DOMESTIC ABUSE AND ALIEN WOMEN IN IMMIGRATION LAW: RESPONSE AND RESPONSIBILITY

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INTRODUCTION

Domestic abuse is the label used to describe a form of assault that includes psychological abuse, physical battery, kidnapping, rape, threats of bodily harm, shootings, and murder. The battery of women by their husbands and boyfriends is not an isolated problem; it is present in every socioeconomic, cultural, and racial group.[1]

Domestic abuse occurs with alarming frequency and severity in the United States. Every 15 seconds a woman is assaulted by a current or former domestic partner;[2] every year 1500 women are killed by domestic violence,[3] representing roughly one third of all women murdered each year;[4] and hospital studies indicate that 30 percent of emergency room visits are the result of domestic assaults against women.[5]

Widespread awareness of the prevalence and lethal nature of domestic violence has spurred legislation designed to protect women and punish their abusers. This note evaluates various legislative responses to domestic abuse, including recent statutory changes to the Immigration and Nationality Act (INA).[6] These laws recognize the unique hardships facing alien women who are the victims of domestic violence.[7] This note

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1 *See* Barry Brown, *Canadian Expert Testifies on Battered Woman Syndrome Before Bernardo Jury*, BUFFALO NEWS, Aug. 4, 1995, at A4.

2 *See* RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE (1988).

3 *See* Robert Gavin and Laurel Champion, *Girlfriend Beaten to Death, Police Say Live-in Boyfriend Charged with Murder*, SYRACUSE HERALD-JOURNAL, Aug. 3, 1995, at Metro 1.

4 *See* Janet Calvo, *The Violence Against Women Act: An Opportunity for the Justice Department to Confront Domestic Violence*, 72 INTERPRETER RELEASES 485 (Apr. 10, 1995).

5 *See* Jennifer Gonnerman, *Miriam's Story*, THE VILLAGE VOICE, Nov. 21, 1995, at 60.

6 8 U.S.C. § 1101 *et seq.* (1994). For example, *see* INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (1994 & Supp. IV 1998) (allowing alien women married to U.S. citizens to self-petition for immigration status); INA § 204(a)(B)(ii), 8 U.S.C. § 1154(a)(B)(ii) (1994 & Supp. IV 1998) (allowing alien women married to LPRs to self-petition for immigration status). *See* discussion *infra* Part II for additional examples.

7 The language used in the INA concerning domestic violence is gender neutral. However, because most victims of domestic abuse are women, this note refers to domestic abusers as male and the victims of domestic violence as female. *See* Liza N. Burby, *Battered Men*, NEWSDAY, Aug. 22, 2000, at B13 (citing U.S. Department of Justice report that 90 percent of domestic abuse reports involve a female victim).

will also discuss the special treatment given to battered alien women by federal and state benefits programs, giving particular attention to their conditional availability. While these federal and state laws indicate an awareness of the problem of domestic abuse and the desire to address it, they inadequately address the needs of abused alien women. Changes are necessary to improve the effectiveness of domestic abuse legislation and to ensure that women are able to access the legislative protections.

Part I of this article presents an overview of recent legislative responses to domestic violence in general, and of laws designed to reach alien women in particular. A brief history of U.S. immigration law and policy lays the foundation for evaluating current immigration procedures. Part II examines the requirements necessary to qualify for preferential treatment as an abused spouse under the INA. This part argues that the qualification standards work to the detriment of alien women. Part III acknowledges the tension inherent in Congress' attempts to protect women in immigration proceedings while effectively enforcing immigration policies, but argues that Congress should place a higher value upon protecting the interests and physical integrity of battered women than on policing the immigration system for hypothetical abuses. Finally, Part IV concludes by calling for legislative action that will enable existing laws to more effectively protect the lives and safety of battered women.

I. LEGISLATIVE RESPONSES TO DOMESTIC ABUSE

A. SCOPE OF RESPONSES

The legal responses to domestic violence come in many forms and from all levels of government. The remedies in New York range from a "mandatory arrest" policy that requires police to make an arrest whenever there is evidence of a crime to granting clemency to battered women found guilty of killing their abusers.[8] New York's Family Protection and Domestic Violence Intervention Act of 1994 created a statewide registry of protection orders to provide information about pending and prior orders of protection.[9]

Legislative activity relating to domestic abuse has not been limited to individual states. In 1994, Congress passed the Violence Against Women Act (VAWA), which addressed the problem on a national scale.[10] VAWA authorizes a range of responses to domestic violence. It provides

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[8] *See* Jennifer Gonnerman, *Pataki's Chance to Help Domestic Victims*, NEWSDAY, Dec. 19, 1996, at A51 (noting that the governors of twenty-three states have granted clemency to women in prison for murdering their abusive spouses).

[9] Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, 1994 N.Y. Laws 786.

