

VAWA'S UNFINISHED BUSINESS: THE IMMIGRANT WOMEN WHO FALL THROUGH THE CRACKS

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I. INTRODUCTION: DOMESTIC VIOLENCE IN LATIN AMERICAN IMMIGRANT COMMUNITIES

Domestic violence is a crime that does not recognize racial, cultural, or socioeconomic barriers. Between 1992 and 1996, there were an average of 960,000 incidents of violence between partners in an intimate relationship per year; most of these victims were women.¹ The case of the Latin American immigrant community is examined later in Part IV of this Note. Although rates of violence between intimate partners are somewhat lower among Hispanics in the United States than the general U.S. population,² undocumented immigrants represent a subgroup in the Hispanic community that is more vulnerable to domestic violence, in part because they are less protected by the legal system.³ In this Note, I will argue that undocumented immigrants fall between the cracks left between American criminal law and federal immigration law.⁴ Regardless of their immigration status, all victims of domestic violence are entitled to the protection of local law enforcement. However, they may not seek that protection because of real and perceived risks to their continued presence in the United States.⁵ While many battered immigrants are protected by the immigration provisions of the Violence Against Women Act, undocumented women may face the threat of deportation and possible separation from their children if they report their batterers to the police.⁶

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1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES 3-4 (1998), available at <http://www.ojp.usdoj.gov/bjs/abstract/vi.htm> (last visited February 27, 2004). The Bureau of Justice Statistics obtains its data from incident-based reporting and a national crime victim survey. *Id.* at 11.

2. *Id.* at 13.

3. Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 251 (2000).

4. The term "undocumented immigrant" encompasses both those immigrants who entered the country without proper authorization and those who entered legally, but remained after their legal authorization expired.

5. See Dutton et al., *supra* note 3, at 252-53.

6. See Heather Maher & Gail Pendleton, *Domestic Violence and Immigration in the Criminal Justice System*, in ABA COMMISSION ON DOMESTIC VIOLENCE REPORT 1, 17-25 (2000).

Although immigrants, both legal and undocumented, are less likely than other women to report all categories of crime to law enforcement, domestic violence is even more likely than other crimes to remain unreported.⁷ Lack of reporting seems, in part, to be due to cultural constraints on battered women. The structure of immigration law, however, is the greatest barrier to reporting crimes of domestic violence. Women who are hoping to obtain legal status through their husbands inevitably fear that reporting abuse will jeopardize their chances for legal immigration, and undocumented women whose husbands or partners are themselves undocumented face the additional threat that their abusers will report them to immigration authorities, and that they will be deported as a result.

II. HISTORY OF PROTECTIONS FOR BATTERED IMMIGRANTS

A. The Historically Gendered Structure of Immigration Law

The historical foundations of United States immigration law reflect the gendered structure of American law generally. Early U.S. immigration laws gave citizen husbands the right to petition for the legal immigration of their noncitizen wives, yet denied the right of citizen wives to petition for their noncitizen husbands.⁸ American women who married noncitizen men would, in fact, lose their U.S. citizenship as their identities were merged with those of their husbands via the doctrine of coverture.⁹ Noncitizen husbands and wives continued to receive explicitly disparate treatment through the 1940s and the immediate postwar period.¹⁰ Although a few minor changes were made, lawmakers never challenged, or sought to change, “the law’s basic notion that one spouse was dominant, and therefore rightfully controlled the other spouse’s immigration status.”¹¹

The 1952 Immigration and Nationality Act (INA) and its subsequent amendments codified immigration law.¹² With the INA, Congress strove to create a facially neutral immigration statute by replacing the terms “husband” and “wife” with the term “spouse.”¹³ In theory, then, men and women were to be treated equally. In practice, however, the immigration statute retained the structure of one dominant spouse who controlled the immigration status of the

7. Robert C. Davis & Edna Erez, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System*, NAT’L INST. OF JUST. RES. IN BRIEF, May 1998, at 4-5 (May 1998).

8. Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 600-01 (1991).

9. Linda Kelly, *Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 668 n.11 (1998) (discussing *Mackenzie v. Hare*, 239 U.S. 299 (1915), which upheld a law requiring women who married noncitizens to take the nationality of their husbands).

10. Calvo, *supra* note 8, at 601-03.

11. *Id.* at 603.

12. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 166 (1952) (codified as amended in scattered sections at 8 U.S.C.) [hereinafter INA].

13. Calvo, *supra* note 8, at 604.

other.¹⁴ Thus, as more women than men continued to immigrate through their spouses,¹⁵ the law continued to have a disparate impact on women.

