER, *supra* note 85, at 21, 36; SCHROEDER, VESTAL, *supra* note 83, at 32–33.

⁹¹ SCHROEDER, VESTAL, *supra* note 83, at 33–34; Alan Brudner, *The Unity of Property Law*, 4 CANADIAN J.L. & JURIS. 3, 19 (1991).

⁹² His analysis is set forth in HEGEL, PHILOSOPHY OF RIGHT, *supra* note 86, at 73–103.

⁹³ SCHROEDER, VESTAL, *supra* note 81, at 53–54; *see supra* text accompanying notes 81–82.

constitutional state in which the citizen is located could not come into being until the late eighteenth to early nineteenth century as its condition precedent. Or, more accurately, abstract right and the subject are born together. As we have discussed, historically, human societies have been characterized by status, *not* abstract right (contract).

On the one hand, despite the fact that Hegel insists on the necessity of private property and contract, he is not a libertarian. The state and laws are necessary for the creation of positive freedom. Just as Kant's notion of the autonomous individual in the state of nature proved to be a partial and inadequate account of personhood that had to be supplemented by the subject in abstract right, so will the subject and abstract right prove to be partial and inadequate. They will be supplemented by more complex and more adequate aspects of personhood created in the realms of morality and ethical life.

On the other hand, despite the fact that Hegel insists that abstract right contains internal contradictions and must go under, neither is he a simplistic socialist. In contrast to Karl Marx who was deeply influenced by Hegel's method and thought that capitalism was a necessary stage in the development of personality, Hegel argued that it was logically necessary for some regime of private property and contract to persist after the development of "higher" levels of societal development.

Hegel's (and Marx's) logic is sometimes described by critics as an initial thesis, contradicted by its antithesis, resulting in a synthesis. In fact, he does not use this crude terminology which suggests that the contradictions within earlier stages in the logic will be eliminated or suppressed by later ones.⁹⁴ Rather, he uses the terms understanding, dialectic, and speculative reasoning (the last often translated as the obscure English word borrowed from chemistry, "sublation").

An understanding is a statement of a proposition.⁹⁵ The dialectic, as the etymology reveals, is a second reading that points out the internal contradictions that any positive statement inevitably leaves out.⁹⁶ Speculative reasoning proposes a third interpretation that shows how the understanding and the dialectic are simultaneously both false (in the sense of inadequate) yet contain a moment of truth.⁹⁷ Any resolution produced by speculative reasoning is, however, merely temporary. The

⁹⁴ Allen Wood states that, to his knowledge, this terminology is "never used by Hegel, not even once The use of [this] terminology to expound the Hegelian dialectic is nearly always an unwitting confession that the expositor has little or no firsthand knowledge of Hegel." ALLEN W. WOOD, *HEGEL'S ETHICAL THOUGHT* 3–4 (1990). Michael Inwood suggests, however, that Hegel does endorse this terminology (which had been used by Fichte and Schelling) in his *Lectures on the History of Philosophy*. MICHAEL INWOOD, *HEGEL* 550 n.100 (1983).

⁹⁵ DAVID GRAY CARLSON, *A COMMENTARY TO HEGEL'S SCIENCE OF LOGIC* 19–21 (2007).

⁹⁶ *Id.* at 21.

⁹⁷ JEANNE LORRAINE SCHROEDER, *THE FOUR LACANIAN DISCOURSES OR TURNING LAW INSIDE-OUT* 125 (2008).

speculative resolution proves to be a new understanding to be contradicted by a new dialectic, etc.⁹⁸ In other words, although any specific contradiction is unstable and must go under, “contradiction” per se can never be eliminated. This means that Hegel’s system is dynamic because the only constant is change.