[10] Violence Against Women Act (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (1994).

funds for battered women's shelters,[11] encourages states to implement improved programs for tracking domestic violence,[12] and establishes a nationwide hotline for domestic abuse.[13] Sections of the VAWA are also codified as part of the INA, giving women navigating the immigration and nationalization process additional protection. However, the immigration and nationalization benefits obtained through the VAWA are undercut by conflicting immigration policies, as discussed below.

B. IMMIGRATION AND MARITAL STATUS: POLICY AND PROCEDURE

The preference system used to allocate immigration visas indicates that family unity is both an underlying value and a goal of U.S. immigration policy. The INA divides potential immigrants into four categories, each with its own qualifications and numerical caps.[14] Family-sponsored immigration has the highest allocation of visas, accounting for about half of all allocated immigration spots.[15]

The family-sponsored category is itself broken down into four categories with different yearly numerical caps.[16] The largest category is comprised of spouses and unmarried sons and daughters of lawful permanent residents (LPRs).[17] Up to 114,200 visas may be allocated to persons in this category each year.[18] Both married and unmarried sons and daughters of citizens are limited to 23,400 visa allocations per year.[19] Brothers and sisters of citizens are limited to 65,000 per year.[20]

A qualifying marriage to a citizen, on the other hand, allows an alien to enter the country on a visa as an "immediate relative," an immigration category that has no annual numerical cap and a relatively short processing period.[21] A qualifying marriage to an LPR creates this same

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11 42 U.S.C. §§ 10,402(f), 10,409 (1994).

12 42 U.S.C. § 3796hh(b) (1994).

13 42 U.S.C. § 10,416 (1994).

14 The four categories of sponsorship of aliens are: family-sponsored immigrants, INA § 203(a), 8 U.S.C. § 1153(a); employment-based immigrants, INA § 203(b), 8 U.S.C. § 1153(b); diversity immigrants, INA § 203(c), 8 U.S.C. § 1153(c); and refugees, INA § 207, 8 U.S.C. § 1157 (1994 & Supp. IV 1998).

15 INA § 203(a)(1)-(4), 8 U.S.C. § 1153(a)(1)-(4) (1994 & Supp. IV 1998).

16 The four family-sponsored categories are: unmarried sons and daughters of citizens, INA § 203(a)(1), 8 U.S.C. § 1153(a)(1); spouses and unmarried sons and daughters of permanent resident aliens, INA § 203(a)(2), 8 U.S.C. § 1153(a)(2); married sons and daughters of citizens, INA § 203(a)(3), 8 U.S.C. § 1153(a)(3); and brothers and sisters of citizens. INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (1994 & Supp. IV 1998).

17 INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1994 & Supp. IV 1998).

18 *Id.* Section 203(a)(2) states that the number *may* be more, if the worldwide level exceeds 226,000 (emphasis added). *Id.*

19 INA § 203(a), 8 U.S.C. § 1153(a) (1994 & Supp. IV 1998).

20 INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (1994 & Supp. IV 1998).

21 INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (1994 & Supp. IV 1998). This processing period is commonly referred to as a waiting period.

opportunity for immigration, but is subject to numerical caps and therefore to longer waiting lists.[22]

The immigration benefits of marriage to a citizen or LPR are obvious. The demand for visas and the relative ease of entering into legal marriages combine to raise fears of potential abuses of the system. Congress responded to these fears by taking steps to preclude the use of marriage as a fraudulent means of attaining legal residency. Relying mostly on anecdotal evidence of widespread marital fraud,[23] Congress passed the Immigration Marriage Fraud Amendments (IMFA) of 1986,[24] which are designed to weed out marriages entered into for the purpose of obtaining citizenship.[25] A citizen or LPR may still petition for a visa on behalf of an immigrant spouse, but the IMFA impose additional requirements and conditions.

Some of these requirements can be difficult to meet. In a departure from prior procedure, the IMFA impose a two-year residency requirement for alien spouses of citizens and LPRs before they can obtain permanent resident status.[26] This requirement applies only to marriages of less than two years.[27] The two-year residency period, however, does not toll from the date the marriage was entered into, but from the date the alien obtained lawful permanent residence.[28] As a result of this tolling provision, in many situations the time spent married to a citizen or LPR prior to obtaining a visa does not count towards fulfillment of the two-year conditional status period.[29]

Once conditional resident status is obtained through marriage and the subsequent petitioning process, it cannot be adjusted to resident status other than through satisfaction of the two-year marriage requirement.[30] As originally enacted in the IMFA, the only way to adjust out of conditional status was to maintain the marriage until the conditional period ended, subject to limited hardship exceptions that did not explicitly

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22 INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1994 & Supp. IV 1998).

23 Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 670 (1998) (Congressional concern focused primarily on male immigrants exploiting the system to gain entry for themselves, when in fact the majority of family-sponsored immigrants are women.).