B. Basic Procedure for Immigration as the Spouse of a Citizen or Permanent Resident

One of the easiest and most frequently employed means to legal immigration is through a family relationship.¹⁶ Many immigrants obtain legal status through marriage to a U.S. citizen or lawful permanent resident (green card holder). The spouse of a U.S. citizen is considered an immediate relative not subject to the country quotas to which other immigrants are subject, and is therefore immediately eligible for an immigrant visa if the sponsor's petition is approved.¹⁷ A permanent resident may also sponsor his or her spouse, although subject to greater restrictions. These immigrants are subject to two sets of numerical quotas: those established for the particular category of immigrant, and those established for the immigrant's country of origin.¹⁸

Although the INA is facially neutral in its treatment of spouses, in practice the great majority of immigrant spouses are women.¹⁹ Because the sponsoring spouse must file a petition for the immigrant spouse, the immigrant spouse's immigration status is in the hands of the sponsor. If the sponsoring spouse decides not to file the petition, or decides to withdraw it after filing, the immigrant spouse has little recourse and must either find another route to legal immigration, remain in the United States illegally, or return to her country of origin.

C. Historical Protections and Barriers for Battered Immigrants

In 1986, Congress amended the INA by passing the Immigration Marriage Fraud Amendments of 1986.²⁰ These amendments were enacted in response to perceived abuses of spouse-sponsored immigration. Congress found that while:

[h]istorically, U.S. immigration policy has recognized the importance of protecting nuclear families from separation by permitting immediate family members of U.S. citizens to immigrate to the United States without numerical limitation[,] . . . aliens who either cannot otherwise qualify for immigration to the United States or who, though qualified, are not willing to wait until an immigrant visa becomes available, frequently find it expedient to engage in a fraudulent marriage in order to side-step the immigration law. Surveys conducted by

14. *Id.* at 605.

15. *Id.* at 614.

16. Immediate relatives of U.S. citizens are exempt from the immigration quotas imposed on most other categories of immigrants. See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000). Other relatives of U.S. citizens, as well as immediate relatives of lawful permanent residents, are subject to quotas; however, those quotas are higher than the quotas imposed on employment-based immigrants. See INA § 203(a), 8 U.S.C. § 1153(a) (2000); see also U.S. Department of State, *Tips for U.S. Visas: Family-Based Immigrants*, at <http://www.travel.state.gov/visa/familybased.html> (last visited February 27, 2004).

17. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(a)(1) (2000).

18. INA §§ 203(a)(2), (4), 8 U.S.C. §§ 1153(a)(2), (4) (2000).

19. Calvo, *supra* note 8, at 623.

20. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified as amended in scattered sections at 8 U.S.C.).

the Immigration and Naturalization Service have revealed that approximately 30% of all petitions for immigrant visas involve suspect marital relationships.²¹

Among other provisions, the new law created criminal penalties for citizens and noncitizens who entered into a marriage for the purposes of circumventing immigration laws.²² The new law also raised the barrier to permanent resident status for immigrant spouses by establishing a two-year period of “conditional” permanent resident status.²³ A noncitizen spouse whose petition is approved is only granted permanent resident status conditional upon the marriage having been entered into in good faith,²⁴ the filing of a joint petition to remove the conditional status within ninety days of the second anniversary of the approval of the initial petition,²⁵ and the participation of both spouses in an INS interview within ninety days of the approval of the second petition.²⁶

The added burdens of a two-year waiting period for permanent resident status, the filing of a second petition, and the joint appearance at an INS interview increase the power that the sponsoring spouse wields over the immigration status of the noncitizen spouse. Even if the citizen or permanent resident spouse agrees to sponsor the immigrant spouse and files the initial petition, he may still prevent her from achieving unconditional permanent residence if he declines to file the second petition or appear for the joint interview. In effect, the nonimmigrant spouse controls the immigration status of his spouse for an additional two years under the 1986 amendments.

Until the 1994 passage of the Violence Against Women Act, if her spouse refused to file an immigration petition, a physically battered or emotionally abused spouse could only hope to have her deportation cancelled through an “extreme hardship waiver,”²⁷ a provision that still exists. This decision was left solely to the discretion of the Immigration and Naturalization Service (INS, now the Bureau of Citizenship and Immigration Services, or BCIS) and the Attorney General.²⁸ The extreme hardship waiver provides that deportation (now called removal) may be cancelled, and legal permanent residency conferred, if an inadmissible or deportable noncitizen has been in the United States for ten years, has demonstrated “good moral character,” has not been convicted of certain crimes, and whose removal “would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child” who is a U.S. citizen or permanent resident.²⁹ This extreme hardship standard is a very difficult one to meet,

21. H.R. REP. No. 99-906, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978. Although the INS data relied upon by Congress has since been shown to be inaccurate and misleading, see James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 699-700 (1997), the amendments remain in effect.

22. INA § 275(c), 8 U.S.C. § 1325(c) (2000).

23. INA § 216, 8 U.S.C. § 1186 (2000).

24. INA § 216(b), 8 U.S.C. § 1186(b) (2000).

25. INA § 216(c)(1)(A), 8 U.S.C. § 1186a(c)(1)(A) (2000).

26. INA § 216(c)(1)(B), 8 U.S.C. § 1186a(c)(1)(B) (2000).

27. Calvo, *supra* note 8, at 609-10.

28. *Id.* at 608-09.

