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NOTES

OLD HURDLES HAMPER NEW OPTIONS FOR BATTERED IMMIGRANT WOMEN

INTRODUCTION

Isabel Cristina Rodriguez de Ramos is a native and citizen of Mexico.¹ She came to the United States in 1988 with her boyfriend, Jesus Ramos. While Jesus previously obtained lawful permanent resident ("LPR") status² as a seasonal agricultural worker, Isabel has remained an undocumented (illegal) alien.³ Isabel and Jesus married in July 1990, and have sub-

¹ *In re Isabel Cristina Rodriguez de Ramos*, Oral Decision of the Immigration Judge, File No. A 29 999 700 (Jan. 2, 1996) [hereinafter Oral Decision Rodriguez]. Isabel Cristina Rodriguez de Ramos is a client of the Immigration and Human Rights Clinic, Bexar County Legal Aid of San Antonio, Texas. She was denied suspension of deportation under the immigration provisions of the Violence Against Women Act ("VAWA"), which is part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. G, 108 Stat. 1796, 1953 (1994) (codified in various sections of Titles 8, 18 and 42 of the U.S. Code), because she failed to meet the continuous presence requirement demanded by the VAWA. Oral Decision Rodriguez, *supra*, at 7. The immigration judge, nevertheless, granted her relief under traditional suspension of deportation provisions based on her abuse. Oral Decision Rodriguez, *supra*, at 9. The Immigration and Naturalization Service ("INS") has subsequently appealed this decision, seeking to deny Isabel relief altogether. Brief for Appellant, *In re Isabel Cristina Rodriguez de Ramos*, File No. A 29 999 700 (Apr. 22, 1996). For a more extensive discussion of suspension of deportation, see *infra* Part II.

² Lawful permanent resident status, which is acquired by petition for a resident alien card (I-551 or "green card"), 8 U.S.C. § 1154 (1994), grants individuals numerous rights in the United States including indefinite legal residence. *Id.* § 1101(a)(20). LPRs have "immigrant" status as opposed to visitors with temporary visas, like students, tourists and business persons, who have "non-immigrant" status. *Id.* § 1101(a)(15).

³ Oral Decision Rodriguez, *supra* note 1, at 3. Undocumented aliens are a class of "unlawfully present" individuals who have not been properly admitted to the United States. 8 U.S.C.A. § 1251(a)(1)(B) (West Supp. 1997). In order for aliens legally to enter the United States, they must obtain either an immigrant or

sequently had three children.⁴ Following the birth of their first child, Jesus began verbally attacking Isabel. This verbal abuse later escalated into physical assaults.⁵ Jesus has also threatened Isabel with a gun and a knife, forced her to stay at home, and abused her and their children economically by not paying for rent or food.⁶

Battered immigrant women in Isabel's situation face enormous barriers hindering their escape from violence. As battered spouses, these women confront partners who use physical, sexual and psychological abuse, as well as isolation, intimidation and economic abuse to exert power and control over their wives.⁷ For battered immigrant women, their subjugation

non-immigrant visa from a consulate prior to embarkation. 8 U.S.C. § 1201 (1994). Aliens granted visas are permitted to travel to the United States. *Id.* §§ 1201, 1184. Visas, however, do not guarantee entry. At the border the INS inspects individuals to determine whether they should be admitted. 8 U.S.C.A. § 1225 (West Supp. 1997). The INS considers nine grounds for inadmissibility. *Id.* § 1182(a). These grounds include: (1) health related concerns; (2) criminal activity; (3) security concerns; (4) public charge classification; (5) labor certification and qualifications; (6) illegal entrance and immigration violations; (7) documentation deficiencies; (8) ineligibility for citizenship; and (9) miscellaneous grounds, including polygamy and child abduction. *Id.*

Prior to April 1, 1997, individuals inspected at a U.S. port or border, who failed to meet any of the nine inadmissibility grounds, were placed into exclusion proceedings ("exclusion"). 8 U.S.C. § 1226 (1994). Similarly, aliens who entered the United States and were found to be deportable under § 1251(a) were subject to deportation proceedings ("deportation"). *Id.* § 1252. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, tit. III, 110 Stat. 3009-546 (1996) (to be codified in various sections of Titles 8, 18, 28 and 42 of the U.S. Code), Congress replaced exclusion and deportation with one process, removal proceedings. 8 U.S.C.A. § 1229a (West Supp. 1997).

Removal proceedings are initiated when the INS issues a "notice to appear" to the alien. *Id.* § 1229(a). Aliens are then given an opportunity to secure counsel. *Id.* § 1229(b). Removal proceedings are conducted before an immigration judge who determines the inadmissibility or deportability of the alien. *Id.* § 1229a(a). In removal proceedings, it is the alien's burden to prove by clear and convincing evidence that they are not inadmissible, or that they are lawfully present. *Id.* § 1229a(c).

The Attorney General, in her discretion, may cancel the removal of inadmissible or deportable aliens and adjust their status to lawful permanent residents; or the Attorney General may allow such aliens to voluntarily depart from the United States without the prejudice of a removal order on their immigration record. *Id.* § 1229b.

⁴ Oral Decision Rodriguez, *supra* note 1, at 3.

⁵ Oral Decision Rodriguez, *supra* note 1, at 3-4.

⁶ Oral Decision Rodriguez, *supra* note 1, at 3-4.

⁷ See Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 333-36 (1997) (discussing coercive

in abusive relationships has been compounded by U.S. immigration law which gives control over an alien's legal status to her U.S. citizen ("USC") or LPR spouse.⁸ Consequently, an abusive spouse can condition sponsorship of his wife's petition for lawful permanent residence on her remaining in the abusive relationship.⁹ Battered immigrant women have thus been left to make an impossible choice: live with their abusers in

tactics batterers use to assert control, including: undermining a partner's sense of herself; social and economic isolation; terrorism (slashing tires, threatening family members, stalking); and sexual abuse).

⁸ This Note deals with alien women present in the United States who are seeking immigrant status through the relative-petition process or cancellation of removal. Many of these women have come to the United States to join their USC or LPR spouses.

Aliens seeking immigrant status through the relative-petition process can generally be separated into two categories: (1) immediate relatives of USCs, 8 U.S.C. § 1151(b)(2) (1994); and (2) preference immigrants, *id.* § 1153. There are four preference categories: first preference immigrants include unmarried children of USCs, *id.* § 1153(a)(1); second preference immigrants include spouses or children of LPRs, *id.* § 1153(a)(2); third preference immigrants include married children of USCs, *id.* § 1153(a)(3); and fourth preference immigrants include siblings of USCs (if the USC is over 21 years of age), *id.* § 1153(a)(4). While immediate relatives are not subject to immigrant visa quotas, *see id.* § 1151(b), preference immigrants are limited by numerical restrictions. *Id.* § 1153.

The relative-petition process involves two parts: First, the sponsoring relative files a petition (I-130) with the INS to classify the alien as an immediate relative or preference immigrant. *Id.* § 1154. Second, if the INS approves the petition, the alien files an application (I-485) with the INS to adjust his or her status to lawful permanent resident. *Id.* § 1255. Adjustment of status is a procedure designed to alleviate the traditional burden imposed on aliens present in the United States who would otherwise have to return to their home country in order to obtain an immigrant visa.

In order for the INS to adjust an alien's status, an immigrant visa must be available. *Id.* § 1255(a)(3). Allocation of immigrant visas are determined by the immigration preference system. *Id.* § 1153. Immediate relatives of USCs avoid this requirement because they are not subject to immigrant visa quotas. *Id.* § 1153(a). Immediate relatives, therefore, can apply for adjustment of status at the same time they file their relative-petition. All other aliens, including spouses of LPRs, must wait for visa availability. *Id.* § 1255. These aliens receive a "priority date" when they file their petition, which is based on their preference category and the date they file their petition. *Id.* § 1152; 8 C.F.R. § 204 (1996); *see* AUGUSTIN FRAGOMEN ET AL., IMMIGRATION PROCEDURES HANDBOOK 11-97 (1997). The priority date places them in line for an immigrant visa. When the priority date becomes "current," the alien is eligible to adjust his or her status to lawful permanent residence. *See* FRAGOMEN, *supra*, at 11-97. This process can take years.

⁹ *See* H.R. REP. NO. 103-395, 103d Cong., 1st Sess. 26 (1993) (stating that "[c]urrent law fosters domestic violence in such situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse.").

the hope of gaining legal status, or escape from their abusers and risk deportation.¹⁰ For this reason, many immigrant women, who could otherwise overcome the physical, psychological and economic abuse, are trapped in abusive relationships for fear of deportation.

Confronting this predicament, President Clinton signed into law the Violence Against Women Act ("VAWA") on September 13, 1994.¹¹ Under the VAWA, battered immigrant women can self-petition for lawful permanent residence instead of depending on their abusers' sponsorship.¹² The legislative history of the VAWA makes clear that "[t]he purpose of permitting self-petitioning is to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse."¹³

The VAWA also provides an immigration remedy for women who's deportation would be an extreme hardship—"cancellation of removal."¹⁴ When Congress passed the VAWA, this remedy fell within the Immigration and Nationality Act's ("INA") "suspension of deportation" provisions, and thus was referred to as the VAWA suspension of deportation.¹⁵ Cancellation of removal supersedes suspension of deportation through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").¹⁶ This Note uses "suspension of deportation" when referring to cases that arose prior to IIRIRA.¹⁷

¹⁰ See Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverage*, 28 SAN DIEGO L. REV. 593, 613 (1991) (adding that battered immigrant women also risk "deprivation of home, livelihood, and ability to promote a child's best interests" should they attempt to leave their abusive relationships).

¹¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 (1994) (codified in various sections of Titles 8, 18 and 42 of the U.S. Code).

¹² The VAWA immigration provisions are codified in 8 U.S.C.A. §§ 1154(a)(1)(A)-(B), 1229b(b)(2) (West Supp. 1997). Sections 1154(a)(1)(A) and (B) contain the VAWA self-petition provisions referred to in the text. Under the VAWA immigration provisions, battered alien children can also acquire lawful permanent residence through the petition of their alien parent or through their own self-petition. *Id.* § 1154(a)(1)(A)-(B); see *infra* Part II for a description of the self-petition process under the VAWA immigration provisions.

¹³ H.R. REP. NO. 395, 103d Cong., 1st Sess. 37 (1993).

¹⁴ 8 U.S.C.A. § 1229b(b)(2) (West Supp. 1997).

¹⁵ 8 U.S.C.A. § 1254(a)(3) (West Supp. 1996).

¹⁶ The traditional suspension of deportation requirements, as well as the cancellation of removal requirements, are outlined *infra* Part II.

¹⁷ Suspension of deportation, in fact, remains effective for cases filed prior to

By creating the self-petition and cancellation of removal options through the VAWA, Congress has made tremendous strides towards remedying pitfalls in U.S. immigration policy that have shackled immigrant women to abusive relationships. In spite of these legal advances, the goals of the VAWA self-petition and cancellation of removal provisions may be lost in their application. Just as judicial application has stymied other well-intended laws to help abused women,¹⁸ administrative and adjudicative hurdles¹⁹ may hamper Congress' initiative to liberate battered immigrant women from domestic violence.

Problems may arise in application if immigration adjudicators fail to consider abuse-related factors when evaluating VAWA claims.²⁰ Unlike other applicants for legal status, battered women confront unique circumstances that affect their ability to meet conventional immigration standards routinely applied by immigration adjudicators. For example, adjudicators might normally disregard loss of community support services

IIIRIRA.