24 Immigration Marriage Fraud Amendments (IMFA) of 1986, Pub. L. No. 99-639, 100 Stat. 3537.

25 *See* Ryan Lilienthal, *Old Hurdles Hamper New Options for Battered Immigrant Women*, 62 BROOK. L. REV. 1595, 1607 (1996).

26 INA § 216(a), (g)(1), 8 U.S.C. § 1186a(a), (g)(1) (1994 & Supp. IV 1998).

27 INA § 216 (g)(1), 8 U.S.C. § 1186(g)(1) (1994 & Supp. IV 1998).

28 INA § 216(a), (g)(1), 8 U.S.C. § 1186a(a), (g)(1) (1994 & Supp. IV 1998).

29 This "conditional" status can be terminated for the reasons described in INA § 216(b)-(c), 8 U.S.C. § 1186a(b)-(c) (1994 & Supp. IV 1998).

30 INA § 245(d), 8 U.S.C. § 1255(d) (1986).

address domestic abuse.[31] Even at the end of the two-year period, the conditional status was not automatically changed. Ninety days before the end of the conditional period *both* the sponsoring spouse and the alien spouse were required to file a joint petition for removal of conditional status.[32] The couple could also be required to attend an interview together.[33]

These requirements posed problems for domestic abuse victims. The IMFA increased an alien woman's dependency on her citizen or LPR husband for immigration status. Not only was she dependent on him for filing the joint petition, she was also precluded from obtaining resident status if she left her abusive marriage before the two year period was over. The IMFA requirements thus potentially furthered the victimization of battered women at the hands of their abusers.[34]

In 1990, Congress responded to this concern by amending the IMFA, enabling abused alien women to file independently for a change in immigration status at the end of the conditional period.[35] But Congress did not change the initial petition procedure – which required the LPR or citizen spouse to participate in the initial petition – so the citizen or LPR spouse was still a necessary part of the process. Thus, under the 1990 changes, relief from the requirement of spousal joinder for petitioning was available only to those battered women who had already obtained conditional residency through the participation of their abusive spouses.

The 1994 VAWA addresses this problem by allowing abused alien women to self-petition throughout the entire process.[36] An abused alien can initiate the petitioning process without her spouse's participation or consent.[37] The removal of spouses from the petitioning process was in-

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31 The exceptions included an "extreme hardship" waiver, which required a finding that deportation would cause extreme hardship to the alien woman or her children, and a "good faith/good cause" waiver, which required that the marriage be judicially terminated and presented various evidentiary and other problems for domestic violence victims. *See* Sandra Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 MD. J. CONTEMP. LEGAL ISSUES 129, 136-37 (1995).

32 INA § 216(c)(1), (d), 8 U.S.C. § 1186a(c)(1), (d) (1986).

33 INA § 216(c)(3)(A)(ii), 8 U.S.C. § 1186a(c)(3)(A)(ii) (1986).

34 *See* Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Women*, 6 B.U. PUB. INT. L.J. 589, 596 (1997).

35 The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C) (1994 & Supp. IV 1998).

36 INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (1994 & Supp. IV 1998) (allowing alien women married to U.S. citizens to self-petition for immigration status); INA § 204(a)(B)(ii), 8 U.S.C. § 1154(a)(B)(ii) (1994 & Supp. IV 1998) (allowing alien women married to LPRs to self-petition for immigration status).

37 *Id.*

tended to prevent abusive husbands from using the immigration procedures to control and intimidate their spouses.[38]

In light of the dependency that abusive husbands foster in their victims and the power disparity that the old petitioning procedures reinforced, the right of an alien woman to self-petition is a significant accomplishment in securing rights for battered immigrant women.[39] As currently codified in the INA, an alien woman may self-petition if she can demonstrate that: (i) she entered into the marriage in good faith; (ii) she or a child of hers has been subjected to extreme battery or cruelty at the hands of the citizen or LPR spouse; and (iii) she or a child of hers would face extreme hardship if she were removed.[40]

A second remedy is available to abused alien women who do not qualify under the self-petitioning provision: the cancellation of removal proceedings.[41] Cancellation of removal is also available to a battered alien whose petition to adjust from conditional status has been denied.[42] Under VAWA, an alien who is inadmissible or deportable may have removal proceedings against her cancelled and her status adjusted upon a showing that she is a battered spouse.[43] This offers battered alien women another chance to obtain legal status.

The cancellation of removal proceedings is not, however, guaranteed upon a showing of abuse. It is a discretionary remedy. Under Section 240A(b)(2) of the INA, the Attorney General *may* cancel removal proceedings if the alien demonstrates that: (1) she has been battered or subjected to extreme cruelty in the United States by a spouse who is a U.S. citizen or lawful permanent resident; and (2) her removal would result in extreme hardship.[44] In addition to the discretionary language in the statute, there is an additional limitation on the availability of this form of relief. The statute limits the number of removal proceedings that the Attorney General may cancel each year.[45]

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38 *See* Lilienthal, *supra* note 25, at 1611.