29. INA § 240A(b)(1), 8 U.S.C. § 1229a(b)(1) (2000).

and because the hardship must be not to the noncitizen, but to a citizen or permanent resident in the noncitizen's immediate family, it is rarely approved.³⁰

Political asylum is difficult to obtain for any immigrant, and most battered immigrants do not qualify for political asylum as a result of the battering they have suffered, even if the abuse occurred in their country of origin. The law of asylum provides that a noncitizen living in the United States may be granted asylum if he or she is "persecuted or . . . has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."³¹ As the persecution must have occurred in the noncitizen's country of origin or habitual residence, abuse in the United States for any reason would not meet the statutory requirements for asylum. Abuse by a spouse or partner, even if it occurred in the noncitizen's country of origin, is unlikely to qualify as persecution on any of the enumerated grounds unless the victim of the battery is specifically targeted on the basis of her race, religion, nationality, membership in a social group, or political opinion; persecution on the basis of gender by itself is, unfortunately, not a basis for political asylum.³²

D. 1990 Battered Spouse Waiver Amendments

In 1990, Congress enacted legislation that permitted self-petition for legal permanent resident status in some cases, thus permitting battered spouses to escape the control of their batterers.³³ Although the 1990 amendments did not completely authorize battered spouses to self-petition, they did waive the conditional residency requirement for a battered immigrant who entered into marriage in good faith and "was battered by or was the subject of extreme cruelty perpetrated by his or her spouse."³⁴ These amendments attempted to address the problem created by the Immigration Marriage Fraud Amendments: that women who married abusive spouses were trapped in those marriages for two years.³⁵

E. The Violence Against Women Act

With the Violence Against Women Act of 1994 (VAWA 1994), Congress sought to address some of the inequities inherent in U.S. immigration law as part of its larger goal of preventing violence against women.³⁶ The immigration provisions of VAWA 1994 were specifically directed toward offering greater

30. Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 271, 299 (2002).

31. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2000).

32. See Barbara C. Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 *AM. U. INT'L L. REV.* 895, 896-99 (2000) (describing *In re R-A-*, No. 3403 (B.I.A. June 11, 1999) (interim decision), a case which rejected a battered woman's asylum claim).

33. Immigration Act of 1990, Pub. L. No. 101-649, § 701, 104 Stat. 4978, 5085 (1990).

34. *Id.*

35. See Leslye E. Orloff & Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 *AM. U. J. GENDER SOC. POL'Y & L.* 95, 105-07 (2001).

36. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941-42 (1994) [hereinafter VAWA 1994].

protection and benefits for battered immigrant women and children than the 1990 amendments provided. First, as discussed above, the new law allowed battered immigrants married to citizens or lawful permanent residents to self-petition for permanent resident status, provided the marriage was entered into in good faith and deportation would result in extreme hardship to the immigrant or her child.³⁷ In addition, the immigrant must have demonstrated good moral character.³⁸ During the marriage, the petitioning immigrant or her child must have been battered by a spouse who is a U.S. citizen or permanent resident, and the battered immigrant must have resided with the battering spouse.³⁹

Second, another provision lowered the evidentiary burden placed on the immigrant when submitting a petition.⁴⁰ Prior to VAWA, battered spouses were required by federal regulations to submit an "evaluation of a professional recognized by the Service as an expert in the field."⁴¹ While that requirement remains in the Code of Federal Regulations, in VAWA 1994 Congress directed the Attorney General, as head of the INS, to "consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General."⁴²

Third, VAWA 1994 also created a special means of suspension of deportation for battered spouses and children.⁴³ The statute provided that deportation be suspended for an immigrant who:

has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.⁴⁴

Other noncitizens seeking to cancel removal (suspend deportation) must demonstrate that deportation will result in hardship to the noncitizen's U.S. citi-

37. Petitions for Relatives, Widows and Widowers, and Abused Spouses and Children, 8 C.F.R. § 204.2(c) (2003); see also Orloff & Kaguyutan, *supra* note 35, at 114.

38. Petitions for Relatives, Widows and Widowers, and Abused Spouses and Children, 8 C.F.R. § 204.2(c)(H) (2003).

39. Petitions for Relatives, Widows and Widowers, and Abused Spouses and Children, 8 C.F.R. § 204.2(c)(D) (2003).

40. VAWA 1994 § 40702, 8 U.S.C. § 1186a(c)(4) (2000).

41. Petitions for Relatives, Widows and Widowers, and Abused Spouses and Children, 8 C.F.R. § 216.5(e)(3)(iv)-(vii) (2003); see also Orloff & Kaguyutan, *supra* note 35, at 116.