Most importantly, the speculative conclusion simultaneously preserves both the understanding and its dialectic and their contradiction even as it negates them. This is because each lower step of the logic is seen as a building block of each higher stage and, therefore, must remain even after the higher stage is generated. To use a metaphor I have suggested before, the lower stages of the logic are like foundations of the higher stages which are like buildings.⁹⁹ A foundation is only a hole in the ground until it becomes a part of the building built upon it. Its status as foundation is only retroactively imposed after the building “negates” its previous status as mere hole. Nevertheless, even after the building is built, the foundation must be preserved or the entire edifice “withdraws into its ground.”¹⁰⁰

In other words, Hegel disagrees both with the libertarian who believes the free market, contract, and property rights should not be restrained by the State and with the communist who would do away with private property and the market. Both ethical life and abstract right (as well as the intermediary realm of morality) are necessary for the actualization of freedom.

Unfortunately, Hegel writes at such an abstract level that he does not give us advice as to how to balance the two. Indeed, Hegel thinks that philosophy is incapable of making such pragmatic decisions which he leaves to practical reason.¹⁰¹ This approach is necessary for his project of explaining the creation of freedom. If logic told us exactly what to do, we would not be free.

What I want to emphasize here is first, Weiner’s point that the state is necessary for creation and preservation of positive liberal rights and freedom, because otherwise we would devolve back into the unfree

⁹⁸ *Id.* at 125–26.

⁹⁹ SCHROEDER, VESTAL, *supra* note 83, at 312.

¹⁰⁰ G.W.F. HEGEL, HEGEL’S SCIENCE OF LOGIC 437 (A.V. Miller trans., 1969).

¹⁰¹ This is one of the points of Hegel’s famous *Preface* to his *Philosophy of Right*. Although Hegel is known as an idealist, he is also a radical materialist in the sense that for an ideal to be potential, it must be actualized in the world—or more radically, we only know what is potential retroactively after it is actualized. This actualization, however, can have myriad forms.

But the infinitely varied circumstances which take shape within this externality as the essence manifests itself within it, this infinite material and its organization, are not the subject-matter of philosophy. To deal with them would be to interfere in things . . . with which philosophy has no concern, and it can save itself the trouble of giving good advice on the subject.

HEGEL, PHILOSOPHY OF RIGHT, *supra* note 86, at 21.

regime of the clan. Second, nevertheless, some degree of private property and markets must be retained. Although there can never be a perfect balance, there must be a, perhaps uncomfortable, coexistence between state and freedom. But third and most surprisingly for our purposes, the Hegelian approach would agree with critics of neo-liberalism that market ideology results in commodification and alienation. However, it also accepts that these are paradoxically *necessary* for the actualization of freedom!

IX. THE DIALECTIC OF FREEDOM AND ALIENATION

It is common for progressives to condemn capitalism—what Europeans tend to call neo-liberalism—for alienating people. Alienation, however, is a necessary moment in individuation. To Hegel (and, surprisingly, Adam Smith) that is abstract right's great achievement. In earlier stages of development, people are ensconced in the hierarchal structures of the extended family and clan organized by status. Although *perhaps* people living in traditional societies were not as alienated as contemporary ones because they knew what their roles were, they were not free in that they had little or no choice in their lives. This was particularly the case for women who, as Zug's book shows, were still largely defined by their status long after American men increasingly defined themselves through contract.

Hegel's position with respect to the historical role of contract has surprising affinities with Adam Smith's. Smith was writing a generation earlier than Hegel, when Europe's clan society (i.e., feudalism on the Continent, as well as clans in his native Scotland) was in the process of being supplanted by Enlightenment values, capitalist economics, and the concept of the liberal representative state.

As Ronald Coase has explained, it is a misconception to think that Smith believed that people were naturally the rational, self-centered autonomous *homo economicus* that we encounter in first-wave law-and-economics literature. As is the case with Hegel, the individual is the result, not the cause, of markets. When Smith thought about self-interest, he conceived of concrete human beings located in family and society bound by ties of love. That is, self-interest includes caring for those one cares for. Coase's point is that although in the simplistic popular misconception, Smith presents "man [as] an abstraction, an 'economic man,' rationally pursuing his self-interest in a single-minded way[,] . . . a rational utility maximiser."¹⁰² In fact, Smith's man also feels fellow feeling or sympathy and concern for others. In Smith's

