Undocumented Immigrants and the Right to Marry

County clerks in a number of states (including, most recently, Alabama) refuse to issue marriage licenses to undocumented immigrants.¹ This article explains why states cannot deny marriage licenses to undocumented immigrants and what CLINIC is doing about this issue.

Why Do County Clerks Ask For a Social Security Number?

Often, the clerks who deny marriage licenses to undocumented immigrants argue that federal law requires marriage license applicants to provide a Social Security number. Undocumented immigrants, who are not eligible to apply for a Social Security number, are therefore denied marriage licenses. This belief that federal law requires a Social Security number for marriage licenses issued by states stems from an incorrect reading of one section of the federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). PRWORA was enacted in 1996 in an effort to reform the public benefits system.² As part of that effort, Congress took steps to increase the effectiveness of child support enforcement. PRWORA required each state to create a plan for enforcing child and spousal support orders.³ As part of each plan, states were required to record the Social Security numbers of applicants for certain licenses.⁴ The relevant section reads:

[42 U.S.C. § 666] (a). In order to satisfy § 654(20)(A) of this title [requirement for a state plan], each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part: …

…

(13) Recording of social security numbers in certain family matters.—

Procedures requiring that the social security number of—

(A) any applicant for a professional license, driver’s license, occupational license, recreational license, or marriage license be recorded on the application;

(B) any individual who is subject to a divorce decree, support order, or paternity determination or acknowledgment be placed in the records relating to the matter; and

Does PRWORA Require States To Deny Licenses to Applicants Who Fail to Provide a Social Security Number?

PRWORA simply directed states to record Social Security numbers in certain family matters; it did not specify how states should treat applicants who will not or cannot provide a Social Security number. Due to the ambiguity of the statute, a number of state attorneys general, state courts, and at least one federal agency have analyzed this section to determine Congress’s intent. Each analysis has found that Congress’s intent when it drafted this section was to facilitate the enforcement of child support orders. Congress did not intend for this section to be used to deny licenses to applicants without a Social Security number. Instead, this section requires applicants who have been issued a Social Security number to provide their number. Applicants who do not have a Social Security number can provide an affidavit stating that they have not been issued a Social Security number.

Has the Federal Government Provided Guidance on this Issue?

In 1999, the Commissioner of the federal Office of Child Support Enforcement issued an interpretative guidance on the issue of Social Security numbers and license applications. In the guidance, the Commissioner wrote that, “We interpret the statutory language in section 466(a)(13) of the Act to require that States have procedures which require an individual to furnish any social security number that he or she may have. Section 466(a)(13) of the Act does not require that an individual have a social security number as a condition of receiving a license, etc.” [emphasis added]

Have State Attorneys General Issued Official Opinions on this Issue?

Several state attorneys general have issued legal opinions regarding whether a state can deny a marriage license to an applicant who does not have a Social Security number. Each attorney general found that a state cannot deny a license to applicants who do not have a Social Security number. The following sections elucidate the reasoning of the state attorneys general.

Analysis: Social Security Number Not a Condition Precedent

In 2001, the Ohio Court of Appeals heard a lawsuit filed by a number of Ohio residents who were denied marriage licenses because they did not have Social Security numbers. The Ohio statute at issue stated:

Each party shall make application and shall state upon oath the party’s name, age, residence, place of birth, occupation, father’s name, and mother’s maiden name, if known … the application also shall include each party’s social security number.

In finding that the plaintiffs were eligible for marriage licenses, the court argued that if each of these varied pieces of information were considered a legal requirement for marriage in the state, the consequences would be unacceptable. For example, no one who did not know their father’s

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5 42 U.S.C. § 666(a)(13).
7 R.C. 3101.05(A).
name could be issued a marriage license. To the contrary, the court found that the Ohio Legislature had intended to place only minimal impediments in the way of couples who wished to be married. The court further found that the word “shall” in the statute need not be read as mandating the inclusion of this information.8

In 2008, the Alabama Attorney General directly relied upon this Ohio court’s decision and its reasoning when he advised that probate offices should not require that applicants for marriage licenses first provide a Social Security number. Rather, they should require that those without Social Security numbers provide an affidavit attesting that they had never been issued one.9