42. VAWA 1994 § 40702, 8 U.S.C. 1186a(c)(4) (2000).

43. VAWA 1994 § 40703, 8 U.S.C. 1254 (2000); see also Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 143-44 (2002).

44. VAWA 1994 § 40703(a)(3), 8 U.S.C. § 1254(a)(3) (2000).

zen or permanent resident child or parent.⁴⁵ Battered immigrants, however, may demonstrate hardship to themselves or to immediate relatives who need not be citizens or lawful permanent residents.

E. Welfare and Immigration Reforms of 1996

1996 was a watershed year for immigration law in general, and for battered immigrants in particular. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)⁴⁶ cut off most public benefits to undocumented immigrants as part of a larger welfare reform package.⁴⁷ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) was aimed at curbing illegal immigration by, among other provisions, penalizing employers for hiring undocumented immigrants.⁴⁸ IIRAIRA also severely curtailed the availability of relief for deportable aliens, heightening the standard of hardship from “extreme” to “exceptional and extremely unusual”⁴⁹ and strictly limiting judicial review.⁵⁰ In spite of its strict nature, IIRAIRA benefited battered immigrants by restoring some of the public benefits that had been taken away by PRWORA.⁵¹ The statute also allowed battered immigrants to apply for public benefits without having their sponsoring spouses’ income imputed to them for that purpose.⁵²

III. VAWA 2000 REFORMS

The unintended consequences of PRWORA and IIRAIRA on battered immigrants prompted Congress to amend the original VAWA 1994 six years later.⁵³ The sections of VAWA 2000 related to immigration, known as the Battered Immigrant Women’s Protection Act, stated findings that:

- (1) the goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships;
- (2) providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in crimi-

45. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2000).

46. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections at 8 U.S.C.) [hereinafter PRWORA].

47. PRWORA § 411, 8 U.S.C. § 1621 (2000).

48. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of the U.S.C.) [hereinafter IIRAIRA].

49. IIRAIRA § 304 (codified as amended in scattered sections at 8 U.S.C.); see also Lee J. Teran, *Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act*, 17 B.U. INT’L L.J. 1, 29-30 (1999).

50. IIRAIRA § 306 (codified as amended in scattered sections at 8 U.S.C.).

51. IIRAIRA § 501, 8 U.S.C. § 1641 (2000).

52. IIRAIRA § 421(f), 8 U.S.C. § 1324b (2000).

53. Victims of Violence and Trafficking Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of the U.S.C.) [hereinafter VAWA 2000].

nal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control; and

(3) there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.⁵⁴

The 2000 amendments therefore attempted to close several gaps left by VAWA 1994 and other welfare and immigration legislation enacted subsequently. For the most part, the statute has achieved many of its intended purposes. Unfortunately, it has not expanded protection to many battered immigrants as was intended and many significant issues remain as a result.

A. Expanded Availability of Self-Petition

VAWA 2000 addressed the problem of battered immigrants who were no longer married to their batterers by allowing divorced women and widows to self-petition within two years of divorce or death.⁵⁵ In the case of divorce, the noncitizen must demonstrate a connection between the abuse and the termination of the marriage.⁵⁶ VAWA 2000 also amended the immigration statute to allow for self-petition by women who married bigamists in good faith, provided that the bigamist spouse is a U.S. citizen.⁵⁷ If the batterer lost his citizenship or permanent resident status as a result of the abuse, through a criminal conviction, for example, the statute permits the battered spouse to self-petition if her "spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence."⁵⁸ All of these provisions have enabled greater numbers of battered immigrants to seek relief through self-petition.

B. Lower Burden of Proof and Removal of the "Extreme Hardship" Requirement

VAWA 2000 reiterated the provision of VAWA 1994 that required the Attorney General to consider "any credible evidence relevant to the application."⁵⁹ The Senate conference report on VAWA 2000 explains that this provision of the statute:

54. VAWA 2000 § 1502(a), 8 U.S.C. § 1101 note (2000).

55. VAWA 2000 § 1503(b), 8 U.S.C. § 1154(a) (2000).

56. VAWA 2000 § 1503(b)(1)(A)(iii)(II)(CC)(ccc), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(CC)(ccc) (2000).

57. VAWA 2000 § 1503(b)(1)(A)(iii)(II)(BB), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(BB) (2000).

58. VAWA 2000 § 1503(b)(1)(A)(iii)(II)(CC)(bbb), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(CC)(bbb) (2000).

59. VAWA 2000 § 1504(a)(2)(D), 8 U.S.C. § 1229b(b)(2)(D) (2000). The legislation also reiterated that the Attorney General retains the sole discretion to determine what evidence is credible and the weight to be given that evidence. *Id.*

[a]llows abused spouses and children who have already demonstrated to the INS that they have been the victims of battery or extreme cruelty by their spouse or parent to file their own petition for a lawful permanent resident visa without also having to show they will suffer “extreme hardship” if forced to leave the U.S., a showing that is not required if their citizen or lawful permanent resident spouse or parent files the visa petition on their behalf.⁶⁰

Another evidentiary requirement removed by VAWA 2000 is the provision of VAWA 1994 requiring battered women to submit evidence that the battering husband had not been previously married or had obtained a legal divorce from any previous wives.⁶¹ As discussed above, this provision allows the wives of bigamists who married in good faith to self-petition; it also removes the extremely burdensome requirement that battered immigrants obtain documentation from their batterers.