¹⁰² R.H. Coase, *Adam Smith's View of Man*, 19 J.L. & ECON. 529, 545 (1976). I make a similar point about Smith in Schroeder, *Economic Rationality*, *supra* note 75.

words, even “[t]he greatest ruffian, the most selfish violator of the laws of society, is not altogether without it.”¹⁰³ “How selfish soever man may be supposed . . . [he is interested] in the fortune of others and . . . their happiness [is] necessary to him though he receives nothing from it, except the pleasure of seeing it.”¹⁰⁴ In other words, although we do things for others out of selfishness or self-love,¹⁰⁵ it is not because we expect to receive some implicit quid pro quo, as the law-and-economics movement would have it. Rather, making others happy, makes us happy.¹⁰⁶

Smith’s concern is that such fellow feeling of benevolence has the limitations that Weiner associates with the clan. This is because the benevolence one feels for others *as an empirical matter* varies with proximity.¹⁰⁷ After self-love, most people feel affection for their immediate family¹⁰⁸ and a lesser sympathy with their extended family.¹⁰⁹ We often develop relations with friends and colleagues that are almost as intense as those we have with parents, siblings, and children.¹¹⁰ We tend to have fellow feelings towards those with whom we share some affinity, such as members of what Smith calls one’s order in society or nation,¹¹¹ and I would add religion or ethnic group. As relationships become more attenuated, feelings for others can change “not simply [to] the absence of benevolence but malevolence.”¹¹² As Weiner argues, in clan societies, groups establish solidarity through feuds.¹¹³ Because there is little conception of individual rights *within* clans, as opposed to the collective honor of the clan, disputes among members of rival clans cannot be peacefully resolved through a legal procedure involving the two parties. Rather, a perceived wrong suffered by one clan member is considered a harm suffered collectively by all that must be avenged by all against the entire clan of the wrongdoer.¹¹⁴ We see this dynamic in modern societies not only within gangs, but in lingering racial, ethnic, and xenophobic hostilities.

¹⁰³ Coase, *supra* note 102, at 529 (quoting ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 3 (E.G. West ed., 1969)). Smith continues, “nothing pleases us more than to observe in other men a fellow-feeling with all the emotions of our own breast.” *Id.* at 530 (quoting ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 10 (E.G. West ed., 1969)).

¹⁰⁴ *Id.* at 529.

¹⁰⁵ *Id.* at 533.

¹⁰⁶ *Id.* at 530 (quoting ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 12–13 (E.G. West ed., 1969)).

¹⁰⁷ *Id.* (quoting ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 192 (E.G. West ed., 1969)).

¹⁰⁸ *Id.* at 533.

¹⁰⁹ *Id.* at 534.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ WEINER, *supra* note 69, at 18, 29.

¹¹⁴ *Id.* at 18, 33–36.

Consequently, the cooperation needed in a modern state and economy cannot be achieved through *actual* feelings of benevolence. To expect people to feel and act on a “benevolence as encompassing ‘the general happiness of mankind’ would require man to do something of which God is no doubt capable, but that is beyond the powers of man”¹¹⁵ Indeed, a government based on benevolence would be corrupt and undemocratic in that our leaders would naturally favor those they love over those they do not.¹¹⁶

Specifically, Smith is contrasting early capitalism to feudalism in which familial and governmental organization were one and the same. Not only were the medieval European words for friend and relative the same, feudal obligations were expressed (and probably experienced) in terms of love.¹¹⁷ We should remember that the tropes of romantic love that Zug criticizes comes initially from the troubadours of courtly love who borrowed the language of the love of vassal and lord to describe that of lover and beloved.¹¹⁸

It is this context that frames Smith’s famous assertion that “it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.”¹¹⁹ Market relations are valuable precisely because they break down the “natural” pull of the family and allow cooperation among persons who are not friends. If the butcher, et al. acted out of actual feelings of benevolence, he would favor his family, friends, and clan first. Such kin-based relationships can only sustain the simplest economy.