¹⁸ See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 383 (1991) (asserting that "the most common impediments to fair trials for battered women are the result not of the structure or content of existing law but of its application by trial judges."). *Id.*

¹⁹ The Attorney General oversees the governmental bodies responsible for immigrant administrative and adjudicative review—the INS and Executive Office of Immigration Review ("EOIR"), respectively. Under the INS, administrative applications, like VAWA self-petitions and other visa applications, are reviewed. 8 C.F.R. § 2.1 (1996). The EOIR, on the other hand, adjudicates applications for relief from deportation, such as cancellation of removal, asylum and other adversarial cases. *Id.* § 3.10.

²⁰ James A. Jones, Comment, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 697-98 (1997) (suggesting that the "greatest impediment" for VAWA self-petitioners is INS discretion to evaluate the weight of evidence supporting VAWA claims). The importance of considering abuse-related factors also arises in cases which involve battered women who kill their abusers. Without considering the circumstances of abuse, judges have denied valid self-defense claims. Since *State v. Wanrow*, 559 P.2d 548 (Wash. 1977), a case involving a woman who killed an alleged child molester because of her belief that he posed an imminent danger, courts have begun to examine more thoroughly the circumstances which give rise to violent acts. See *State v. Kelly*, 478 A.2d 364, 372 (N.J. 1984) (commenting on the battered woman's syndrome, the court explained that "[o]nly by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood.").

as a measure of extreme hardship. But for battered women, these support services enhance their ability to flee and to recover from abuse.²¹ In one of the first VAWA suspension of deportation cases, *In re Rivera-Gomez*,²² an immigration judge ignored abuse circumstances—which otherwise would have demonstrated the applicant's deportation hardship—when he rejected her VAWA claim.²³

Recognizing the risk that adjudicators may overlook the violence that VAWA claimants face, the INS promulgated regulations which direct immigration adjudicators to consider "evidence arising from circumstances surrounding abuse."²⁴ The regulations underscore that "any credible evidence" must be considered in the evaluation of VAWA self-petition and cancellation of removal claims.²⁵ Nonetheless, regulations cannot guarantee the action of adjudicators. To maximize the impact of the VAWA and its interpretive regulations, the INS should train adjudicators to frame VAWA evaluations in the context of abuse.

The challenge to escape abuse does not end with the VAWA—battered immigrant women must also overcome economic hurdles. Indeed, a battered woman's poverty not only makes her financially dependent on her abuser, but may also prevent her from taking advantage of legal outlets like the VAWA.

This Note explores the significance of including abuse circumstances in the evaluation of VAWA immigration claims. Part I examines the nature of power and control dynamics in abusive relationships and discusses how U.S. immigration policy leading up to the VAWA reinforced the cycles of abuse.

²¹ See *infra* Part III.A for a discussion of abuse-related extreme hardship factors. Cf. Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978) (explaining that circumstances of abuse must be considered when evaluating self-defense claims by battered women who kill their abusers).

²² *In re Rivera-Gomez*, Oral Decision of the Immigration Judge, File No. A 70 922 256 (June 5, 1995) [hereinafter *Rivera-Gomez Oral Decision*].

²³ *Id.* at 13-16.

²⁴ 8 C.F.R. § 204.2(c)(1)(viii) (1997). An interim rule issued on March 26, 1996, listed specific abuse-related factors to be used by immigration adjudicators. 61 Fed. Reg. 13061 (1996); see *infra* Part III.A.

²⁵ 8 C.F.R. § 204.2(c)(1)(viii). The "any credible evidence" standard is also delineated in the VAWA immigration provisions. 8 U.S.C.A. §§ 1154(a)(1)(H), 1254(g) (West Supp. 1996).

Part II outlines the VAWA self-petition and cancellation of removal provisions. Part III analyzes residual obstacles that persist for VAWA applicants if immigration adjudicators fail to consider abuse factors in their VAWA evaluations. This Part also contemplates how an abused alien's poverty may create economic hurdles that prevent her from utilizing VAWA's immigration provisions and financially fetter her to an abusive husband. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996²⁶ is highlighted in this discussion as a new hurdle that reinforces economic challenges. The Note concludes that in spite of VAWA's liberating potential, failure to consider abuse factors will undermine VAWA's implementation.

Only by tailoring VAWA requirements to address the unique circumstances of abuse, along with training adjudicators to consider these factors, will the VAWA meet Congress' intent to open doors for battered immigrant women. Moreover, to ensure VAWA's success, Congress must remove the economic hurdles that keep battered immigrant women from leaving abusive relationships.

I. BACKGROUND

A. *The Dynamics of Abuse*

When Congress passed the Violence Against Women Act, it recognized the enormous and devastating impact that domestic violence plays in the lives of millions of American women.²⁷ Over one-quarter of married couples experience domestic violence.²⁸ One-third of these experiences involve serious assaults such as punching, kicking and hitting, as well as attacks

²⁶ Pub. L. No. 104-193, tit. IV, 110 Stat. 2260 (1996) (to be codified in various sections of Titles 8 and 42 of the U.S. Code).

²⁷ H.R. REP. NO. 395, 103d Cong., 1st Sess. 26 (1993) (noting that "[a]n estimated four million American women are battered each year by their husbands or partners. Approximately 95% percent of all domestic violence victims are women. About 35% of women visiting hospital emergency rooms are there due to injuries sustained as a result of domestic violence.").

²⁸ ANGELA BROWNE, WHEN BATTERED WOMEN KILL 4 (1987).

with knives or guns.²⁹ Indeed, violence committed by an intimate partner is more likely to result in injury than violence perpetrated by a stranger.³⁰

The roots of domestic violence in our legal system and social structure can be traced back to the coverture doctrine, a centuries-old precept which declares that, upon marriage, a wife's identity merged with her husband's.³¹ According to the coverture doctrine, a woman's legal identity ceased to exist after marriage, when she became her husband's chattel.³² Moreover, to exert power and control over his wife, a husband had the "right of chastisement," a legal privilege condoning spousal abuse.³³ In fact, the "rule of thumb"—a rule allowing husbands to beat their wives with sticks no broader than a thumb—is based on the chastisement law.³⁴ While much of the facade and some of the substance of coverture have washed away with time, the underlying principles of coverture persist in modern society.³⁵

²⁹ *Id.* (finding that these figures are much higher for women who have recently separated or divorced, two-thirds of whom reported violence in their former relationships).

³⁰ *Id.* at 5 (citing the 1980 National Crime Survey which found that over one-half of attacks committed by strangers resulted in injury, while three-fourths of those committed by intimates caused injury).

³¹ 1 WILLIAM BLACKSTONE, COMMENTARIES 442 (1783), laying the foundation of the coverture doctrine, stating:

By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called . . . a *feme-covert*, . . . is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.

Janet Calvo in *Legacies of Coverture*, *supra* note 10, uses the framework of coverture in her discussion of U.S. immigration policy. This framework is discussed further *infra* Part I.B.

³² 1 BLACKSTONE, *supra* note 31.

³³ See Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241, 243 (1917); see also Calvo, *supra* note 10, at 597 (noting that "[a] husband's total control over his wife's livelihood, home, and children created a coercive situation which was reflected in a subsidiary doctrine, the right of 'chastisement.'").

³⁴ Stedman, *supra* note 33, at 243.

³⁵ Substantively, the American legal system has retained the precepts of coverture and has buoyed the principle that "a man's home is his castle." Perhaps the most blatant incorporation of coverture in our legal system is interspousal immunity. At common law, interspousal immunity barred a wife from bringing a tort action against her husband. Douglas Scherer, *Tort Remedies for Victims of Domes-*

The concept on which the coverture doctrine is based—that women belong to or are property of their husbands—promotes the power and control dynamics that shape abusive relationships. To ensure their domination, batterers employ a variety of manipulative tactics, which include physical, psychological and economic abuse, as well as intimidation, coercion and threats.³⁶ The violence encountered by battered women has also been likened to that experienced by captives or prisoners of war.³⁷ Cycles of humiliation and degradation followed by acts of kindness are tools used by both batterers and captors to demoralize and weaken their prisoners.³⁸ Additionally, like other victims of severe trauma, battered women respond to the reality of abuse by focusing on self-protection and survival.³⁹ Continued victimization results in feelings of powerlessness, vulnerability, loss of control and self-blame.⁴⁰

Furthermore, a batterer seeks to isolate his spouse socially and economically in order to bolster his power and control.⁴¹ Battered women are often forced to stay at home.⁴² Attempts

tic Abuse, 43 S.C. L. REV. 543, 561-63 (1992). Since the wife's legal identity, according to the coverture doctrine, merged into that of her husband, any lawsuit she raised became his. Thus, an action for battery by a wife against her husband was equivalent to an action by a husband against himself. *Id.* at 562. This rationale prevented women from challenging abuse through civil legal recourse. Although most states have rejected interspousal immunity, the sentiment behind the immunity—that spouses should be immune from actions against each other—continues.

³⁶ See Dalton, *supra* note 7, at 333-36.

³⁷ BROWNE, *supra* note 28, at 125 (noting that "[p]arallels . . . exist between the principles of brainwashing used on prisoners of war and the experiences of some women in battering relationships.").

³⁸ BROWNE, *supra* note 28, at 125; see LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 27-28 (1984) (citing Amnesty International's psychological torture definition now used to assess domestic violence cases).

³⁹ BROWNE, *supra* note 28, at 123.

⁴⁰ BROWNE, *supra* note 28, at 123, stating that emotional reactions of victims of assault include fear, anger, guilt, shame; a feeling of powerlessness or helplessness such as is experienced in early childhood; a sense of failure, and a sense of being contaminated and unworthy. Experiences of personal attack and intrusion, such as rape, often lead to acute perceptions of vulnerability, loss of control, and self-blame. During a personal assault, the victim may offer little or no resistance, in an attempt to minimize the threat of injury or death. Again, the emphasis is on survival.

⁴¹ See Dalton, *supra* note 7, at 334-35.

⁴² See Dalton, *supra* note 7, at 334.

to make friends and develop relationships are met with anger and escalated violence. Batterers also prevent their wives from pursuing employment and gaining financial independence.⁴³

For immigrant women, their isolation is exacerbated by the lack of available resources and their inability to speak English and obtain lawful employment.⁴⁴ Often, information immigrant women receive about their legal rights is filtered through their abusive spouses.⁴⁵ In addition, many immigrant communities consider domestic violence a private issue and castigate women who openly confront their husbands' abusive behavior.⁴⁶ To discuss abuse publicly brings shame and disgrace to the family.⁴⁷ The separation of private and public issues in these communities accentuate the isolation and captivity which battered immigrant women experience.

Domestic violence not only harms the physical, psychological and emotional well-being of abused spouses, but injures their children as well. Studies indicate a substantial correlation between spouse abuse and child abuse.⁴⁸ Children are both directly and indirectly affected by domestic violence. In

⁴³ See Dalton, *supra* note 7, at 334 (stating that "[b]atterers often mount fierce campaigns to keep their partners from attending school or taking a job."). Dalton notes that destroying professional wardrobes, giving partners a black eye, intruding at work or school, and failing to show up to take care of the children are among the measures batterers use to isolate their partners. Dalton, *supra* note 7, at 334.

⁴⁴ Chris Hogeland, *Immigrant Women in United States History*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN at V-2 (Deeana Jang et al. eds., 1991). See *infra* Part III.C.2 for a brief discussion of work authorization acquisition.

⁴⁵ Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 323 (1995).