C. Modified “Good Moral Character” Requirement

VAWA 2000 authorizes the Attorney General to consider that a battered immigrant has shown “good moral character” despite having been convicted of crimes related to her abuse, provided that she has not been the “primary perpetrator of violence in the relationship[,]” that she has acted in self-defense, that she has not violated a protective order designed to protect her, and that the crime did not result in serious bodily injury.⁶² This provision allows a battered spouse to defend herself against abuse without the fear that by doing so she is jeopardizing her immigration status.⁶³

D. Creation of the U Visa

Finally, Congress created the U visa in VAWA 2000 in order to facilitate prosecution of crimes of domestic violence and in order to protect “trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status”⁶⁴ from removal as long as they cooperate with law enforcement. The visa is available to those noncitizens who have “suffered substantial physical or mental abuse” as a result of criminal activities including rape, torture, trafficking, incest, domestic violence, sexual assault, prostitution, kidnapping, or murder, among many others.⁶⁵ The U visa petitioner must obtain a certification from law enforcement that he or she “has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of criminal activity.”⁶⁶ Unfortunately, this provision has yet to be put into effect by means of agency regulations and, in the absence of such regulations, there have been no U visas issued to date.

60. 146 CONG. REC. S10,188-03, (daily ed. Oct. 11, 2000) (statement of Sen. Hatch); *see also* Orloff & Kaguyutan, *supra* note 35, at 145.

61. 146 CONG. REC. S10,188-03, (daily ed. Oct. 11, 2000) (statement of Sen. Hatch).

62. VAWA 2000 § 1505(b)(1), 8 U.S.C. § 1227(a)(7)(A) (2000).

63. Kwong, *supra* note 43, at 147-48.

64. VAWA 2000 § 1513(a)(2)(B), 8 U.S.C. § 1101 note (2000).

65. INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2000).

66. INA § 214(o)(1), 8 U.S.C. § 1181(o)(1) (2000).

In spite of this, the INS has issued a policy memorandum that “provides for interim relief for noncitizens who are potentially eligible for U visa status” in order that they not be removed before the INS implements regulations.⁶⁷ The U visa is potentially of great benefit to those undocumented battered women who are unmarried or whose batterers are neither U.S. citizens nor lawful permanent residents. The Battered Immigrant Women’s Protection Act, the portion of VAWA 2000 addressing battered immigrants, stated clearly that its goal was, “to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and . . . to offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.”⁶⁸ The U visa was enacted simultaneously with the T visa for victims of severe forms of trafficking;⁶⁹ together, they hold out the promise that battered and exploited women who are otherwise ineligible to remain in the United States will at least be able to obtain temporary relief.

Although there are some options available to them, many battered immigrants do not seek help from law enforcement because of the threat of deportation. While immigrants who are battered by citizen or permanent resident spouses are eligible to self-petition for immigrant visas, battered immigrants lacking such a relationship are not. For these very vulnerable women, the U visa may enable them to seek the help that they need without the fear of deportation that inheres in making themselves known to authorities. On the other hand, if law enforcement decides not to press criminal charges against the batterer or decides that the battered woman’s testimony is not reliable, she will be left in the same position that she would have feared in the absence of the U visa. In order for the U visa to accomplish Congress’s policy goals, two things are essential: first, that battered women receive reasonable assurance that their visa petitions will be granted; and second, that the women who need the protection of the U visa are aware of its existence. When the INS issues regulations for the U visa, it must take these factors into account if the U visa is to protect battered immigrants effectively.

IV. BARRIERS TO SEEKING HELP FACED BY UNDOCUMENTED LATIN AMERICAN IMMIGRANTS

A. Cultural Barriers

The most obvious barrier faced by undocumented Latino immigrants—men and women alike—is language. According to a recent survey, seventy-two percent of foreign-born Latinos in the United States speak Spanish as their dominant language, while only twenty-four percent consider themselves bilingual.⁷⁰ Compounding the language barrier, fifty-five percent of foreign-born La-

67. AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LEGISLATION HANDBOOK § 5:22 (2002).

68. VAWA 2000 § 1502(b)(1), (2).

69. INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2000).

70. ROBERTO SURO ET AL., PEW HISPANIC CENTER/KAISER FAMILY FOUNDATION, 2002 NATIONAL SURVEY OF LATINOS: EXECUTIVE SUMMARY OF FINDINGS § 1 (2002), available at <http://www.pew>

tinians have less than a high-school education.⁷¹ Outside of cities with large Latino populations, law enforcement agencies are unlikely to have sufficient bilingual staff, and even when translators are available Spanish-speaking immigrants may have difficulty understanding law enforcement and court procedures.⁷²