39 *Id.* at 1610 (stating that "the VAWA is a leap forward for alien spouses, who, under this law, can individually pursue permanent resident status").

40 INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii); INA §204(a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii) (1994 & Supp. IV 1998).

41 INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (1994 & Supp. IV 1998).

42 INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1) (1994 & Supp. IV 1998).

43 INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (1994 & Supp. IV 1998).

44 *See id.*

45 INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1) (1994 & Supp. IV 1998) (the current limit is 4,000 cancellations in any given year).

C. CONTINUED AVAILABILITY OF WELFARE FUNDS AND LEGAL ASSISTANCE

Two important areas of law outside of the immigration process that directly affect aliens have made accommodations for battered alien women: welfare and legal assistance.

Although domestic violence is not limited to any particular class, it does affect a substantial number of poor women. Between 50 and 80 percent of women who receive welfare benefits are past or current victims of abuse.[46] Given such statistics, it is important to provide women in abusive relationships with the safety net of public assistance.

Alien women are particularly vulnerable to the denial of benefits because they face significant obstacles to self-reliance. They often lack the language or other skills necessary to obtain meaningful employment.[47] Battered women, in particular, are often ill equipped emotionally or physically to maintain steady employment.[48] The loss of benefits may force women to remain in or return to threatening situations because they cannot afford any alternatives. Welfare funding can therefore help abused women make the transition out of an abusive situation into a productive and safe livelihood.[49]

Aware of this need, Congress made allowances for battered alien women in welfare law. The Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act) of 1996[50] sharply decreases most aliens' access to public benefits programs by directing states to limit the amount and types of benefits available to aliens.[51] It initially contained no provisions for battered alien women, but Congress soon remedied this through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.[52] IIRIRA allows women who have been "subjected to extreme cruelty or battery" to be classified as "qualified aliens,"[53] which in turn allows them to remain eligible for certain federal benefits.[54] In this way, IIRIRA ensures that certain wel-

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46 *See* Jennifer M. Mason, *Buying Time For Survivors of Domestic Violence: A Proposal For Implementing An Exception to Welfare Time Limits*, 73 N.Y.U. L. REV. 621, 642-43 (1998).

47 *See id.* at 640-42.

48 *See id.*

49 *See id.* at 643-44.

50 Pub. L. No. 104-193, 110 Stat. 2105 (1996).

51 *See* Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201, 202 (1996).

52 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

53 INA § 431(b), 8 U.S.C. § 1641(b) (1994 & Supp. IV 1998).

54 Other "qualified aliens" who are able to maintain their benefits include refugees and aliens granted asylum; aliens admitted for lawful permanent residence under the INA; and aliens who qualify for withholding of deportation under INA §243(h). *Id.*

fare funds will be available to battered alien women despite the recent restrictions of the Welfare Reform Act.[55]

A second avenue of relief available to battered alien women outside of the immigration process is legal assistance. Congress allows federal money to be used to assist undocumented aliens who meet specified criteria.[56] This enables abused spouses to obtain legal assistance they otherwise cannot afford, including representation for family law and immigration law matters.

Legal representation is crucial for abused alien women.[57] The immigration process is complicated and confusing, and representation can be expensive. For example, discretionary relief is sometimes available to aliens faced with deportation, but many aliens lack the knowledge or resources to seek such relief. Legal assistance is therefore invaluable in helping an abused alien, undocumented or otherwise, to identify the options available to her and to determine which of these options is the most promising.[58] Adequate representation is also an extremely valuable tool for guidance in proving and documenting domestic abuse.

The continuing availability of funding indicates Congress' willingness to protect the interests of all undocumented battered alien women despite fiscal concerns. Part II examines the availability and impact of these laws.

II. INTENDED BENEFITS AND UNINTENDED CONSEQUENCES OF DOMESTIC ABUSE LEGISLATION

A. SOCIAL CONTEXT

Legislative responses to domestic violence take it out of a private, family context and into a public, legal realm where the abusive behavior is recognized as criminal.[59] The benefits of this approach include increasing society's awareness of the problem and giving women greater protection from and significant criminal redress against their abusers.[60]

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55 *See* Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 304 (1997).

56 The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-59, 1321-54 (this is a departure from the prohibition against using federal legal assistance funds to assist undocumented aliens).

57 For example, under the VAWA a woman may self-petition, but she must be married at the time of filing her self-petition. If the abusive spouse is threatening to institute divorce proceedings to preclude her from self-petitioning, legal assistance is an invaluable tool for delaying the divorce proceedings until the petition is filed. *See* Lauren Gilbert, *Family Violence and the Immigration and Nationality Act,* IMMIGR. BRIEFINGS No. 98-3, at 5 (1998).