⁴⁶ Margaret R. O'Herron, *Ending the Abuse of the Marriage Fraud Act*, 7 GEO. IMMIGR. L.J. 549, 559 (1993).

⁴⁷ *Id.* Illustrating the difficulties faced by immigrant women who must make private issues public in order to confront their abuser, O'Herron quotes Tina Shum at the Cameron House, a shelter for abused women:

Confrontation is completely against what is taught in Asian culture. The girl may receive great pressure from relatives against her going forward to complain. Even her own parents may not take her back if she divorces her husband. Just to find the opportunity and courage to call us [Cameron House] is an accomplishment for many.

Id.

⁴⁸ Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 159-61 (Kersti Yllo & Michele Bograd eds., 1988).

many homes where a man beats his wife, he also beats his children.⁴⁹ Moreover, some studies show that children, by simply witnessing abuse, experience significant emotional harm that may result in post-traumatic-stress disorder.⁵⁰

The public's denial of responsibility for domestic violence—premised on the belief that domestic violence is a private, family issue—encourages male power and control and legitimizes violence against women.⁵¹ Modern manifestations of coverture, though, are not limited to the private realm. The vestiges of coverture persist in some areas of American jurisprudence, notably in U.S. immigration law.

B. Coverture in U.S. Immigration Law

In her article, *Spouse-Based Immigration Laws: The Legacies of Coverture*, Janet Calvo persuasively introduces the coverture framework as a means for understanding the challenges posed by U.S. immigration law for battered immigrant women.⁵² The discussion below uses this framework to review past U.S. policies and to explore new immigration laws as well.

Although many states have sought to end coverture through Married Women's Property Acts—statutes designed to give married women the legal right to own property⁵³—the

⁴⁹ Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1056 (1991) (identifying one study that found that in over 70% of the families where there is spouse abuse there is also child abuse); see Bowker, *supra* note 48, at 161, presenting the hypotheses that:

(1) Children of battered wives are commonly abused by their fathers. (2) The more severe the wife abuse, the more severe the child abuse. (3) The higher the degree of husband-dominance in a violent marriage, the more severe the child abuse. (4) The more extensive the father's experiences with violence in his family of origin, the more likely he is to move from wife abuse to child abuse.

⁵⁰ See Dalton, *supra* note 7, at 335-36; see also Cahn, *supra* note 49, at 1056.

⁵¹ See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983-85 (1991) (exploring the idea that the public's identification of intimate violence as a "private" issue not only allows the public to deny responsibility for such acts, but also is an "affirmative political decision . . . [that] plays a particularly subtle and pernicious ideological role in supporting, encouraging and legitimating violence against women").

⁵² See Calvo, *supra* note 10.

⁵³ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 902 (5th ed. 1984).

remnants of coverture continue to permeate U.S. immigration law.⁵⁴ Disparate treatment of immigrant women is evident in the first restrictions on immigration imposed in the later part of the nineteenth century. These restrictions excluded undesirable individuals, such as criminals and prostitutes, and those with physical or mental illness. Alien wives, whose legal status depended on their USC or LPR husbands, were sometimes exempt from these restrictions.⁵⁵ Nevertheless, in 1922 Congress passed the Cable Act,⁵⁶ which prevented USC or LPR wives from sponsoring their alien husbands.⁵⁷ Moreover, under the Cable Act, female citizens who tried to sponsor their alien spouses could lose their own citizenship.⁵⁸

Since the 1920s, however, there have been several attempts to remedy the unequal treatment of women in immigration law. A July 11, 1932, congressional act recognized a woman's right to sponsor her alien husband by allowing her to support her husband's lawful permanent resident application if the marriage took place prior to July 1, 1932.⁵⁹ This law was later extended to marriages that took place prior to 1948.⁶⁰ A more significant step toward equality in spousal sponsorship came with the Immigration and Nationality Act of 1952. In the process of consolidating prior immigration policy and establishing the foundation of modern immigration law, the INA furthered the goal of family unification by protecting both husbands and wives from exclusionary quotas.⁶¹ Thus, any USC or LPR has the right to sponsor his or her alien spouse. Nonetheless, this law has failed to alleviate the harsh consequences

⁵⁴ See Calvo, *supra* note 10, at 606-13.

⁵⁵ See Hogeland, *supra* note 44, at V-3; Calvo, *supra* note 10, at 601-02.

⁵⁶ Act Relative to the Naturalization and Citizenship of Married Women, Pub. L. No. 67-346, ch. 411, 42 Stat. 1021 (1922); see Hogeland, *supra* note 44, at V-3.

⁵⁷ See Hogeland, *supra* note 44, at V-3 (citing C.Y. Yu, *The World of Our Grandmothers*, in MAKING WAVES 33 (Asian Women United of California ed., 1989)).

⁵⁸ Hogeland, *supra* note 44, at V-3.

⁵⁹ Calvo, *supra* note 10, at 603 (explaining that "an alien husband of a United States citizen became eligible for admission into the United States as a non-quota immigrant, but only if the marriage occurred prior to July 1, 1932") (citing Act of July 11, 1932, Pub. L. No. 277, § 4(a), 47 Stat. 656).

⁶⁰ Calvo, *supra* note 10, at 603 (citing Act of May 19, 1948, Pub. L. No. 538, § 4(a), 62 Stat. 241).

⁶¹ Calvo, *supra* note 10, at 603-06 (citing Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 166).

for battered immigrant women who still depend on their husbands for spousal sponsorship. Indeed, the INA only equalized the ability of USC or LPR women and men to exert power over their alien spouses through the sponsorship process.⁶² As discussed below, subsequent immigration legislation has contributed to an abuser's domination in violent relationships.

C. *The Immigration and Marriage Fraud Amendments of 1986 and the Immigration Act of 1990*

The Immigration and Marriage Fraud Amendments of 1986 ("IMFA")⁶³ further entrenched USC and LPR control over their alien spouses.⁶⁴ Congress passed this legislation to halt sham marriages created by aliens seeking to circumvent other more cumbersome and prohibitive avenues for obtaining immigrant status in the United States.⁶⁵ The IMFA alters the spousal sponsorship process by making conditional the permanent resident status of aliens who have been married for less than two years at the time of becoming lawful residents.⁶⁶ The conditional status may be removed after a two-year test period by a subsequent joint petition filed by the alien and his or her spouse.⁶⁷ During this time, the INS reserves the right to interview the married couple to ensure the validity of the marriage.⁶⁸ If the couple's union survives the two-year test period, the alien spouse may be given lawful permanent residence.

⁶² It is not uncommon for USC and LPR spouses to blackmail their alien spouses by threatening to withdraw sponsorship of their spouses' relative-petitions for lawful permanent residence. Although some USC and LPR spouses may request money, batterers, as discussed above, may condition spousal sponsorship on their wives remaining in abusive relationships.

⁶³ Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified in various sections of Title 8 of the U.S. Code).

⁶⁴ See 8 U.S.C. § 1186a (1994).

⁶⁵ Ignatius Bau & William R. Tamayo, *Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act) and Other Related Issues*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN at VII-1 (Deeana Jang et al. eds., 1991).

⁶⁶ 8 U.S.C. § 1186a(a)(1), (g)(1) (1994).

⁶⁷ *Id.* § 1186a(c). The joint petition is filed on an I-751 form and requires documentation demonstrating that the marriage is bona fide. *Id.*

⁶⁸ *Id.* § 1186a(b). The Attorney General may terminate the marriage if she finds that it was entered into for the purpose of acquiring immigrant status or if the marriage is judicially annulled or terminated. *Id.*

Unfortunately, the conditional period provides abusers with greater opportunity to control their wives. Before the 1986 amendments, battered spouses were subject to coercion prior to gaining immigrant status, but were freed from this manipulation once LPR status was granted. Under the IMFA, abusers can still control their wives even after initial immigrant status has been granted because of its conditional nature.⁶⁹

Two limited waivers included in the 1986 amendments may relieve some alien spouses from the spousal sponsorship requirement once they have acquired conditional residence.⁷⁰ The first waiver offers relief if the alien spouse demonstrates that deportation would result in extreme hardship.⁷¹ Although Congress requires a liberal construction of the extreme hardship waiver,⁷² "extreme hardship" in other contexts is narrowly defined.⁷³

Narrow interpretations of extreme hardship can be devastating for battered women relying on this waiver.⁷⁴ For exam-

⁶⁹ Calvo, *supra* note 10, at 613.

⁷⁰ 8 C.F.R. § 216.5 (1996).

⁷¹ 8 U.S.C. § 1186a(c)(4)(A) (1994).

⁷² S. REP. NO. 491, 99th Cong., 2nd Sess. 8 (1986). See *infra* note 76 for examples of the broad range of factors that could be included in a liberal interpretation of the extreme hardship standard.

⁷³ See *INS v. Wang*, 450 U.S. 139 (1981) (holding that the Attorney General has the discretion to define narrowly the criteria of "extreme hardship"). The *Wang* case involved the suspension of deportation claim of a Korean family. The U.S. Supreme Court reversed the Ninth Circuit's holding that the extreme hardship requirement could be satisfied if the alien produces sufficient evidence to suggest that "hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported." *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980), *rev'd*, 450 U.S. 139 (1981); see *In re Anderson*, 16 I. & N. Dec. 596 (1978) (identifying factors to consider when evaluating extreme hardship). Factors to be considered include: (1) age of subject; (2) family ties in the United States and abroad; (3) length of residence in the United States; (4) health conditions; (5) political and economic conditions in country of origin; (6) financial status; (7) possibility of adjustment through other means; (8) utility to United States or community; (9) immigration history; and (10) position in community. *Id.* at 597 (citation omitted); cf. *Hernandez-Cordero v. United States INS*, 783 F.2d 1266, 1268 (5th Cir. 1986) (stating that extreme hardship should take into account the specific circumstances of each case).

⁷⁴ Janet Calvo argues that extreme hardship should be evaluated differently in waiver petition cases than in suspension of deportation cases because the two remedies address different circumstances. Calvo, *supra* note 10, at 636. Suspension applies to individuals "either in illegal status or [who] are permanent residents who have participated in activity that makes them deportable." Calvo, *supra* note

ple, one INS official asserts that extreme hardship only applies to suffering once deported.⁷⁵ According to this view, a woman's past suffering bears no relationship to future hardship.⁷⁶ Thus, the abuse suffered by women who seek to use this waiver would be irrelevant. The second waiver created by the IMFA allows a woman to obtain permanent residence if she entered the marriage in good faith and the USC or LPR spouse dies or the marriage ends in divorce or annulment.⁷⁷

The Immigration Act of 1990 ("IMMACT")⁷⁸ added a third waiver to the joint petition requirement—the battered spouse waiver.⁷⁹ The battered spouse waiver may be granted if the beneficiary wife shows that the marriage was entered into in good faith and that she or her child was battered or subject to

10, at 636. The extreme hardship waiver involves aliens who have obtained legal status, "but whose marriages did not last for two years, or whose spouse is using his power over immigration status as a means of control." Calvo, *supra* note 10, at 636.

⁷⁵ Calvo, *supra* note 10, at 610.

⁷⁶ Cf. Calvo, *supra* note 10, at 610, stating that

[t]his approach ignored the extreme hardship inherent in a battering situation. If deported, a battered alien spouse could not pursue criminal or divorce proceedings against her abuser. She could not continue the health care and counseling needed to recover from the abuse. Deporting her would force her to go to a place where she may not have legal or physical protection from the battering spouse or be stigmatized because of having been battered. Deportation of a battered spouse would heap additional extreme trauma on a person who has been subjected to the harrowing experience of violence in her own family at the hands of an individual from whom she expected love and affection.