These language barriers have a significant effect on a battered woman's access to social and legal services, including shelters and other resources. Illiteracy in English (and often Spanish as well) makes the dissemination of information difficult and seriously hampers a battered woman's ability to navigate the bureaucracy of public and private agencies dedicated to addressing problems of domestic violence.⁷³ A lack of knowledge about the law enforcement and judicial systems is closely related to the language barrier faced by Spanish-speaking immigrants. Immigrants may not understand the legal process at a structural level (who should be called, what should be reported, what the sequence of events will be) and at a functional level (where the police station or courthouse is, what the hierarchy of authority is, which forms must be filled out).⁷⁴ One commentator has described the Latina immigrant's experience of the legal system as "an overwhelming maze" in which "[l]itigants unfamiliar with the legal process or the judicial system are particularly disadvantaged in navigating such space and quickly get the message that they 'don't belong' . . . [which is] further compounded when the only information that is available is in a language that the traveler does not understand."⁷⁵

Exacerbating these difficulties is an unwillingness to violate strong cultural norms of what a wife and mother should be, which represent another barrier to seeking help. As one commentator has put it:

[w]ithin the Latino community, Latinas' identities are defined on the basis of their roles as mothers and wives. By encouraging definitions of Latinas as interconnected with and dependent upon status within a family unit structure, the Latino patriarchy denies Latinas individuality on the basis of gender. For Latinas, cultural norms and myths of national origin intersect with these patriarchal notions of a woman's role and identity. The result is an internal community-defined role, modified by external male-centered paradigms.⁷⁶

hispanic.org/site/docs/pdf/LatinoReportExecSumandSectionOne.pdf (last visited February 27, 2004).

71. *Id.*

72. Davis & Erez, *supra* note 7, at 3-4 (citing statistical evidence that recent immigrants face language barriers when interacting with the criminal justice system).

73. See Berta Esperanza Hernández-Truyol, *Las Olvidadas—Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 354, 371-73 (1998). See generally Dutton et al., *supra* note 3 (discussing generally the barriers faced by immigrant women).

74. LESLYE E. ORLOFF & RACHEL LITTLE, *Overview of Domestic Violence and Battered Immigrant Issues*, in SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES AVAILABLE TO BATTERED IMMIGRANT WOMEN 1, 9-10 (1999), available at <http://www.vawnet.org/domesticviolence/servicesandprogramdev/serviceprovandprog/BIW99-C1.php#CH1tp> (last visited February 27, 2004).

75. Hernández-Truyol, *supra* note 73, at 372.

76. Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 241 (1994).

Following cultural norms, Latina women tend to marry at a younger age than other women, have more children, and remain in the home rather than work.⁷⁷ Battered Latinas are also more likely than white women to remain with their batterers.⁷⁸

B. Legal Barriers

The fear of jeopardizing her immigration status and being removed to her native country is perhaps the greatest legal barrier faced by a battered undocumented immigrant. Although local law enforcement officials are not required to inquire about a victim's immigration status, they are not barred from inquiring.⁷⁹ The victim's batterer, if arrested, may try to punish her further by reporting her undocumented status to law enforcement or to the INS itself. The threat of deportation may seem greater than the threat of further battering.

There are also few legal resources available. Although IIRAIRA restored public benefits to some battered immigrants, undocumented women who are battered by men who are not their husbands or who are not legal permanent residents are still barred from receiving most federal, state, and local benefits; they are eligible only for those benefits that are considered emergency relief.⁸⁰ Thus, they may not receive welfare, food stamps, Medicaid, Supplemental Security Income, or public housing benefits.⁸¹

Most undocumented immigrants are also ineligible to receive legal assistance from organizations that receive funding from the Legal Services Corporation.⁸² Noncitizens who are married to U.S. citizens are eligible for Legal Services assistance only if they have filed an application to adjust their status to that of a legal permanent resident.⁸³ As foreign-born Latinos are more likely to live below the poverty line than other victims of domestic violence,⁸⁴ undocumented immigrants' inability to receive legal assistance from the Legal Services Corporation cuts them off from a vital legal resource.

Additionally, the fear that she may lose custody of her children is a very real one to an undocumented immigrant. If she is deported, her children will not be deported with her if they are U.S. citizens.⁸⁵ If the children's father or

77. *Id.* at 252, 238; *see also* Dutton et al., *supra* note 3, at 249.

78. Dutton et al., *supra* note 3, at 251 (citing statistics that Latina women remain with their batterers longer than women in other ethnic groups); *see also* Hernández-Truyol, *supra* note 73, at 385-86.

79. *See* Maher & Pendleton, *supra* note 6, at 17.