58 *See id.*

59 *See* Kelly, *supra* note 23, at 667.

60 *See* Kelly, *supra* note 55, at 306.

However, to understand the adequacy and potential shortcomings of the legal system's response to domestic violence, it is necessary to analyze the private, social context of domestic abuse. It is within the private realm that the utility of the law will be played out and its practical applicability and unanticipated side effects realized. Therefore, the implementation of domestic abuse legislation can be evaluated most effectively by examining the interaction between the public and the private spheres.

The first step in this analysis is to explore the social context in which the domestic abuse of alien women takes place. The danger and severity of domestic violence is particularly acute for alien women of uncertain immigration status, for two reasons. First, living outside of the dominant culture, alien women are often unaware of their legal rights as individuals.[61] Second, some immigrant women come from cultures where domestic abuse is tolerated or condoned; such women are unaware that the treatment they are suffering is illegal.[62] Language barriers often bar alien women from access to social programs and police support, increasing their isolation and compounding the problems they face.[63] As can be the case with native-born American women, strong cultural value may be placed on keeping family problems private, which prevents women from revealing the abuse.[64] These women fall victim to the "quadruple whammy" of marginalization resulting from their immigration status, gender, ethnicity, and abuse.[65]

Case histories of abuse victims provide insight into the situation of abused women on a personal level.[66] This insight can illustrate the negative side of laws designed to protect battered women by explaining how a seemingly benign tool of reform can become a double-edged sword.

The next step in the analysis is to evaluate the effectiveness of legislation designed to help these marginalized women. The legislation described in Part I illustrate Congress' commitment to providing assistance for abuse victims. The discussion that follows highlights the unforeseen pitfalls of these laws. Included are specific examples of the laws as applied by immigration lawyers who regularly deal with domestic abuse clients. These stories, coupled with an understanding of their context,

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61 *See generally* Susan Girardo Roy, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263, 271 (1995).

62 *See id.* at 270.

63 *See id* at 271.

64 *See id.* at 269.

65 Kelly, *supra* note 55, at 312 (citing Kevin Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 U.C.L.A L. REV. 1509, 1515 (1995)).

66 *See generally* Kelly, *supra* note 23.

will help to "encourage decision makers to make a commitment to the meaningful implementation of the laws."[67]

B. DEPORTATION FOR DOMESTIC ABUSE – DESERVED PUNISHMENT OR DISINCENTIVE TO REPORTING?

Because domestic abuse is a deportable offense,[68] alien women are often afraid that contacting the police or courts will result in the removal of their abusers or of themselves.[69] When asked why they did not report their abuse, 64 percent of Latina and 57 percent of Filipina abuse victims said the primary reason was fear of deportation.[70]

The punishment of deportation for abusive alien husbands is intended to punish abusers, prevent further abuse, and give voice to society's outrage.[71] Unfortunately, this provision in the INA sometimes operates to the detriment of those it is intended to help. The sanction of deportation makes the decision to speak out and get police help in a domestic abuse situation an extremely difficult one. The woman wants the abuse to stop, but feels guilt over triggering the "irreversible punishment" of deportation.[72]

It is easier to understand this situation if one looks at domestic abuse on a personal level. Personal testimony and individual accounts demonstrate that battered women often want their husbands to get better so they can have a normal life together.[73] They know there is no possibility of this happening if their husbands are deported.[74] As a result, these battered women are reluctant to contact the police because to do so would be to abandon all hope that things could improve.[75]

Requiring an abused woman to shoulder the responsibility for triggering deportation proceedings can prove too much of a social burden. There are strong cultural pressures in many immigrant communities not to report a member of the community for possible deportation.[76] Abused women have stated that they do not want to be ostracized for turning in an abusive husband at a point where they need their community's sup-

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67 Kelly, *supra* note 23, at 667.

68 INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (1994 & Supp. IV 1998).

69 *See* Michell J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1421 (1993).

70 *See id.*

71 *See* Kelly, *supra* note 55, at 303-04.

72 *See id.* at 309. An alien who has been ordered removed becomes inadmissible for a period of between 5 and 20 years after such removal, depending on the circumstances of removal; an alien convicted of an aggravated felony is permanently inadmissible after removal. INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (1994 & Supp. IV 1998).

73 *See* Kelly, *supra* note 55, at 308-09.

74 *See id.*

75 *See id.* at 310-11.

76 *See id.* at 311-12.

port.[77] Ignorance of the impact of immigrant culture on the behavior of abused women hinders the formulation of laws that could help liberate women from these cultural pressures.