Calvo also remarks that this view ignores congressional intent, which stipulated that the extreme hardship waiver apply to alien spouses abused by a citizen or resident spouse. Calvo, *supra* note 10, at 610.

⁷⁷ 8 U.S.C. § 1186(c)(4)(B) (1994). Originally, the good faith waiver could only be utilized if the alien spouse terminated the marriage for good cause and was not the one responsible for failing to file a joint petition. This prerequisite placed the abused spouse in the precarious situation of confronting the man from whom she was trying to escape at the most dangerous juncture of the relationship—separation. See BROWNE, *supra* note 28, at 110 (noting that "some estimates suggest that at least 50 percent of women who leave their abusers are followed and harassed or further attacked by them."); see also Calvo, *supra* note 10, at 610-11.

This limitation was removed by the Immigration Act of 1990, which permits the waiver even if the husband terminates the marriage. See Deborah Weissman, *Protecting the Battered Immigrant Woman*, 68 FLA. B.J. 81 (1994).

⁷⁸ Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified in various sections of Title 8 of the U.S. Code).

⁷⁹ 8 U.S.C. § 1186(c)(4)(C) (1994).

extreme cruelty by her spouse.⁸⁰ Waivers based on physical abuse must be supported by clear evidence, including documentation such as police or physicians' reports, affidavits from social service workers or school officials, or other official reports.⁸¹

Although the IMFA and the IMMACT waivers partially remedy the additional hurdle imposed by the IMFA conditional residence status, the waivers do not entirely save alien wives from abusive husbands. Battered immigrant women, according to the IMFA, must still rely on their husband's sponsorship to obtain initial immigrant status. As discussed below, the VAWA is a leap forward for alien spouses, who, under this law, can individually pursue permanent resident status.

II. THE VIOLENCE AGAINST WOMEN ACT

The VAWA makes an enormous step toward eradicating the vestiges of coverture in immigration law.⁸² Two new out-

⁸⁰ *Id.*

⁸¹ Note that the extreme cruelty component of this waiver is limited to aliens who suffer mental abuse. Affidavits from licensed professionals are required to support extreme cruelty waivers. See O'Herron, *supra* note 46, at 555-59 (discussing evidentiary requirements for IMMACT's battered spouse waiver).

⁸² Perhaps most striking about the VAWA is its timing. At this juncture in American history, it is surprising that the federal government has passed legislation which eases immigrant access to the United States. As today's political climate demonstrates, politicians, searching for targets to blame for American economic woes, make scapegoats of voiceless and disenfranchised immigrants. See Roberto Suro, *White House Pressured by Immigration Politics*, WASH. POST, Mar. 28, 1994, at A1.

Riding this anti-immigrant wave, both Congress and the President have initiated efforts to curtail the flow of immigration and enforce deportation of illegal aliens. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *supra* note 3 (tightening border controls, enhancing enforcement against deportable aliens, increasing deterrence of alien smuggling, eliminating suspension of deportation); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 440-43, 110 Stat. 1214 (1996) (limiting the rights of aliens with criminal records); Personal Responsibility and Work Opportunity Act of 1996, *supra* note 26 (restricting access to public benefits for lawful permanent residents).

Given this anti-immigrant trend, passage of the VAWA immigration provisions is all the more impressive and illustrative of the drive in this country to improve the lives of battered women. In addition to its immigration provisions, the VAWA provides a host of remedies for victims of violence motivated by gender. As stated in the Senate report, the goals of the VAWA are "both symbolic and practical":

[T]he act is intended to educate the public and those within the justice system against the archaic prejudices that blame women for the beatings

lets are provided by the VAWA for battered immigrant women, children, and alien parents of battered children: self-petition for lawful permanent residence, and cancellation of removal.⁸³ Unlike the waivers outlined in the IMFA and the IMMACT, the self-petition and cancellation of removal provisions do not require any participation on the part of abusers. Abusive husbands, under the VAWA, can no longer bind their alien spouses in violent relationships by withholding sponsorship of their wives' resident applications during either the initial application period or the conditional residence period.

Gaining immigrant status as a VAWA self-petitioner is a two part process.⁸⁴ First, the applicant must show that she is eligible to receive an immigrant visa by filing a self-petition (I-360).⁸⁵ To qualify as a self-petitioner, the VAWA requires a battered immigrant to show that she: (1) is the spouse of a USC or LPR; (2) is a person of good moral character; (3) is classifiable as an immediate relative or is a spouse of an LPR; and (4) has resided in the United States with her spouse.⁸⁶ The alien's petition may be approved by the Attorney General if she demonstrates that: (1) she currently resides in the United States; (2) she entered her marriage in good faith; (3) she or her child was battered or subject to extreme cruelty by the USC or LPR spouse during the marriage; and (4) she or her child would suffer extreme hardship if deported.⁸⁷

and the rapes they suffer; to the women the support and the assurance that their attackers will be prosecuted; and to ensure that the focus of criminal proceedings will concentrate on the conduct of the attacker rather than the conduct of the victim.

S. REP. NO. 138, 103d Cong., 1st Sess. 38 (1993). Thus, the VAWA acknowledges on a national level the government's responsibilities to battered women. Through the VAWA the government provides crucial program funding, essential mechanisms to improve police protection, and creates a civil rights remedy. *Id.* at 48.

⁸³ 8 U.S.C.A. §§ 1154(a)(1)(A), (B), 1229b(b)(2) (West Supp. 1997).

⁸⁴ This process modifies the standard relative-petition process used by aliens who rely on their spouse's petition. *See supra* note 8.

⁸⁵ The I-360 is used instead of the I-130, which is the form used by spouse sponsors. Memorandum from T. Alexander Aleinikoff, Commissioner, Immigration and Naturalization Service, to INS Regional Directors, District Directors, Service Center Directors and Officers in Charge, at 2 (Apr. 16, 1996) [hereinafter Aleinikoff Memorandum].

⁸⁶ 8 U.S.C.A. § 1154(a)(1)(A), (B) (West Supp. 1997).

⁸⁷ *Id.* Similar requirements apply to alien children who self-petition. *See id.*

Second, along with filing a self-petition the alien must also apply to adjust her status to lawful permanent resident.⁸⁸ This step is no different than the standard procedure followed for aliens with approved relative-petitions.⁸⁹ Adjustment of status is contingent on the availability of visas.⁹⁰ Because of their classification as immediate relatives, alien spouses of USCIs need not wait for visa availability. These spouses can adjust their status as soon as their self-petition is approved.⁹¹ Spouses of LPRs, however, may have to wait several years for visas to become available. This occurs when their "priority date"—placement on the visa waiting list—becomes "current."⁹²

While the VAWA self-petition option is available to anyone regardless of their immigration status, the VAWA cancellation of removal provision is specifically designed to protect inadmissible or deportable aliens for whom deportation would be an extreme hardship.⁹³ If an alien is granted cancellation of removal, she will be allowed to stay in the United States indefinitely and will have her immigrant status immediately adjusted to lawful permanent resident.⁹⁴

When Congress passed the VAWA, it softened what were the traditional suspension of deportation requirements for cases involving battered immigrant women. At the time of VAWA's enactment, suspension of deportation relief required more than seven consecutive years of presence in the United States, a showing of good moral character, and a demonstration that deportation would be an extreme hardship to the alien or his or her legal spouse, parent or child.⁹⁵

To qualify for the VAWA cancellation of removal, however, a battered immigrant woman must be: (1) deportable under any law of the United States except for marriage fraud; (2) physically present in the United States for three consecutive

⁸⁸ 8 U.S.C. § 1255 (1994). See *supra* note 8 for a description of the adjustment of status process.

⁸⁹ See *supra* note 8 for a description of the relative-petition process.

⁹⁰ 8 U.S.C. § 1255 (1994).

⁹¹ *Id.* § 1151(b)(2).

⁹² See Aleinikoff Memorandum, *supra* note 85, at 2-3.

⁹³ 8 U.S.C.A. § 1229b(b)(2) (West Supp. 1997).

⁹⁴ *Id.* § 1229b(b)(3).

⁹⁵ 8 U.S.C.A. § 1254(a)(1) (West Supp. 1996).

years; (3) a victim of battering or extreme cruelty by a USC or LPR spouse or parent; (4) a person of good moral character; and (5) a person whose deportation would result in extreme hardship to the alien, the alien's parents or children.⁹⁵

Under the Illegal Immigration Reform and Immigrant Responsibility Act,⁹⁷ cancellation of removal provisions supersede and tighten suspension of deportation requirements for non-VAWA applicants.⁹⁸ In spite of these more stringent requirements, IIRIRA preserves VAWA's softer provisions.⁹⁹ IIRIRA maintains VAWA's three-year presence requirement¹⁰⁰ while lengthening the burden for all other cancellation applicants.¹⁰¹ IIRIRA also keeps VAWA's extreme hardship requirement¹⁰² while heightening the traditional suspension standard.¹⁰³ Congress' preservation of VAWA's provisions—in the face of escalating attacks on immigrants—underscores Congress' intent to protect battered women.

A number of battered women have already benefited from the VAWA self-petition and cancellation of removal options. Despite these successes, the VAWA immigration provisions do not ensure that battered women will receive relief. As mentioned earlier, VAWA claims may be denied if adjudicators fail to incorporate in their VAWA evaluations abuse factors which demonstrate the unique challenges confronting battered immigrant women.

⁹⁵ 8 U.S.C.A. § 1229b(b)(2) (West Supp. 1997).

⁹⁷ Pub. L. No. 104-208, div. C, tit. III, 110 Stat. 3009-546 (1996) (to be codified in various sections of Titles 8, 18, 28 and 42 of the U.S. Code).

⁹⁸ 8 U.S.C.A. § 1229b (West Supp. 1997).

⁹⁹ *Id.* § 1229b(b)(2).

¹⁰⁰ *Id.* § 1229b(b)(2)(B).

¹⁰¹ *Id.* § 1229b(b)(1)(A) (requiring ten years of continuous residence in the United States).

¹⁰² *Id.* § 1229b(b)(2)(E).

¹⁰³ 8 U.S.C.A. § 1229b(b)(1)(D) (demanding that aliens show "exceptional and extremely unusual hardship" to the alien's USC or LPR spouse, parent or child). Not only does the new law remove an alien's ability to rely on "extreme hardship" to herself—as was the case prior to IIRIRA, 8 U.S.C.A. § 1254(a)(1) (West Supp. 1996)—now aliens can only qualify for this form of deportation relief by demonstrating the effects of deportation on a USC or LPR relatives, 8 U.S.C.A. § 1229b(b)(1)(D) (West Supp. 1997). If an alien does not have lawful U.S. relatives, she may not qualify for cancellation of removal.

III. APPLICATION OF THE STANDARDS

While the VAWA uproots the remnants of coverture in immigration law, the strengths behind its provisions may be lost in its application. The immigration provisions lay the groundwork for battered immigrant women to escape abusive relationships without the fear of deportation. However, if adjudicators ignore circumstances of abuse in their application of the VAWA provisions, Congress' intent to protect battered spouses may be thwarted.

To illustrate VAWA's limitations, a divorced battered woman cannot self-petition if her divorce took place prior to filing.¹⁰⁴ This no-divorce requirement presents substantial risk to battered immigrant women¹⁰⁵ who may need a divorce to protect themselves and their children.¹⁰⁶ Furthermore, under the VAWA, an abusive husband can endanger his spouse's self-petition and perpetuate his control by threatening a divorce.