80. *See, e.g.*, 8 U.S.C. § 1611 (1999) (federal benefits); 8 U.S.C. § 1621 (1999) (state and local benefits). Emergency benefits available to undocumented immigrants include emergency medical services, disaster relief, immunizations, and programs necessary for the protection of life and safety. 8 U.S.C. § 1611(b)(1)(A)-(E) (1999).

81. *See* Leslye E. Orloff, *Access to Public Benefits for Battered Immigrant Women and Children*, 33 CLEARINGHOUSE REV. 237, 237 (1999).

82. *See* Omnibus Consolidated Revisions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-54; *see also* Orloff & Kaguyutan, *supra* note 35, at 127-29.

83. Omnibus Consolidated Revisions and Appropriations Act of 1996 § 504(a)(11)(B).

84. *See* SURO ET AL., *supra* note 70, at 86; *see also* Rivera, *supra* note 76, at 236.

85. Persons born in the United States are U.S. citizens regardless of the nationality or immigration status of their parents. INA § 301(a), 8 U.S.C. § 1401(a) (2000).

other relatives wish the children to remain in the United States, they will be separated from their mother, and the father's abuse of the mother will not preclude his custody of the children in many states, as long as he has not abused the children themselves. In fact, in some cases battered women have lost custody because they have failed to protect their children.⁸⁶ If deported, undocumented immigrants face a three- or ten-year bar to reentry into the United States, depending on the length of their unlawful presence,⁸⁷ although there is an exception to the bar for battered women and children. Unsurprisingly, the exception only applies to those women and children battered by U.S. citizens or permanent residents.⁸⁸ Again, battered undocumented immigrants suffer disproportionately because of the structure of immigration law.

VI. WHY ALL BATTERED IMMIGRANTS SHOULD BE PROTECTED BY IMMIGRATION LAWS

VAWA 2000 went a long way toward closing the gaps in protection for battered immigrants left by VAWA 1994. Serious gaps remain, however, and if VAWA is to accomplish its goals they need to be closed. Undocumented women who are battered by husbands who are not U.S. citizens or legal permanent residents continue to be faced with the prospect of continued abuse or deportation and possible separation from their children.⁸⁹ Likewise, immigrant women who are not married to their batterers are also left unprotected by immigration law because each of the protections granted to battered immigrants in VAWA depends on marriage to a citizen or lawful permanent resident.⁹⁰

Congress stated in VAWA 2000 that the "goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships;"⁹¹ that goal cannot be reached as long as many women are not protected by immigration laws. Allowing other women to self-petition would also serve the purposes behind allowing battered wives of U.S. citizens and permanent residents to self-petition for legal permanent residence. The fear of deportation means that undocumented immigrants are in many cases effectively barred from seeking criminal and civil remedies to violence. The goals of prosecuting those who commit acts of domestic violence and protecting their victims cannot be accomplished if battered immigrants face deportation for reporting the crimes committed against them.

86. See ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 150-53 (2000).

87. INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i) (2000).

88. INA § 212(a)(9)(B)(iii)(IV), 8 U.S.C. § 1182(a)(9)(B)(iii)(IV) (2000).

89. The INA provision permitting victims of battering to self-petition, section 204(a)(1)(A)(iii), is available only to spouses of U.S. citizens, while the provision permitting cancellation of removal, section 240A(b)(2) of the INA, pertains only to those whose batterers are U.S. citizens or legal permanent residents.

90. For example, section 204(a)(1)(A)(iii) of the INA permits an "alien spouse" to self-petition if he or she has been battered by the U.S. citizen spouse. Similarly, cancellation of removal, section 240A(b)(2) of the INA, is available to immigrants who have been battered by a "spouse or parent" who is a U.S. citizen or lawful permanent resident. The INA contains no parallel provisions for victims of battering who have never been married to their batterers.

91. VAWA 2000 § 1502(a)(1), 8 U.S.C. § 1101 note (2000).

VAWA 1994 and VAWA 2000 are constrained by the historical roots of immigration law in coverture and the resulting rigid structure of family-based immigration.⁹² Congress has limited its protection of battered immigrants to those who, were they not in abusive relationships, would otherwise be eligible to immigrate through their husbands.⁹³ It would, seemingly, require a fundamental shift in the structure of immigration law to allow women to immigrate in the absence of a sponsoring employer or family member. Under existing immigration law an undocumented woman who is battered by an undocumented man does not have a sufficient nexus to the United States to be eligible to immigrate;⁹⁴ however, it does not require a distortion of the underpinnings of immigration law to define abuse suffered in the United States, within the jurisdiction of U.S. criminal law, as a compelling connection that should trigger the protection of U.S. immigration law. The nonimmigrant U visa, along with its companion S and T visas, are in fact tied to U.S. criminal law and permit adjustment of status to that of a legal permanent resident without a sponsor.⁹⁵ To permit battered women to self-petition in the absence of a qualifying family relationship is consistent with the goals of VAWA and the structure of the U visa.