That some women will endure abuse to avoid deporting a spouse and facing the social consequences of such an action is troubling, but in many cases, true. One commentator argues that moving abuse out of the private, family law realm and into the criminal court system operates to the detriment of abused women.[78] According to this critic, the punishment of deportation fails to reflect full consideration of the victim's interests.[79] Such punishment ignores the economic impact of deportation on the family unit and the permanency and irreversible nature of separation, as well as the extremely counterproductive and dangerous reality that women might avoid getting help altogether.[80]

Deportation for violent crimes makes good politics. The idea of preventing criminals from obtaining citizenship appeals to many people and has long been a staple of U.S. immigration policy.[81] But in the realm of domestic abuse, such a response is ill advised. Stiff criminal sentences for abuse can prove effective at reducing domestic violence only if they are not so harsh that women are reluctant to file criminal charges against their abusers in the first place.

In addition, deportation as a punishment for domestic abuse undermines the right to self-petition, as the right to self-petition is available only to women with citizen or LPR husbands. Once convicted of a deportable offense, a spouse loses his LPR status. Therefore, a woman who wants to self-petition will lose the ability to do so if she reports her abusive husband for a deportable offense and he is found guilty.[82] In addition, if the abusive spouse loses his status as an LPR, a woman whose status is dependent upon her husband's may herself be at risk of deportation. An alien woman in this situation may be able to cancel subsequent removal proceedings, but the requirements for cancellation of removal are slightly different from the requirements of self-petitioning and she may qualify only for the latter.[83]

If both spouses are deported as a result of the husband's arrest and conviction for a domestic violence crime, the abused woman's future

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77 *See id.* at 310.

78 *See id.* at 307-08.

79 *See id.* at 307.

80 *Id.*

81 INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (1994 & Supp. IV 1998) (providing that any alien who is convicted of or admits to committing certain specified crimes is inadmissible).

82 An alien women may self-petition only if her spouse is a citizen or LPR; LPR status is lost upon deportation. INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii)(1998) (1994 & Supp. IV 1998); INA § 204(a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii) (1994 & Supp. IV 1998).

83 *See* Table I, *infra* p. 715.

could be very bleak. In the worst case scenario, she could find herself deported along with her husband to a country that does not provide protection or assistance to victims of domestic abuse.

Furthermore, impending or threatened deportation may aggravate a violent abuser. The most severe domestic violence often occurs after a woman has reported her husband for domestic abuse or has taken steps to leave him.[84] This phenomenon is known as "separation assault."[85] A rational fear of battered alien women would be that if their husbands beat them terribly after a night in jail, their husbands might beat or kill them for their role in initiating deportation proceedings.

In light of these facts, an examination of deportation for spousal abuse should begin not from the narrow viewpoint of punishing the abuser, who deserves punishment, but from the broader viewpoint of the impact on the victim. A possible resolution of the tension between just punishment and protection of the victim would be to strengthen criminal penalties for domestic abuse, but not go so far as to make it a deportable offense. Stiffer penalties for domestic abuse would discourage abusive behavior without asking the battered wife to feel responsible for deportation or face dangerous and possibly fatal consequences for reporting abuse. If the implications of deportation are severe enough to discourage the reporting of domestic abuse, then its intended benefit is undermined and the punishment must be changed.

If spousal abuse does remain a deportable offense, however, deportation of an abusive husband should not disqualify the battered alien woman from self-petitioning for a visa or otherwise adversely affect her immigration status. If the deportation of the LPR spouse is a direct result of domestic abuse, a narrow exception should be drawn to allow the petitioning spouse to qualify for a visa despite the absence of a resident spouse.

C. SELF-PETITIONING: SUBSTANTIVE AND PROCEDURAL SHORTCOMINGS

1. *Good Faith Requirement*

To qualify for any immigration benefit by virtue of marriage to a citizen or LPR, an alien woman must prove that the marriage was entered into in good faith.[86] This good faith requirement covers not only the current marriage under INS scrutiny but both spouses' prior marriages as well.[87] A finding that an abusive spouse's prior marriage was fraudulent

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[84] *See* Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991).

[85] *Id.*

[86] INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (1994 & Supp. IV 1998).

[87] INA § 204(a)(2), 8 U.S.C. § 1154(a)(2) (1994 & Supp. IV 1998).

may result in denial of the alien woman's petition and lead to subsequent deportation.[88] Thus, an abusive spouse can threaten to claim not just that the marriage currently under scrutiny is fraudulent, but also that any prior marriage was fraudulent, defeating the abused woman's claim. This threat can discourage abused women from filing valid petitions.

Congress addressed these concerns in the IIRIRA.[89] Under Section 384, the INS may not make a VAWA petition decision based solely on the information supplied by an abusive spouse.[90] This is a reasonable compromise, but Congress could go further to protect the interests of battered women. In cases of domestic abuse, the INS should be limited to considering evidence only from the marriage currently under scrutiny. A prior marriage entered into for fraudulent purposes should have no bearing on a current immigration proceeding involving domestic abuse.