Likewise, the VAWA's evidentiary requirements create conflicts for self-petitioners and suspension of deportation claimants.¹⁰⁷ Battered women who attempt to document their good faith marriages and the legal status of their husbands may be hindered by angry and uncooperative spouses. Efforts to obtain such documentation—in light of a separation with the batterer—heightens the risk of abuse.¹⁰⁸

¹⁰⁴ 8 C.F.R. § 204.2(c)(1)(ii) (1997); 8 U.S.C.A. § 1154(a)(1)(A)(iii), (B)(ii) (West Supp. 1997) (stating that self-petitions are available to an "alien who is the spouse" of a USC or LPR). However, the INS will review self-petitions of divorced battered immigrant women if they filed the self-petition before getting divorced. 8 C.F.R. § 204.2(c)(1)(ii). The VAWA suspension of deportation does not contain this bar. See Aleinikoff Memorandum, *supra* note 85, at 6.

¹⁰⁵ See Janet Calvo, *The Violence Against Women Act: An Opportunity for the Justice Department to Confront Domestic Violence*, 72 INTERPRETER RELEASES 485, 488 (1995).

¹⁰⁶ *Id.* at 488-89 (explaining that a battered spouse may need a divorce in order to obtain custody and to end "the relationship that serves as the basis for abuse").

¹⁰⁷ See Memorandum from the National Network on Behalf of Battered Immigrant Women to Amy Jeffress (May 23, 1995) (on file with author) (generally discussing evidentiary issues in battered immigrant women proceedings); see also Jones, *supra* note 20, at 694-95 (noting that VAWA's implementing regulations give "the INS sole discretion to determine what evidence is credible and what weight to give that evidence").

¹⁰⁸ See BROWNE, *supra* note 28, at 115 (noting that women are at greatest risk of serious injury when they separate from their abusers); cf. Aleinikoff Memorandum, *supra* note 85, at 5-7 (recognizing "the difficulties some self-petitioners may

By focusing on the extreme hardship and good moral character requirements, the discussion below explores the inherent problems with applying the VAWA immigration standards without considering the violence that VAWA claimants confront. This section also addresses how an abused woman's poverty may impede her VAWA claim and frustrate her ability to escape abuse even if she gains legal status.

A. *The Extreme Hardship Standard*

The VAWA immigration provisions require self-petitioners and cancellation of removal applicants to demonstrate that their deportation will result in extreme hardship to themselves or their children.¹⁰⁹ Generally, the U.S. attorney general has the discretion to determine how applicants can meet the extreme hardship standard.¹¹⁰ Narrow interpretations of extreme hardship, which ignore abuse factors, may deny battered women the opportunity to present the strongest evidence supporting their VAWA claims. One of the first adjudicated VAWA suspension cases, *In re Rivera-Gomez*,¹¹¹ demonstrates this concern. In *Rivera-Gomez*, an immigration judge denied the applicant's suspension of deportation claim by narrowly construing acceptable extreme hardship evidence, which excluded abuse-related factors.¹¹²

Ms. Rivera, a Salvadoran woman, fled from her country in August 1991,¹¹³ when death squads threatened her life because of her political affiliation with Salvadoran guerrilla forces.¹¹⁴ Soon after her arrival in the United States in September 1991, Ms. Rivera began living with Raul Salinas, a lawful permanent resident.¹¹⁵ She eventually married him in

experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent"). The Aleinikoff Memorandum adds that INS officials should aid self-petitioners by checking "[r]eadily available electronic" and other INS records. Aleinikoff Memorandum, *supra* note 85, at 5.

¹⁰⁹ 8 U.S.C.A. §§ 1154(a)(1)(A), (B), 1229b(b)(2)(E) (West Supp. 1997).

¹¹⁰ See *INS v. Wang*, 450 U.S. 139 (1980).

¹¹¹ *Rivera-Gomez Oral Decision*, *supra* note 22.

¹¹² *Rivera-Gomez Oral Decision*, *supra* note 22, at 13-16.

¹¹³ *Rivera-Gomez Oral Decision*, *supra* note 22, at 4.

¹¹⁴ *Rivera-Gomez Oral Decision*, *supra* note 22, at 4-10.

¹¹⁵ Transcript of Hearing at 26, *In re Rivera-Gomez*, File No. A 70 922 256 (June 2, 1995) [hereinafter *Rivera-Gomez Transcript*].

1994.¹¹⁶ Throughout their relationship, Mr. Salinas both physically and psychologically abused Ms. Rivera.¹¹⁷ He also sought to intimidate her with death threats and threats of deportation should she report him to the police.¹¹⁸ Mr. Salinas limited her involvement with the community and reacted violently to her attempts to become involved.¹¹⁹ After she went to a community service agency to get immigration information, Mr. Salinas accused Ms. Rivera of dating the interviewer.¹²⁰ Ms. Rivera eventually received a civil protection order and filed charges of spouse abuse against her husband.¹²¹

While the immigration judge conceded that the applicant had met the three-year residence requirement,¹²² had proved abuse,¹²³ and had shown good moral character,¹²⁴ he rejected her VAWA suspension claim on the grounds that she failed to demonstrate that deportation would cause her extreme hardship.¹²⁵ The judge based his decision on the fact that Ms. Rivera is capable of applying her employment skills "anywhere in the world," and is not faced with political threats in her country of origin.¹²⁶ In reaching this conclusion, the im-

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 27, 29-30.

¹¹⁸ Brief for Appellant at 10, *In re Rivera-Gomez*, File No. A 70 922 256 (June 2, 1995) [hereinafter Appellant's Brief] (the brief was filed by the Central American Resource Center ("CARECEN"), counsel for the appellant).

¹¹⁹ *Id.* at 11.

¹²⁰ *Id.* at 11-12.

¹²¹ *Id.* at 12.

¹²² *Rivera-Gomez Oral Decision*, *supra* note 22, at 12.

¹²³ *Rivera-Gomez Oral Decision*, *supra* note 22, at 12.

¹²⁴ *Rivera-Gomez Oral Decision*, *supra* note 22, at 13 (though finding that the applicant made "very willful deceptions and very willful false statements and very large exaggerations in her asylum application").

¹²⁵ *Rivera-Gomez Oral Decision*, *supra* note 22, at 13-16.

¹²⁶ *Rivera-Gomez Oral Decision*, *supra* note 22, at 13-16. The applicant also presented asylum and withholding of deportation claims. See *Rivera-Gomez Oral Decision*, *supra* note 22, at 2-3. The immigration judge denied these claims as well, holding that the applicant had neither demonstrated a well-founded fear of persecution required for asylum nor the likelihood of persecution demanded for withholding of deportation. See *Rivera-Gomez Oral Decision*, *supra* note 22, at 11-12. As a supporter of Salvadoran guerrillas, the applicant participated in political and social activities of the Salvadoran rebel group at her university and church. She also provided medical assistance to the rebels. *Rivera-Gomez Oral Decision*, *supra* note 22, at 4. In March of 1991, the applicant had a bomb thrown at her. The assailants throwing the bomb shouted her name. *Rivera-Gomez Oral Decision*,

migration judge ignored abuse factors which would have shown the unique and extreme hardship experienced by Ms. Rivera.¹²⁷

The immigration judge merely followed a traditional, narrow interpretation of the extreme hardship standard. According to the U.S. Supreme Court holding in *INS v. Wang*,¹²⁸ "[t]he Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so."¹²⁹ The attorney general considers the following limited factors when evaluating extreme hardship: age; family ties in the U.S. and abroad; health conditions; economic and political conditions of the country to which the alien is returnable; financial status—business and occupation; the possibility of other means of status adjustment; whether the alien is of special assistance to the United States; position in the community; and the alien's immigration history.¹³⁰

In recognizing that these traditional standards are too narrow to encompass the unique manifestations of extreme hardship in abusive relationships, the INS promulgated regulations which direct adjudicators to consider abuse circumstances and "any credible evidence" that may support a VAWA claim.¹³¹ The regulations encourage self-petitioners "to cite and document all applicable factors . . . [and underscore that] there is no guarantee that a particular reason or reasons will result in a finding that deportation would cause extreme hardship."¹³²

supra note 22, at 6. She subsequently went to hide in her aunt's village. *Rivera-Gomez Oral Decision*, *supra* note 22, at 8. Later, the applicant was also shot by army personnel. *Rivera-Gomez Oral Decision*, *supra* note 22, at 9. The immigration judge ultimately denied the applicant's asylum and withholding of deportation claims on the belief that she was lying. *Rivera-Gomez Oral Decision*, *supra* note 22, at 10.

¹²⁷ *Rivera-Gomez Oral Decision*, *supra* note 22, at 13-16.

¹²⁸ 450 U.S. 139 (1981).

¹²⁹ *Id.* at 145. By supporting a narrow reading of extreme hardship, the Supreme Court reversed the Ninth Circuit's lenient construction of the standard. The Ninth Circuit suggested that "suspension of deportation will be granted to the alien for whom the hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported." *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980), *rev'd*, 450 U.S. 139 (1981).

¹³⁰ *In re Anderson*, 16 I. & N. Dec. 596, 597 (1978).

¹³¹ 8 C.F.R. § 204.2(c)(1)(viii) (1997).

¹³² *Id.*

The interim rule of March 26, 1996 also lists a number of abuse oriented factors that may serve as a basis for demonstrating extreme hardship.¹³³ These factors instruct adjudicators to consider: (1) the nature and extent of the physical and psychological consequences of the abuse suffered by the petitioner; (2) the loss of access to U.S. courts and the criminal justice system; (3) the unavailability in the country of deportation of needed social, medical, mental health and support services; (4) the laws, social practices, or customs in the country of deportation that would castigate the self-petitioner for leaving her husband or taking action to stop the abuse; (5) the abuser's ability to travel to the country of deportation to harass the self-petitioner and the willingness of public officials in that country to protect the petitioner; and (6) the likelihood that the abuser's family or friends in the country of deportation will harass the self-petitioner on behalf of the abuser.¹³⁴

The extreme hardship factors listed in the INS interim rule reflect those outlined in the *Rivera-Gomez* appellant's brief ("appellant's brief").¹³⁵ While the factors are not identical, appellant's discussion of these factors provides a model framework for evaluating extreme hardship in the abuse context. The brief underscores that the immigration judge's "decision makes little or no mention of any of the factors related to the VAWA provision. This incomplete and distorted analysis violated the congressional intent behind VAWA."¹³⁶ Appellant's brief describes five abuse-related, extreme hardship factors.¹³⁷

First, appellant's brief underscores that the nature and extent of abuse suffered by battered women like Ms. Rivera is analogous to that of prisoners of war.¹³⁸ For three and a half

¹³³ 61 Fed. Reg. 13061, 13067 (1996).

¹³⁴ *Id.*; see Orloff, *supra* note 45, at 327 (suggesting additional factors to consider for extreme hardship evaluation, which include: the batterer's economic capability to travel to the country of deportation; the danger posed by the abuser's relatives in the country of deportation; the impact of family separation on children of the abused mother; the effect of deportation on pending child custody, child support, and visitation proceedings; and the hardship on children deported with their alien mother).

¹³⁵ Appellant's Brief, *supra* note 118, at 16-32.

¹³⁶ Appellant's Brief, *supra* note 118, at 16.

¹³⁷ Appellant's Brief, *supra* note 118, at 16-32.