As Coase says,

[l]ooked at in this way, Adam Smith’s argument for the use of the market for the organisation of economic activity is much stronger than it is usually thought to be. The market is not simply an ingenious mechanism, fueled by self-interest, for securing the cooperation of individuals in the production of goods and services. In most circumstances it is the only way in which this could be done. . . . A politician, when motivated by benevolence, will tend to favour his family, his friends, members of his party, inhabitants of his region or country (and this whether or not he is democratically elected). Such benevolence will not necessarily redound to the

¹¹⁵ Coase, *supra* note 102, at 537–38.

¹¹⁶ *Id.* at 541 (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 818 (Edwin Cannan ed., 1937)). As psychologist Paul Bloom states, “[e]mpathy has some unfortunate features—it is parochial, narrow-minded, and innumerate. We’re often at our best when we’re smart enough not to rely on it.” Paul Bloom, *The Baby in the Well*, NEW YORKER (May 20, 2013), <https://www.newyorker.com/magazine/2013/05/20/the-baby-in-the-well>.

¹¹⁷ MARC BLOCH, 1 FEUDAL SOCIETY 231–33 (L. Manyon trans., 1961).

¹¹⁸ *Id.* at 233.

¹¹⁹ Coase, *supra* note 102, at 543 (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 818 (Edwin Cannan ed., 1937)).

general good. . . . The great advantage of the market is that it is able to use the strength of self-interest to offset the weakness and partiality of benevolence, so that those who are *unknown, unattractive, or unimportant, will have their wants served*.¹²⁰

Shlomo Avineri sees a similar dynamic in the *Philosophy of Right* in the political realm. Note, this aspect of Hegel's analysis is the mirror image of my earlier discussion. From the perspective of logic, abstract right is the most primitive method through which the liberal abstract person becomes individuated so that she can have the relationships with others that will make her freedom concrete. As an empirical matter, however, abstract right occurs late: it is the means by which the situated clan member separates herself from others in order to become an individual. In both accounts, however, individualism is the link between the abstract and concrete; between being autonomous and being dependent. In Hegel's terminology, the individual is the sublation between the universal (Kant's abstract person) and the particular (status within a specific clan).

In Avineri's reading, the family is characterized by "particular altruism" in which the actor acts "for the benefit of someone else with whom the actor is connected through ties which are called 'family ties'. . . . Hence this altruism is limited and particular and does not apply to all and sundry."¹²¹ This is Weiner's rule of the clan. A state, in contrast, must be characterized by "universal altruism" in which one acts "out of solidarity, out of the will to live with other human beings in a community. . . . based on *free consciousness, not on a biological determination*."¹²²

To get from the instinctual emotion of particular altruism to the conscious attitude of universal altruism, we require an intermediate condition. This is not, as one might suspect, "particular egotism." This characterizes the Kantian individual in the state of nature—a *logically* simpler conception of personhood that does not exist empirically. Rather the ideal of political equality requires a moment of "universal egotism."¹²³ This is the regime of abstract right, i.e., civil society and the market economy. "This is the sphere where everyone acts according to what he perceives as his enlightened self-interest."¹²⁴

Consequently, the state could not do away with the universal egotism of civil society or the particular altruism of the family without destroying itself. The state needs to preserve civil society and its regime of property, contract, and individual rights precisely because it breaks

¹²⁰ *Id.* at 544 (emphasis added).

¹²¹ SHLOMO AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 134 (1972).

¹²² *Id.* (emphasis added).

¹²³ *Id.*

¹²⁴ *Id.*

down the “natural” ties of family (i.e., particular altruism) and creates the type of person who can serve as a citizen. Universal altruism, unlike particular altruism, is an *ethical commitment*, not an empirical emotion. Political equality requires that we *not* favor those we *actually* love—government by love is feudalism. God demands that we love our neighbor. The state functions because it only demands that we act towards others *as though* we love them.¹²⁵

Consequently, Hegel, Smith, and Weiner’s point is not *just* that individualism and freedom are unnatural. It is that they must be purchased through a sacrifice of empirical solidarity. Hegelian logic however, insists that just as abstract right (property and contract) must be preserved in more developed human societies, so must the order of right that he calls morality, which includes the affectionate relationship of marriage.