In 2002, when a Mississippi county clerk asked the Attorney General if he may “lawfully issue a marriage license to persons of marriageable age who I know or have reason to believe are illegally in the United States,” the Attorney General answered in the affirmative. Once the conditions set forth in Mississippi state law are met, then they may marry, regardless of whether the documentation proffered was issued by a foreign government (in the case of a foreign passport or birth certificate, for example).10

Analysis: State’s Interest in Protecting the Institution of Marriage
In his advisory opinion on this matter, the Attorney General of South Carolina stressed the intent of the legislature and the important public policy of protecting the institution of marriage. He wrote that, “The requirements of a Social Security number and alien identification number were included in the statute as part of the state and federal government's ongoing efforts relating to child support enforcement. In our opinion, the General Assembly did not intend that these requirements would serve as a basis for denial of a marriage license in these instances in which an alien is unable to obtain either an SSN or an alien identification number. Further, it is the policy of the State of South Carolina to preserve and protect the institution of marriage in its traditional sense.”11

Analysis: Constitutional Right to Marry
The opinions of several Attorneys General have refused to require Social Security numbers for marriage license in an effort to avoid potential Constitutional problems. These Attorneys General cite the likelihood that restricting marriage licenses based on an individual’s ability to provide a Social Security number would infringe upon his or her fundamental constitutional right to marry.

For example, the Attorney General of Tennessee reasoned that requiring a Social Security number as a condition precedent to issuing a marriage license would likely infringe on an individual’s fundamental right to marry.12 Using similar reasoning, the Attorney General of North Dakota wrote that “…requiring an applicant for a marriage license to first obtain a social security number before being issued that license would risk imposing an unconstitutional barrier on the fundamental right of marriage. That interpretation would

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also be inconsistent with the legislative purpose of the enactment and contrary to its administrative construction.”

**Analysis: Congressional intent to facilitate enforcement of child support**

When the **Florida** Attorney General provided an opinion on this issue, he pointed out that a court’s primary duty is to follow the intent of the legislature. Therefore, he wrote that the law requiring a Social Security number from a license applicant should be construed in light of its intended purpose of facilitating the enforcement of child support orders. Using this analysis, he stated that the statute should not be construed as to prohibit an individual who had not been issued a Social Security number from obtaining a marriage license.

When the Attorney General of **North Carolina** issued an opinion on this matter, he found that it was illogical to ask an undocumented immigrant for a Social Security number, when undocumented immigrants are ineligible to receive a Social Security number. He wrote, “The General Assembly amended § 51-8 to comply with the federal law requiring stricter and more efficient means of enforcement of child support laws…. To read § 51-8 in such a way that would deny an alien a marriage license because he cannot provide a social security number which he may not legally obtain would make a mockery of the law. Certainly, that was not the intent of Congress or the General Assembly.”

The **Michigan** Attorney General directly pointed to the guidance issued by the federal Office of Child Support Enforcement, discussed above. Based on that guidance, the Michigan Attorney General found that county clerks should not deny marriage licenses to applicants who do not have a Social Security number.

Using similar reasoning, the Attorney General of **Virginia** found that the law requires Social Security numbers only from individuals who have been issued Social Security numbers. He wrote that the statute “does not deny the right of marriage to those who have no such numbers, nor does the statute contemplate that applicants must obtain such a number before applying for a marriage license.”

In 2002, the **Texas** Attorney General agreed with Virginia. Texas’s statute (Tex. Fam. Code Ann. § 231.302(c)(1)) regarding marriage and other licenses was drafted specifically to comply with federal law facilitating the enforcement of child support orders, he said, not to add prerequisites to the state’s licensing requirements. A Social Security number is not needed for these licenses, the Attorney General said: “[B]ecause a social security number is not a prerequisite to obtaining a license under 42 U.S.C. § 666(a)(13), it is not a prerequisite to obtaining a license under section 231.302(c)(1) of the Texas Family Code.”

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Have Any States Passed Legislation on This Issue?

Yes. Colorado and Minnesota have enacted legislation clarifying that while, Social Security numbers must be provided by those applicants who have been issued one, those applicants who have not been issued a Social Security number can submit affidavits to that effect. Idaho, by contrast, enacted legislation explicitly requiring documentary proof of lawful presence as a condition of receiving a marriage license. Alabama recently enacted legislation that seems to protect the ability of undocumented immigrants to apply for marriage licenses, but many probate courts in the state have cited the legislation in refusing to issue marriage licenses absent proof of lawful presence.