¹³⁸ Appellant's Brief, *supra* note 118, at 23.

years, Ms. Rivera's husband attacked her physically and psychologically.¹³⁹ He punched her in the face, chest, arms and legs and did not stop the abuse when she became pregnant.¹⁴⁰ He also threatened to kill her if she reported him to the police.¹⁴¹ While this pattern of abuse demoralized Ms. Rivera, she has begun the fragile process of reasserting control over her life.¹⁴² In this context, deportation would only frustrate her efforts to recover.¹⁴³

Second, appellant's brief highlights that deportation would cause Ms. Rivera extreme hardship by severing her ties to community support services.¹⁴⁴ Ms. Rivera depends on the counselling and support services that she receives in the United States.¹⁴⁵ These services are essential to combat the physical and psychological effects of the abuse she suffered, such as arthritis, hypertension and heart disease.¹⁴⁶ Although community support services are crucial to Ms. Rivera's recovery, these services are unavailable in El Salvador.¹⁴⁷

Third, appellant's brief argues that deportation would cause Ms. Rivera extreme hardship because it forecloses access to U.S. courts and the criminal justice system.¹⁴⁸ In the past, Ms. Rivera successfully used the criminal justice system to gain police protection and to obtain a temporary restraining order against her husband.¹⁴⁹ These options might be unavailable in El Salvador.

Furthermore, deportation would deny Ms. Rivera the ability to seek legal redress against her husband for his crimes.¹⁵⁰ A primary goal of the VAWA is to punish perpetrators and pre-

¹³⁹ Appellant's Brief, *supra* note 118, at 23-24.

¹⁴⁰ Appellant's Brief, *supra* note 118, at 23-24.

¹⁴¹ Appellant's Brief, *supra* note 118, at 24.

¹⁴² See BROWNE, *supra* note 28, at 124.

¹⁴³ Appellant's Brief, *supra* note 118, at 24.

¹⁴⁴ Appellant's Brief, *supra* note 118, at 24.

¹⁴⁵ Appellant's Brief, *supra* note 118, at 24-25 (citing CAROLINE KNAPP, A PLAGUE OF MURDERS: OPEN SEASON ON WOMEN (1992); Lori Heise et al., *Violence Against Women: The Hidden Health Burden*, WORLD BANK DISCUSSION PAPERS NO. 255 (1994); *Physicians and Domestic Violence: Ethical Considerations*, TRENDS IN HEALTH CARE LAW & ETHICS, SPRING 1993, at 48).

¹⁴⁶ Appellant's Brief, *supra* note 118, at 25.

¹⁴⁷ Appellant's Brief, *supra* note 118, at 25.

¹⁴⁸ Appellant's Brief, *supra* note 118, at 25-26.

¹⁴⁹ Appellant's Brief, *supra* note 118, at 27.

¹⁵⁰ Appellant's Brief, *supra* note 118, at 26-27.

vent them from committing future offenses.¹⁵¹ When the government deports women like Ms. Rivera, it keeps them from pursuing criminal actions that punish their abusers. Thus, the government implicitly condones an abuser's actions by deporting his alien spouse and allowing the abuser to escape punishment.

Fourth, appellant's brief proposes that deportation would leave Ms. Rivera unprotected from the risk of future abuse.¹⁵² This risk arises when battered women attempt to leave abusive relationships.¹⁵³ Indeed, abusive relationships often become more violent at separation, which heightens the difficulty for battered women seeking to escape from their abusers.¹⁵⁴ At the separation juncture, batterers strive to reassert their power and control.¹⁵⁵ An abuser's familiarity with his wife's habits, family members and friends, enables him easily to stalk and harass her.¹⁵⁶

Successful separation, therefore, depends on strong community support systems that involve local police, prosecutors, shelter workers and judges who work with the abused alien.¹⁵⁷ Support systems enhance protection of battered women who flee from their abusers and facilitates their recovery.¹⁵⁸ Ms. Rivera's support network is evident in her use of local police and her reliance on friends and associates.¹⁵⁹ If deported, Ms. Rivera's network will disappear. Moreover, it is unlikely that her distance from her husband in El Salvador will assure her security. Batterers go to great lengths to perpetuate their domination, which might include travelling to their wives' country of deportation or extending abuse through a surrogate, such as a relative in that country.¹⁶⁰

¹⁵¹ Appellant's Brief, *supra* note 118, at 25-26; see S. REP. NO. 138, 103d Cong, 1st Sess. 38, 41 (1993).

¹⁵² Appellant's Brief, *supra* note 118, at 27.

¹⁵³ Appellant's Brief, *supra* note 118, at 27.

¹⁵⁴ Appellant's Brief, *supra* note 118, at 27-28; see BROWNE, *supra* note 28, at 114-15.

¹⁵⁵ Appellant's Brief, *supra* note 118, at 28.

¹⁵⁶ Appellant's Brief, *supra* note 118, at 29.

¹⁵⁷ Appellant's Brief, *supra* note 118, at 28-29.

¹⁵⁸ Appellant's Brief, *supra* note 118, at 29-30.

¹⁵⁹ Appellant's Brief, *supra* note 118, at 30.

¹⁶⁰ Appellant's Brief, *supra* note 118, at 30; see BROWNE, *supra* note 28, at 115 (explaining that "[v]iolent men do search desperately for their partners once the woman leaves If they believe the woman has left town, they frequently at-

Fifth, appellant's brief notes that the circumstances and conditions in the country of deportation for domestic violence victims will cause Ms. Rivera extreme hardship because El Salvador lacks protection for domestic violence victims.¹⁶¹ Although Salvadoran women face a growing trend of physical violence, the Salvadoran legal system does little to prevent abuse.¹⁶² Appellant's brief maintains that to deport Ms. Rivera from a country with a developed system of protective and social services to one lacking in such services would be an extreme hardship.¹⁶³

Rivera-Gomez demonstrates how abuse factors can illuminate a battered woman's qualifications for relief from deportation. On June 17, 1996, the Board of Immigration Appeals remanded *Rivera-Gomez*, finding that the immigration judge improperly prevented Ms. Rivera from presenting evidence to support her immigration claims.¹⁶⁴ Ms. Rivera has subsequently been granted suspension of deportation.¹⁶⁵

While the INS regulations encourage adjudicators to employ abuse factors, the regulations cannot guarantee that these factors will shape an adjudicator's judgment. In order to realize Congress' VAWA goals, the INS must take greater steps to educate adjudicators about domestic violence and the role abuse plays in deterring women from leaving abusive relationships. On April 16, 1996, the INS circulated a memorandum to INS offices briefly describing the VAWA and its interpretive regulations.¹⁶⁶ Nevertheless, more training is required to ensure that adjudicators evaluate VAWA claims in the context of abuse.

tempt to follow her, traveling to all locations they think she might be found. She is theirs.").

¹⁶¹ Appellant's Brief, *supra* note 118, at 31-32.

¹⁶² Appellant's Brief, *supra* note 118, at 32.

¹⁶³ Appellant's Brief, *supra* note 118, at 31.

¹⁶⁴ *In re Rivera-Gomez*, File No. A 70 922 256 (BIA 1996).

¹⁶⁵ *In re Rivera-Gomez*, Order of the Immigration Judge, File No. A 70 922 256 (Jan. 22, 1997).

¹⁶⁶ Aleinikoff Memorandum, *supra* note 85.

B. *The Good Moral Character Standard*

Like the extreme hardship requirement, VAWA's good moral character standard should be evaluated in the abuse context. Both VAWA self-petitioners and cancellation of removal applicants must establish their good moral character.¹⁶⁷ The good moral character requirement, an element of the traditional suspension of deportation application since 1940,¹⁶⁸ "was charted by assessing the current mores of the community. It did not demand moral excellence, but rather adherence to the moral standards of the average person. In one aspect the term doubtless contemplated an absence of proven misconduct."¹⁶⁹ Courts will preclude aliens from demonstrating good moral character if they have been convicted in a court of law for committing certain classes of offenses, including serious crimes and narcotics violations, as well as polygamy and prostitution.¹⁷⁰

Under INS VAWA regulations, good moral character must be determined on a case-by-case basis and judged according to the standard of the "average citizen in the community."¹⁷¹ The regulations give immigration adjudicators greater flexibility to consider extenuating circumstances in cases that do not involve convictions.¹⁷² For example, prostitutes who plea bargain, and thus avoid a court-of-law determination, may still qualify for self-petition approval if surrounding circumstances demonstrate that their conduct was the result of abuse.¹⁷³ Despite this apparent flexibility, immigration advocates fear that VAWA applicants will be denied relief based on arrests arising out of domestic violence.¹⁷⁴

¹⁶⁷ 8 U.S.C.A. §§ 1154(a)(1)(A)(iii), (A)(iv), (B)(ii); 1229b(b)(2)(B) (West Supp. 1997).

¹⁶⁸ CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 74.03[6][E][iv] (1992).

¹⁶⁹ *Id.*

¹⁷⁰ The list of offenses that can preclude an alien from establishing good moral character include: polygamy, prostitution, smuggling aliens, guilt for an aggravated felony, commission of a crime of moral turpitude, narcotics violations, petty offenses, illegal gambling, fraudulent testimony before the INS, and habitual drunkenness. 8 U.S.C. § 1101(f) (1994).

¹⁷¹ 8 C.F.R. § 204.2(c)(1)(vii) (1997).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Telephone Interview with Gail Pendleton, Coordinator of the National Immi-

In the domestic violence context, battered women are often arrested through no fault of their own. Sometimes police, acting pursuant to mandatory arrest statutes, arrest both the abuser and the abused when responding to domestic violence emergency calls.¹⁷⁵ In other cases, police arrest battered women based on counter charges asserted by arrested abusers.¹⁷⁶

In one currently pending VAWA self-petition case, an alien woman, Constance,¹⁷⁷ was arrested for assaulting her husband when she left her child with him for visitation.¹⁷⁸ In truth, Constance's husband attacked her.¹⁷⁹ When Constance reported his conduct to the authorities, a police clerk indicated that her husband had already filed an assault charge, and soon after she was arrested.¹⁸⁰ Despite the charge's fabrication, Constance's attorneys fear that the immigration service, looking at the charge without considering the circumstances behind it, will preclude Constance from establishing good moral character.¹⁸¹

Even when arrest records accurately reflect a woman's conduct, adjudicators should consider such acts in the context of abuse. Battered women's advocates have successfully argued

gration Project of the National Lawyers Guild (Apr. 28, 1997) [hereinafter Pendleton Interview].

¹⁷⁵ See Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 387 (1994) (noting the unintended consequences of mandatory arrest laws).

¹⁷⁶ Pendleton Interview, *supra* note 174; cf. Zorza, *supra* note 175, at 392 (discussing the harms caused by mutual protection orders which "label both parties as abusers, conveying the message to the parties and the world that they were each to blame for the abuse").

¹⁷⁷ Constance is a pseudonym for a client of Marianthe Poulianos, an immigration attorney in New York City. Interview with Marianthe Poulianos, Esq., in New York, N.Y. (May 20, 1997) [hereinafter Poulianos Interview].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Poulianos Interview, *supra* note 177. Constance's attorney noted that the immigration examiner interviewing Constance asked many questions about her arrests and seemed to indicate that these arrests might influence the outcome of Constance's case. Constance's attorney had to intervene during the interview to explain the circumstances of the arrest to avoid the impression that Constance lacked good moral character.

that a woman's violent acts may be rooted in self-defense.¹⁸² Indeed, battered women mostly cite self-defense as the motive for their violent acts.¹⁸³

Moreover, adjudicators should consider circumstances of abuse when confronted with women held criminally liable for their inaction—for example, women liable for child neglect.¹⁸⁴ Up to seventy percent of the families which experience spousal abuse also experience child abuse.¹⁸⁵ In some families just one parent abuses the children, in others both parents are responsible for the abuse.¹⁸⁶ While courts have moved away from holding both parents liable for abuse, many states still find the non-abuser strictly liable for child neglect.¹⁸⁷ Battered women are often blamed for their child's victimization even when they have not harmed the child themselves.¹⁸⁸

¹⁸² See *State v. Kelly*, 478 A.2d 364, 372 (N.J. 1984) (noting that "[o]nly by understanding the [] unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood."); see also Schneider & Jordan, *supra* note 21, at 150 (asserting that judges and juries should consider the "variety of societally-based factors" that elucidate the reasonableness of a woman's actions to physically defend herself).