If an individual enters into a marriage for the purpose of obtaining a green card, he or she becomes part of a bad faith marriage.[91] Many INS examiners, in administering the IMFA, have attempted to establish a pattern of behavior indicating a motive to obtain immigration benefits.[92] For example, threats by an abusive spouse to deport a battered spouse followed by a reconciliation could indicate to the INS that that marriage was undertaken in bad faith.[93]

The INS' treatment of self-petitions must incorporate the psychology of battered women and their reasons for remaining in abusive relationships. It is difficult for most people to understand why women remain in abusive situations. When the husband has citizenship or LPR status and the wife does not, the seemingly obvious rationale is that the woman wants to obtain a green card. But the real reasons are more complex. The reasons women give for remaining in abusive relationships include, but are not limited to, the hope that things will get better and cultural, religious and social pressures against divorce.[94]

Evidence of domestic abuse should satisfy the good faith marriage requirement. The psychology of abusive relationships can have much more to do with why women remain in a dangerous situation than their desire for a green card. The uncertain risk of fraud, combined with the complicated nature of relationships marked by violence and battery, makes the good faith requirement unworkable in a domestic abuse situation.

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88 *See* Gilbert, *supra* note 57, at 6.

89 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

90 IIRIRA § 384, 8 U.S.C. § 1367 (1994).

91 *See* Gilbert, *supra* note 57, at 6.

92 *See id.*

93 *See id.*

94 *See* Roy, *supra* note 61, at 266-69.

2. *Evidence of Spousal Abuse*

The alien woman must demonstrate abuse to qualify for self-petitioning and cancellation of removal proceedings.[95] As currently written, the INS considers "any credible evidence relevant to the application."[96] Credible evidence includes affidavits, shelter records, and hospital records.[97] Despite the seeming leniency of the standard, these requirements impose a difficult burden on battered alien women.

Any evidentiary showing presents difficulties because of one important aspect of domestic abuse: it is often kept hidden. The fear of deportation and lack of access to social services contribute to low levels of reporting.[98] Requiring a record of abuse, therefore, presents an obvious problem. One study indicates that abused women first call the police, on average, after the thirty-fifth attack.[99] Abused women often keep their problems to themselves, so much so that even people close to them are unaware of the abuse.[100] This makes it difficult to find informed witnesses to participate in INS proceedings.

In the absence of concrete evidence, a finding of domestic abuse depends upon a judge's understanding of the nature of domestic abuse. Reliance on such understanding does not provide enough protection for battered women. Rather, credible testimony from the victim herself should be enough to qualify as evidence of abuse. Although personal testimony usually satisfies general evidentiary requirements, its validity as evidence in immigration proceedings should be codified in the INA so that an errant judge does not require information that is simply unavailable to the battered woman.

3. *INS Proceedings and "Good Moral Character"*

A woman in removal or self-petitioning proceedings must demonstrate "good moral character" to qualify for relief.[101] A woman must demonstrate such "good moral character" for three consecutive years prior to seeking cancellation of removal proceedings.[102] Hence, prior criminal acts may disqualify a woman from obtaining cancellation of removal proceedings.[103] This three-year duration should be reduced for victims of domestic abuse to avoid the danger that a battered woman will remain in a dangerous marriage to wait out the required period.

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95 INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C) (1994 & Supp. IV 1998).
96 INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4) (1994 & Supp. IV 1998).
97 *See* Gilbert, *supra* note 57, at 7.
98 *See* discussion *supra* Part II.B.
99 *See* Brown, *supra* note 1, at A4.
100 *See* Gonnerman, *supra* note 5, at 60.
101 INA § 240A(b)(2)(C), 8 U.S.C. § 1229b(b)(2)(C) (1994 & Supp. IV 1998).
102 INA § 240A(b)(2)(B)-(C), 8 U.S.C. § 1229b(b)(2)(B)-(C) (1994 & Supp. IV 1998).
103 INA § 240A(b)(2)(D), 8 U.S.C. §1229b(b)(2)(D) (1994 & Supp. IV 1998).

In order to deny cancellation of removal proceedings, the INS must find that a person is not of good moral character according to the requirements set out in §101(f) of the INA.[104] But this list is not exclusive; hence, additional criteria not contained in section 101(f) may preclude a finding of good moral character.[105]

The INA standards are somewhat malleable. For example, prostitution is one of the specified grounds for inadmissibility.[106] Forced prostitution, however, is recognized as a form of abuse.[107] The INS takes this flexibility into account when evaluating claims by making exceptions for situations in which "it was determined that the person was involuntarily reduced to such a state of mind or such acts through the use of abusive, oppressive, or immoral means."[108] This built-in mechanism of flexibility accommodates the needs of domestic abuse victims.