Colorado’s § 14-14-113 states that Social security numbers are required on the marriage license application, but if an applicant does not have a social security number, an affidavit provided by the Clerk's Office must be signed stating that the party does not have a social security number.

Minnesota’s § 517.08-(8) states that the full names the parties will have after marriage and the parties' Social Security numbers must be provided, but if a party listed on a marriage application does not have a Social Security number, the party must certify on the application, or a supplement to the application, that the party does not have a Social Security number.

Idaho’s § 32-403(2) states that every application for a marriage license shall include the social security numbers of the parties applying for the license, but that the requirement that an applicant provide a social security number shall apply only to applicants who have been assigned a social security number. An applicant who has not been assigned a social security number shall:

(i) Present written verification from the social security administration that the applicant has not been assigned a social security number; and

(ii) Submit a birth certificate, passport or other documentary evidence issued by an entity other than a state or the United States; and

(iii) Submit such proof as the department may require that the applicant is lawfully present in the United States.

On September 28, 2011, most of the provisions of Alabama’s controversial HB 56 went into effect. One such provision is Section 30, which explicitly protects marriage licenses while it bans other interactions between state courts and undocumented persons. Section 30 makes it a Class C felony for an undocumented person to enter into a “business transaction” with the state. While noting that “business transaction” includes but is not limited to applying for or renewing a license plate, driver’s license, non-driver’s identification card or business license, Section 30 explicitly says that prohibited “business transactions” do NOT include applying for a marriage license.

In some Alabama counties, however, probate courts now rely on HB 56 in refusing to issue marriage licenses to undocumented individuals. These courts arguably misread HB 56 to allow them to deny marriage licenses to anyone who is not lawfully present. A federal lawsuit was filed in Alabama in October 2011 by the Southern Poverty Law Center (SPLC) challenging the
constitutionality of this practice by Alabama county probate courts.  The lawsuit alleged that 54 of Alabama’s 67 counties were refusing to issue marriage licenses to undocumented individuals. Since that lawsuit was filed, the plaintiffs withdrew for personal reasons, but a subsequent lawsuit was filed in November 2011 raising the same legal questions. The second lawsuit, however, only stated that 41 of the 67 counties refused to issue marriage licenses to undocumented immigrants. The SPLC stated that the initial lawsuit “resulted in 14 Alabama counties either ending the practice of denying marriage licenses due to immigration statutes or affirming they abide by the law and marrying individuals regardless of their immigration status.”

Can States Constitutionally Deny Marriage Licenses to Undocumented Immigrants?

Immigrants, including undocumented immigrants, are protected by the United States Constitution. The U.S. Supreme Court has held that the right to marry is of fundamental importance. For example, in Loving v. Virginia, the Court noted that, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.” In Maynard v. Hill, the Court characterized marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress.”

When a state enacts a statute that infringes on a fundamental right, the statute must be justified by a compelling state interest and be narrowly tailored to achieve that interest. For example, a state might enact a law prohibiting individuals without a Social Security number from marrying, using the justification that the law helps track earnings and assists in enforcing child support orders. It is true that children’s welfare is an important state interest. However, a prohibition on marriage for those lacking a Social Security number is not narrowly tailored to achieve that interest. States can find another, less restrictive, way to enforce child support orders.

It would be very difficult for a state to enact a law prohibiting undocumented immigrants from marrying that would pass Constitutional muster. An analogous case arose in Pennsylvania, where a county clerk denied a marriage license to an applicant who could not prove that he was lawfully present. A federal judge found that the policy of requiring non-citizens to show proof

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20 See Brian Lyman, SPLC Sues Montgomery County Over Marriage-License Policy, The Montgomery Advertiser, Nov. 18, 2011.
23 See, for example, Mathews v. Diaz, 426 U.S. 67, 77 (1976): “There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivations of life, liberty and property without due process of law. … Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”
of lawful presence unconstitutionally infringed on the fundamental right to marry of both the undocumented immigrant and his U.S. citizen fiancé.  

27

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