¹⁸³ Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat?*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 90, 107 (Kersti Yllo & Michele Bograd eds., 1988).

¹⁸⁴ Lee Teran & Barbara Hines, *Suspension of Deportation as Relief for Battered Immigrant Women and Children*, IMMIGR. NEWSL., July 1995, at 12 (noting that the INS may consider the "alleged endangerment to a child or failure of a parent to protect children from the other parent's battery and cruelty" as the basis for denying good moral character).

¹⁸⁵ Cahn, *supra* note 49, at 1056.

¹⁸⁶ Cahn, *supra* note 49, at 1056-57 (stating that "children in these [abusive] families may be abused by both parents. One study found that women who are abused are twice as likely to abuse their children as women who are not abused.") (citing M. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN AMERICAN FAMILIES* 216-17 (1980)).

¹⁸⁷ *In re Glenn G.*, 154 Misc. 2d 677, 587 N.Y.S.2d 464 (Family Ct. Kings County 1992), is one example of a judicial decision—though arrived at reluctantly—convicting a battered woman who, despite overwhelming efforts to protect her children, was found neglectful on the basis of strict liability. Even though holding Mrs. G. negligent, Judge Sara Schecter emphasized that Mrs. G. suffered from battered woman's syndrome. *Id.* at 688, 587 N.Y.S.2d at 470. She stated that "[t]his court is in accord with those who have recognized that Battered Woman's Syndrome is a condition which seriously impairs the will and the judgment of the victim." *Id.* Yet, despite this recognition Judge Schecter was compelled to find Mrs. G. negligent under the strict liability statute. *Id.*

¹⁸⁸ See Marie Ashe & Naomi Cahn, *Child Abuse: A Problem for Feminist Theo-*

Like abused women generally, a number of reasons may explain why battered immigrant women are unable to protect their children and fail to report abuse.¹⁸⁹ By taking action against her abuser, a battered woman may place her own life in danger.¹⁹⁰ Moreover, an abuser may threaten to have her deported if she reports him to the police.¹⁹¹

In light of the harsh and unjust consequences of the strict liability statutes, some states have modified these laws to account for abuse circumstances faced by battered women. For example, the Minnesota Criminal Code provides a defense to its strict liability statute for women who reasonably believe that taking steps to stop the child abuse would cause substantial bodily harm to themselves.¹⁹² The Minnesota statute is indicative of a trend recognizing the unique circumstances influencing the actions of battered women.

The VAWA, in fact, attempts to alleviate the immigration concerns which prevent battered immigrant women from reporting child abuse and removing their children from family violence.¹⁹³ According to the VAWA, an alien spouse can self-

ry, 2 TEX. J. WOMEN & L. 75 (1993) (discussing the Hedda Nussbaum case which involved a battered woman who was also the adoptive mother of a six-year old child who was killed as a result of a violent attack by her adoptive father). Nussbaum has been described as both "a person so victimized as to be incapable of moral agency" and "an active participant in her own—and Lisa's [Nussbaum's daughter's]—destruction." *Id.* at 85. The authors also refer to Alice Miller, who offers a particularly unforgiving perspective of battered women:

The situation of an adult woman confronted by a brutal man is not the same as that of a small child. Although, because of her childhood, the woman can see herself as equally helpless and thus may overlook her chances of defense, she is in fact no longer helpless. Even when her rights are inadequate, even when the courts are on the side of the man, an adult woman can speak up, report, look for allies, and she can scream (assuming she hasn't, as a child, learned not to).

Id. at 96. Ashe and Cahn also offer arguments illuminating the actions and inactions of battered women. They refer to Martha Minow who recommends reassessing the conduct of "bad mothers" in light of complex family dynamics and a society unresponsive to domestic violence. *Id.* at 100 (citing Martha Minow, *Words at the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1682-83 (1990)).

¹⁸⁹ See Ashe & Cahn, *supra* note 188, at 109.

¹⁹⁰ See Ashe & Cahn, *supra* note 188, at 109.

¹⁹¹ See Howard Davidson, *The Impact of Domestic Violence on Children*, ABA CENTER ON CHILDREN AND THE LAW, Oct. 1994, at 19-20.

¹⁹² MINN. STAT. ANN. § 609.378(2) (West Supp. 1996).

¹⁹³ H.R. REP. NO. 395, 103d Cong., 1st Sess. 38 (1993).

petition for lawful permanent residence or acquire cancellation of removal if her child has been battered or subject to extreme cruelty.¹⁹⁴ This allows a battered immigrant woman to take action to protect her child without fearing immigration consequences.

A battered woman's failure to report or stop child abuse should not universally be a strike against her capacity to establish good moral character. As with current trends modifying child neglect statutes, adjudicators should look behind the inaction of women charged with child neglect before making moral character judgments.

Only by evaluating VAWA standards, such as extreme hardship and good moral character, within the abuse framework, will VAWA meet its intended goal—helping battered women leave abusive relationships. Without incorporating abuse factors into VAWA evaluations, adjudicators may overlook crucial components of a battered woman's hardship and misconstrue an alien's inaction for moral failure.

C. *The Poverty Hurdle*

In addition to the hurdles within VAWA's standards, many battered immigrant women are prevented from leaving abusive husbands because of their poverty. As discussed in Part I, abusers use economic isolation to further their power and control.¹⁹⁵ Isolation tactics deter battered women from finding or maintaining employment, developing marketable skills, and building community ties.¹⁹⁶ As a result, battered women are left financially dependent on their abusers.

Immigration law heightens an alien's financial dependence by requiring aliens to demonstrate the ability to "rely on their own capabilities and the resources of their families, their sponsors, and private organizations."¹⁹⁷ Aliens unable to provide these assurances may be found to be inadmissible as burdens on society,¹⁹⁸ or "public charges."¹⁹⁹ Consequently, battered

¹⁹⁴ 8 U.S.C.A. §§ 1154(a)(1)(A)(iii), (B)(ii), 1229b(b)(A) (West Supp. 1997).

¹⁹⁵ See Dalton, *supra* note 7.

¹⁹⁶ See Dalton, *supra* note 7, at 334-36.

¹⁹⁷ 8 U.S.C.A. § 1601(2)(A) (West Supp. 1997) (codifying § 553 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *supra* note 26).

¹⁹⁸ The fear of allowing indigent aliens into the United States can be traced

immigrant women who cannot show economic independence because of their financial isolation are left to rely on their abusive husbands to avoid public charge classification. Moreover, VAWA applicants who are willing and able to work may not have the opportunity to do so because the INS has not guaranteed employment authorization to all individuals seeking relief under the VAWA.²⁰⁰

1. Public Charge Ground for Inadmissibility

Up to half of government denials of immigrant and non-immigrant applications are based on the public charge ground for exclusion.²⁰¹ In determining whether an alien might become a public charge, the INS considers the following factors: age, physical or mental disability, education, work history and number of dependents.²⁰² Ultimately, aliens must prove their financial independence to avoid public charge classification.²⁰³ Typically, evidence of one's own financial worth or that of a sponsoring U.S. resident can counter this classification.²⁰⁴

back to this country's roots. Provisions in the Articles of Confederation called for the exclusion of "paupers, vagabonds and fugitives from justice" from American shores. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1846 (1993) (citation omitted). It was feared that America would become the encampment for European indigents, threatening the image Americans wanted for their country: a place for the honest and hard-working. *Id.* at 1847. The current political climate reflects how little has changed in 220 years. Over the past year, three major anti-immigrant legislative initiatives have been passed into law: the Anti-Terrorism and Effective Death Penalty Act of 1996, *supra* note 82; the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *supra* note 26; and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *supra* note 3.

¹⁹⁹ Public charge is one of nine grounds for inadmissibility. 8 U.S.C.A. § 1182(a)(4) (West Supp. 1997); see *supra* note 3 (enumerating the eight other grounds for exclusion). Grounds for inadmissibility will primarily affect self-petitioners, not cancellation of removal claimants. Indeed, to apply for cancellation of removal, one must be deportable. 8 U.S.C.A. § 1229b (West Supp. 1997).

²⁰⁰ See *infra* Part III.C.2.

²⁰¹ See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1521 (1995) (citation omitted).

²⁰² See Elizabeth Ruddick, *Public Charge and Battered Immigrant Women*, in MATERIALS ON IMMIGRATION RELIEF 1 (1995) (available from the National Immigration Project of the National Lawyers Guild).

²⁰³ GORDON & MAILMAN, *supra* note 168, § 61.05[4].

²⁰⁴ GORDON & MAILMAN, *supra* note 168, § 61.05[5]; *DeSousa v. Day*, 22 F.2d 472, 473 (2d Cir. 1927); *United States ex rel. Engel v. Tod*, 294 F. 820, 824 (2d

Public charge determination—which is prospective—threatens aliens who may require public benefits in the future.²⁰⁵ Consequently, battered immigrant women who have been stripped of financial independence are particularly vulnerable to public charge classification because of their potential need for benefits. This risk is heightened for undocumented women who successfully access the limited public benefits available to illegal aliens because current receipt of benefits creates a presumption of future need.²⁰⁶

Illustrating the harsh consequences of the public charge classification is the example of Elena,²⁰⁷ a native and citizen of the Dominican Republic seeking to gain immigrant status in the United States through VAWA's self-petition provision.²⁰⁸ Elena was nine months pregnant when she decided to leave her husband, a native of Puerto Rico, after a brutal assault.²⁰⁹ Although Elena is a physician by profession,²¹⁰ she neither speaks English nor has an American license to practice medicine.²¹¹ Without other relatives in the United States, Elena currently lives with another single mother.²¹² Elena's

Cir. 1923); *In re Day*, 27 F. 678, 681 (S.D.N.Y. 1886).

²⁰⁵ 8 U.S.C. § 1182(a)(4) (1994) (stating that any alien "likely at any time to become a public charge is inadmissible").

²⁰⁶ See Ruddick, *supra* note 202, at 2-3 (suggesting that the particular purpose of the public benefits received by the alien is a critical factor for determining immigration implications). Public assistance supplementing a recipient's standard of living, such as free school lunches, vocational training, rent subsidies and food stamps, are inconsequential. On the other hand, Aid to Families with Dependent Children ("AFDC"), Old Age Assistance, and Supplemental Security Income ("SSI") are relevant to public charge classifications. Ruddick, *supra* note 202, at 2-3. Ruddick notes, however, that "receipt of cash benefits . . . is not conclusive proof of likelihood of becoming a public charge." Ruddick, *supra* note 202, at 3. Ruddick argues that they are just part of the assessment of circumstances determining public charge classification. Ruddick, *supra* note 202, at 3. Ruddick cites *In re A—*, 19 I. & N. Dec. 867 (1989) (finding woman not to be a public charge because her minimal work history and receipt of public assistance were "temporary circumstances 'beyond the control of the alien'"), and *In re Perez*, 15 I. & N. Dec. 136 (1974) (determining that public charge classification does not apply to a 28 year-old mother of three receiving welfare because she was healthy and "in the prime of her life"), as two examples of welfare recipients granted legal status).