Zug suggests how mail-order marriage can be a liberating moment for women, at least during a transitional period from clan-status to liberal-contract. Although in the clan, relationships are characterized by actual empirical feelings of solidarity and affection to the extended family, marriage decisions had to be subordinated to the greater good of the clan. If this was difficult for men, it was harder for women whose duty was to reproduce in a way to further the interest of her family. The empirical emotions that the bride feels for the groom (and vice versa) were not the primary concern (although presumably, most parents hoped that their daughters not be miserable).

In this context, mail-order marriage can help to establish individuality and feminine subjectivity by interfering with marriage as a status relationship. Is a woman a commodity in a mail-order marriage? Yes, but she was a commodity in traditional marriage. Hegel argues that the minimal condition of empirical freedom is subjectivity created through a regime of possession, enjoyment, and exchange of an object of desire. Ironically, in mail-order marriage, the woman might become *more* subjective by being the active participant in the arrangements of possessing, exchanging, and enjoying her own body as the object of desire that heretofore had been controlled by others.

Those who decry the lack of individualized romantic element in mail-order marital decisions ignore—as Zug insists—that this element

¹²⁵ As Bloom states:

[Some] have argued, plausibly, that moral progress involves expanding our concern from the family and the tribe to humanity as a whole. Yet it is impossible to empathize with seven billion strangers Our best hope for the future is not to get people to think of all humanity as family—that’s impossible. It lies, instead, in an appreciation of the fact that, even if we don’t empathize with distant strangers, their lives have the same value as the lives of those we love.

Bloom, *supra* note 116.

was probably largely missing from the alternatives available for the women who accepted such offers. In clans, affection is vertical in the sense that what was important was the empirical love women felt for their parents and children because their duty is to continue the lineage. Marital affection might be a happy consequence of—not a reason for—a successful marriage. Consequently, to complain about the commodification of women in mail-order marriages is to ignore the material conditions of these women's lives. Hegel opines that the conceptualization of marriage in terms of contract is "disgraceful."¹²⁶ And so it is, if the parents and the groom are the effective parties to the contract. But from the position of the bride, the conceptualization of her role as a contract party is a step forward.¹²⁷

CONCLUSION

Is Zug convincing in her defense of mail-order marriage? Yes, if one keeps in mind her modest goal. She is not trying to argue that it is, in its many permutations over the centuries, a wonderful institution. Rather, she recognizes that historically most women had limited autonomy. Feminine choice, particularly in connection with the choice of marriage partners and careers, has been constrained by law and custom. Nevertheless, women—and more recently gay men—should be judged as rational actors, not passive victims. In this context, mail-order marriages can be seen as a way to "increase . . . marital choice and form advantageous and empowering relationships."¹²⁸ That is, if women have been dealt with a bad hand, mail-order marriage has been one way they have played it to their advantage. She concludes, "[t]oday's mail-order brides and grooms are not a throwback to an earlier, unenlightened time. Instead, like most of us, they are simply men and women who believe marriage will improve their lives, and we should support their choice."¹²⁹

Zug easily demolishes the critics of mail-order marriages she does discuss, but leaves me wishing that she gave more time to discussing the negatives as well as the positives. I am also not entirely convinced that it is analytically useful to lump together so many different institutions. In particular, I question whether early colonist and settler recruitment

¹²⁶ HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 86, at 105.

¹²⁷ At least by the high middle ages, the Catholic Church insisted that marriage was a relationship between the couple so that the bride's (and groom's) free consent was a necessary element. As a practical matter, however, marriages were often contracted by the family and "consent" was coerced. *See, e.g.*, JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 275–76* (1987).

¹²⁸ ZUG, *supra* note 1, at 224.

¹²⁹ *Id.*

programs really have much in common with contemporary marriage-brokerage websites.

Nevertheless, this is a consistently interesting and thought-provoking work. And, dare I say with respect to a scholarly book, it is a great read.