The aspect of the good moral character standard that needs alteration is the length of its retroactive reach. A woman who is aware of her inability to demonstrate good moral character might feel constrained to wait out an abusive relationship so that she can petition INS with a clean slate. In cases where all that is standing in the way of a woman's successful petition is the passage of time, the requirement should be waived. If it is politically impossible to do away with the good moral character requirement altogether, its retroactive reach should be limited to the lowest politically feasible duration, such as one year or six months.

III. DIFFERENT STANDARDS AT DIFFERENT STAGES OF THE PROCEEDINGS

There is a tension between Congress' interest in protecting abused women, as demonstrated by the aforementioned changes to the INA, and Congress' interest in preventing and discouraging illegal immigration. Disparities in the standards set by the INA at different stages of immigration proceedings indicate Congress' difficulty in reconciling these conflicting goals. The need to protect battered women should, however, weigh more heavily than the need to prevent potential illegal immigration.

As currently written, the INA requires an alien woman to meet a different set of standards for each immigration procedure she seeks relief under. Table I illustrates some differences and similarities in the requirements for relief under exceptions available to victims of domestic abuse.

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104 INA § 101(f), 8 U.S.C. §1101(f) (1994 & Supp. IV 1998).

105 *Id.*

106 INA § 101(f)(3), 8 U.S.C § 1101(f)(3) (1994 & Supp. IV 1998).

107 8 C.F.R. §204.2(c)(1)(vi) (1996).

108 Gilbert, *supra* note 57, at 9 (citing 61 Fed. Reg. 13,066-67 (1996)).

TABLE 1

REMEDY	ANNUAL CAP	HARDSHIP SHOWING	DURATION OF RESIDENCE REQUIREMENT	MARITAL STATUS
IMFA Removal of conditional status INA § 216(c)(4)	NO	YES	• Statute is silent, although to reach this stage the alien would have had to satisfy the self-petitioning residency requirement described below	Do not have to be married
VAWA Self-petitioning provision INA § 204(a)(iii)	NO	YES	• Currently residing in the U.S. • Has resided in the U.S. with the qualifying spouse	Must be married at time of filing
VAWA Cancellation of Removal INA § 204A	YES	YES	• 3-Year continuous physical presence in the U.S. prior to filing	Do not have to be married

The disparities among the requirements for these three proceedings are both significant and unwarranted. Instead of being linked to the particular immigration procedure, the requirements should be linked to the abused status of the applicant. In other words, a demonstration of domestic abuse at the hands of a citizen or LPR spouse should result in uniform requirements for obtaining relief. The requirements for all three remedies should incorporate the least cumbersome standards currently imposed by the INA in order to provide maximum relief for battered women. The current standards, however, impose arbitrary burdens on abused alien women.

First, there is no cap on admissions for immediate family members of U.S. citizens. Neither are there any limits on the number of self-petitions that may be granted. Cancellation of removal, however, is limited to four thousand per year.[109] Women seeking relief under this provision should not be included in the annual tally or subjected to the annual cap. There are good reasons for limiting the availability of waivers, such as preserving the immigration system and enforcing removal criteria. But domestic abuse is a situation that warrants different treatment. If the removal of conditional resident status and the granting of the ability to self-petition are not subject to an annual cap for victims of domestic

[109] INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1) (1994 & Supp. IV 1998).

abuse, there is no reason for such a limitation to apply to abused women seeking cancellation of removal proceedings.

An additional requirement imposed by the cancellation of removal procedures is a three-year continuous residency requirement, as previously discussed. At the very least, this residency requirement should be altered to mirror that required for self-petitioning, which is currently set at two years. In the context of domestic abuse, the disparity between the two standards has no justification.

Finally, the marriage requirement for self-petitioning should be altered so that abused women can petition regardless of their current marital status. If a woman's marriage was terminated because of domestic abuse, she should retain the ability to self-petition, if not indefinitely then for a reasonable period of time, such as two years. This would decrease the possibility of battered women remaining with abusive spouses because of the adverse immigration consequences of divorce.

CONCLUSION

The continued availability of various forms of government assistance for illegal aliens and the exceptions made in immigration law for abuse victims indicate Congress' willingness to put the interests of battered women ahead of other economic concerns. While such legislation is well intentioned, however, problems in implementation and unintended consequences limit their effectiveness. First the punishment of deportation for domestic abuse can preclude women from getting help in violent household situations. Second, the durational and good faith marriage requirements imposed by the IMFA can lead to the unintended and dangerous result of women remaining in abusive households to obtain immigration status. The good moral character requirement of the INA can also lead women to wait out an abusive situation. Third, the evidentiary requirements imposed upon abused alien women can prove difficult to meet. Finally, the disparate standards at different stages of immigration proceedings impose unwarranted obstacles in the way of obtaining stability and security for battered women.

These weaknesses must be recognized and addressed. Failure to do so will prevent the laws from reaching their full potential, which is to protect the lives and safety of battered women, and will also maintain a system that unintentionally hinders an abused alien woman's fight for independence and security.