²⁰⁷ See Poulianos Interview, *supra* note 177. "Elena" is a pseudonym for a client of Marianthe Poulianos.

²⁰⁸ Poulianos Interview, *supra* note 177.

²⁰⁹ Poulianos Interview, *supra* note 177.

²¹⁰ Poulianos Interview, *supra* note 177.

²¹¹ Poulianos Interview, *supra* note 177.

²¹² Poulianos Interview, *supra* note 177.

attorneys fear that her ability to adjust status to lawful permanent resident might be jeopardized on public charge grounds because of her need for public assistance.²¹³

The BIA requires that public charge determinations encompass the "totality of the circumstances."²¹⁴ Immigration officials, when reviewing VAWA applications, should recognize that a battered woman's inability to work and achieve financial independence is directly related to power and control tools, such as forced isolation and harassment, used by abusers to subjugate their spouses.²¹⁵ Without personal financial resources, battered women may need public assistance to escape abusive relationships.²¹⁶ Yet, a battered spouse's dependence on public assistance is temporary, and most battered women become self-sufficient within two years.²¹⁷ Battered women who demonstrate the desire to become productive members of society should be excused from public charge classification.²¹⁸

2. New Economic Hurdles

Even if the need for public assistance does not result in public charge classification, the Personal Responsibility and Work Opportunity of 1996²¹⁹ (the "Welfare Act") heightens a battered immigrant women's economic reliance on her husband. By restricting public benefits available to aliens,²²⁰ the Welfare Act augments a battered woman's dependence on her

²¹³ Poulianos Interview, *supra* note 177. See *infra* Part III.C.2 for a fuller discussion of benefits available to legal and illegal aliens.

²¹⁴ *In re Perez*, 15 I. & N. Dec. 136, 137 (1974).

²¹⁵ See Dalton, *supra* note 7, at 334; see also Zorza, *supra* note 175, at 386 (remarking that "[m]ost battered women do not leave [abusive relationships] because they have no housing, child care, or money, and they justifiably fear retaliation against themselves and their children if they leave").

²¹⁶ See Ruddick, *supra* note 202, at 5 (recognizing that "a temporary recourse to public assistance is often the only alternative to returning to the relationship").

²¹⁷ Ruddick, *supra* note 202, at 6 (citation omitted). Demonstrating this point, Elena, who received employment authorization subsequent to filing her VAWA self-petition, now supports herself through her work as a counsellor at a community mental health center. Poulianos Interview, *supra* note 177; see text accompanying note 208.

²¹⁸ *In re Martinez-Lopez*, 10 I. & N. Dec. 409 (A.G. 1964).

²¹⁹ See *supra* note 26.

²²⁰ 8 U.S.C.A. §§ 1183a, 1601, 1611-13, 1621-22, 1631-32, 1641-45 (West Supp. 1997).

husband in order to meet basic needs. Congress, however, amended the Welfare Act through provisions in IIRIRA to protect battered women from the Welfare Act's harsher provisions.²²¹ Some battered immigrant women are now included among the list of "qualified aliens" still eligible for public benefits.²²²

In truth, all aliens—legal and illegal—continue to be eligible for some federal public benefits such as emergency medical assistance and disaster relief.²²³ Qualified aliens are eligible for additional assistance, which includes social service benefits intended to aid poor families with children, disabled individuals and domestic violence victims.²²⁴ However, the benefits for which qualified aliens are eligible represent a fraction of

²²¹ Minty Sui Chung, *Public Benefits, New Welfare Restrictions and Battered Immigrant Women and Children*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN ch. 9 (Deeana L. Jang et al. eds., 1997) (discussing provisions in the Welfare Act which implicate the lives of battered immigrant women). In addition to explaining new public benefits limitations, Chung also outlines affidavit of support and deeming rules under IIRIRA. *Id.* This source is available from the Family Violence and Prevention Fund.

²²² *Id.*; 8 U.S.C.A. § 1641(c) (West Supp. 1997). Battered immigrants become "qualified aliens" by demonstrating that: (A) they have been "battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household" and that there is a "substantial connection between the abuse and the need for assistance," *id.* § 1641(c)(1)(A); and (B) they have a pending or approved relative-petition, VAWA self-petition, or VAWA cancellation of removal application. *Id.* § 1641(c)(1)(B). Alien parents of battered children may also meet the "qualified alien" requirement so long as they did not actively participate in the abuse and there is a substantial connection between the abuse and the need for benefits. *Id.* § 1641(c)(2). Other "qualified aliens" include: lawful permanent residents, asylees, refugees, parolees, withholding of deportation beneficiaries, and conditional residents. *Id.* § 1641(b).

²²³ 8 U.S.C.A. § 1611(b) (West Supp. 1997). Benefits protected by this section include: emergency medical assistance; short-term, non-cash, in-kind emergency disaster relief; public health assistance for immunizations; community-level, in-kind programs, services and assistance specified by the Attorney General that are necessary for the protection of life and safety; and housing programs for aliens utilizing such programs on August 22, 1996.

²²⁴ *Id.* § 1612(b)(3). These benefits include temporary assistance for needy families ("TANF"), which, like Aid to Families with Dependent Children ("AFDC"), assists poor families with children; social service block grants, which provide programs for child care, disabled individuals and victims of domestic violence; and Medicaid.

Note that the Welfare Act imposes time limits and work requirements for TANF eligibility. Chung, *supra* note 221. States acting before July 1997 may waive these requirements under the Welfare Act's Family Violence Option for domestic violence victims. Chung, *supra* note 221.

those once available to all lawful permanent residents.²²⁵ Significantly, most qualified aliens can no longer receive supplemental security insurance or food stamps.²²⁶ Moreover, eligibility does not guarantee access to benefits. The Welfare Act grants states the discretion to impose stringent eligibility requirements that may preclude qualified aliens from receiving the benefits.²²⁷

While the Welfare Act limits alien access to public benefits, the exceptions for battered immigrant women suggest a positive message. By creating exceptions, Congress overtly acknowledged the importance of benefits to battered women. It is curious and disappointing that Congress, having recognized this need, stopped short of providing battered immigrant women with the full panoply of benefits available to other protected classes of immigrants.²²⁸ Why not include battered immigrant women among these groups?

Furthermore, the recognition of abuse-factors inherent in the Welfare Act exceptions have meaning for public charge evaluations. Adjudicators, who might otherwise disqualify a VAWA applicant on public charge grounds, should acknowledge, as Congress has in the Welfare Act, that the financial concerns of battered immigrant women are unique. The very

²²⁵ Pre-Welfare Act benefits available to many lawful permanent residents include AFDC, Medicaid and food stamps. Chung, *supra* note 221. Prior to the Welfare Act's passage, states could not discriminate against lawful permanent residents in granting welfare benefits. *Graham v. Richardson*, 403 U.S. 365 (1971) (articulating substantive due process rights of lawful permanent residents).

²²⁶ 8 U.S.C.A. § 1612(a)(3) (West Supp. 1997). Three limited categories of aliens are excused from this rule: (1) refugees, asylees, and withholding of deportation beneficiaries; (2) permanent residents who have worked 40 qualifying quarters in the United States; and (3) alien veterans, aliens on active duty in the military, and the spouses and unmarried children of these individuals. *Id.* § 1612(a)(2). Aliens in categories one and three, who gain status after August 22, 1996, are also not subject to the five-year requirement for federal means-tested programs. *Id.* § 1613(b).

²²⁷ *Id.* § 1612(b). Furthermore, qualified aliens who gain status after August 22, 1996, are ineligible for federal means-tested programs for five years. *Id.* § 1613(a). Exempt from the five-year restriction are the federal programs available to all aliens, which are listed above, and programs providing school lunches, child nutrition, foster care and adoption assistance, elementary and secondary school education, head start, and job training. *Id.* § 1613(c)(2).

²²⁸ *Id.* § 1612(a)(2); see *supra* note 226.

benefits that Congress admits are needed by abused aliens should not be public charge classification barriers for VAWA applicants.

While public benefits may help a battered immigrant woman leave an abusive relationship, employment authorization is an essential tool for gaining economic independence. The March 26, 1996 interim rule²²⁹ outlines circumstances under which VAWA self-petitioners can acquire employment authorization.²³⁰ The rule points out that self-petitioners immediately eligible for adjustment of status may qualify to work.²³¹ Although this provision only encompasses immediate relatives of U.S. citizens, the rule suggests that self-petitioning spouses of lawful permanent residents may also obtain employment authorization by requesting voluntary departure or being placed in deferred action status.²³² These avenues are available to aliens who demonstrate compelling circumstances and their need to work.²³³ Under IIRIRA, though, aliens can no longer acquire work authorization through voluntary departure.²³⁴ Therefore, their only recourse is deferred action, which is granted at the discretion of the INS.²³⁵

A battered woman's poverty, nevertheless, remains a double hurdle obstructing her way to independence. First, if the government forecasts that a self-petitioner will become a public charge, she will be unable to adjust her status to lawful permanent resident. Second, if a battered immigrant woman's VAWA application succeeds, she may not have the financial resources as a lawful resident to live a life economically inde-

²²⁹ 61 Fed. Reg. 13061 (1996).

²³⁰ *Id.* at 13070-71. While not all VAWA self-petitioners are eligible for employment authorization, cancellation of removal applicants may receive this relief. 8 C.F.R. § 274a.12(10) (1997).

²³¹ 61 Fed. Reg. at 13071 (citing 8 C.F.R. § 274a.12(c)(9)).

²³² *Id.* (citing 8 C.F.R. § 274a.12(c)(12), (14), respectively).

²³³ 8 C.F.R. § 274a.12(c)(12), (14).

²³⁴ Gail Pendleton, *Immigration Relief for Women and Children Suffering Abuse*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN ch. 7 (Deeana L. Jang et al. eds., 1997) (stating that the "1996 immigration law eliminates voluntary departure as an option" for gaining employment authorization). Pendleton adds that voluntary departure relief, under IIRIRA, expires after four months. *Id.* Aliens who stay in the United States beyond this period may be barred from gaining lawful permanent residence for ten years and face \$1,000 to \$5,000 fines. *Id.*

²³⁵ *Id.*

pendent from her abuser. Consequently, the public charge ground for inadmissibility, along with the welfare restrictions, perpetuate a batterer's domination through economic control.

CONCLUSION

The Violence Against Women Act immigration provisions combined with INS regulations uproot the coverture framework in United States immigration policy. The VAWA provisions make enormous strides toward removing a key tool—the relative-petition—used by batterers to shackle immigrant women to abusive relationships. INS regulations further VAWA's goals by stipulating that any credible evidence related to abuse will be considered when VAWA claims are evaluated by immigration adjudicators.

Indeed, VAWA's implementation rests in the hands of adjudicators. Even the most progressive laws and regulations cannot ensure that circumstances of abuse will be considered when VAWA immigration claims are reviewed. Educating adjudicators about the dynamics of abuse and training them to evaluate VAWA claims in context of domestic violence is essential to ensuring the VAWA's success.

Moreover, while yesterday's Congress, through the passage of the VAWA, extended a hand to battered women escaping intimate violence, today's Congress, through welfare reform, locks them in abusive relationships. The VAWA does not remedy the financial hurdles battered immigrant women face when fleeing abuse. The public charge ground for inadmissibility in concert with the lack of public benefits promotes a system which incarcerates battered women in abusive relationships because of their poverty.

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