The dynamic of power inherent in battering negates the legal assumption that undocumented immigrants freely choose to enter and remain in the United States illegally. It is often argued that undocumented immigrants choose to violate U.S. immigration laws for economic reasons rather than pursue legal avenues of immigration, and that therefore they are undeserving of legal protection.⁹⁶ There is no denying that the U.S. needs to place limits on immigration, and that undocumented immigrants have violated U.S. law; it is unreasonable, however, to assume that a woman in an abusive relationship can freely choose to remain behind when her husband or partner crosses the border.⁹⁷ It is equally unreasonable to deny her the protection of U.S. law when she continues to suffer abuse in this country.

It is against public policy and international human rights norms to deny protection to the most vulnerable members of society. International human rights laws protect individuals from harm by the state and although domestic

92. See *supra* Part II.

93. See *supra* Part III.

94. See *supra* Part IV.B.

95. The S visa is available to "informant[s] of criminal organization information" and "informant[s] of terrorism information," INA § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S) (2000), and the T visa is available to victims of severe forms of trafficking, INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2000).

96. See, e.g., James R. Edwards, Jr., *Unemployed in the U.S.*, NAT'L REV. ONLINE, July 17, 2003 at <http://www.nationalreview.com/comment/comment-edwards071703.asp> (arguing that "wage depression and job displacement are already happening, because of cheap foreign labor"); Lou Dobbs, *Swamped by Illegal Immigrants*, N.Y. NEWSDAY, June 29, 2003, at A25 (arguing that "it's time for this administration to form a national policy on immigration and border security that effectively reduces the threat of terrorism and stops the drain on our economy"). See generally PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1996) (arguing generally that illegal immigrants drain American resources and create racial strife).

97. See Dutton et al., *supra* note 3, at 249-50 (describing the obstacles faced by battered Latina women to leaving their batterers); see also SCHNEIDER, *supra* note 86, at 47 (describing the physical risks to women who attempt to leave their batterers: "At the moment of separation or attempted separation . . . the batterer's quest for control often becomes acutely violent and potentially lethal.").

violence is generally considered to be private, not public, violence, the state must assume some responsibility when it fails to protect individuals from violence.⁹⁸

Allowing undocumented battered women to remain in the U.S. will not encourage illegal immigration. It is absurd to imagine that women will consciously enter abusive relationships in order to gain legal status or that women will fabricate evidence of abuse sufficiently credible to convince the INS. The INS has already erected numerous safeguards against fraud and has created a special office in Vermont, staffed by agents trained in domestic violence, to adjudicate VAWA petitions.⁹⁹

VII. CONCLUSION

Undocumented immigrants remain caught between the cracks left open by the Violence Against Women Act and its subsequent amendments; although Congress has properly amended the VAWA as enacted in 1994 to provide greater protection to undocumented immigrants, the protections that U.S. immigration law currently affords to battered immigrants depend largely upon marriage to a U.S. citizen or a lawful permanent resident.¹⁰⁰ Unfortunately, in the post-September 11 political climate Congress is unlikely to extend further protections to immigrants, particularly to undocumented immigrants; the tide seems instead to be turning in the opposite direction. Since September 11, 2001, the government's commitment to the humanitarian goals of immigration law has been called into question; the promulgation of regulations for the U visa has been delayed, and the number of refugees admitted to the United States has declined precipitously as a result of heightened security screening.¹⁰¹ Noncitizens who are present unlawfully fear an increased risk of removal if they seek the help of law enforcement.¹⁰² In the current climate of suspicion of noncitizens, the government must ensure that the most desperate and vulnerable noncitizens are not deprived of their statutory and constitutional rights. The United States is a nation of immigrants; we must not turn away those who need our protection the most.

98. See Michele E. Beasley & Dorothy Q. Thomas, *Domestic Violence as a Human Rights Issue*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 323, 326-28 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994).

99. See Kelly, *supra* note 9, at 675 n.52. The Bureau of Citizenship and Immigration Services provides instructions for self-petitioners at <http://www.immigration.gov/graphics/howdoi/battered.htm>.

100. See *supra* notes 90-91 and accompanying text. The non-immigrant S, T, and U visas do not depend on marriage to a U.S. citizen or lawful permanent resident. See INA § 101(a)(15)(S)-(U), 8 U.S.C. § 1101(a)(15)(S)-(U) (2000). However, they are limited to narrow categories of noncitizens: those who possess information "critical" to the prosecution of criminal organizations or terrorists; victims of "a severe form of trafficking in persons"; and those who possess information related to a serious crime who would suffer "extreme hardship" if deported. *Id.*

101. Christopher Marquis, *Since Attacks, U.S. Admits Fewer Refugees*, N.Y. TIMES, Oct. 30, 2002, at A18, available at <http://www.nytimes.com/2002/10/30/international/americas/30REFU.html>.

102. Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667, 669 (2003).