THE EVOLVING, YET STILL INADEQUATE, LEGAL PROTECTIONS AFFORDED BATTERED IMMIGRANT WOMEN

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I. INTRODUCTION

Domestic violence is a troubling crime that occurs in all racial, cultural and socioeconomic communities. Regardless of race, culture, or economic status, all victims face immense challenges in escaping their abusers, finding a safe haven, and obtaining healing, both physically and emotionally. Despite these common challenges to all domestic violence victims, immigration laws within the United States have created an additional barrier for one specific class of domestic violence victims—immigrant women.

An examination of United States immigration laws reveals that the laws have historically presented significant obstacles for battered immigrant women because they place control of a battered immigrant woman's legal status in the hands of her abuser. Providing the abuser with this additional control causes the victim to be entirely dependent on her abuser for her existence within the country, thus making it nearly impossible for her to flee the dangerous situation. As a result of the structure of United States immigration laws, battered immigrant women endure an even greater challenge in escaping their abusers.

In recent years, Congress has recognized the predicament that immigration laws have created for battered immigrant women and has made great strides toward providing relief, primarily through its enactment of certain immigration provisions in the Violence Against Women Act (VAWA). However, an analysis of the law as it exists today will show that VAWA falls short of completely eradicating the obstacles that United States immigration laws have created for battered immigrant women.

This paper will analyze the role that United States immigration laws have played in fostering domestic violence against battered immigrant women. It will also examine the effectiveness of VAWA in eliminating those barriers to relief. Section I presents a discussion of the unique problems that immigrant women face in escaping domestic

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violence, with an emphasis on how immigration laws have created an additional barrier to relief for battered immigrant women. Section II discusses Congress' attempts to remedy the barrier to relief created by immigration laws through its enactment of VAWA. Section III analyzes the effectiveness of Congress' attempts to protect battered immigrant women and suggests future legislation which may help to further ameliorate the barriers to relief faced by these women.

II. UNIQUE CHALLENGES FACED BY BATTERED IMMIGRANT WOMEN, WITH IMMIGRATION LAWS POSING AN ADDITIONAL BARRIER TO RELIEF

This section discusses the barriers that battered immigrant women face in seeking relief from domestic violence. It has been recognized that "while domestic violence does not occur more often within one racial group or socio-economic class, immigrant victims of domestic violence are more adversely affected when abuse occurs."[1] This is primarily because battered immigrant women face several unique challenges that other domestic violence victims do not face.[2] Some of those challenges are non-legal in nature, such as language, cultural and social barriers. However, one of the greatest impediments to relief for battered immigrant women is the obstacle created by immigration laws in the United States.

A. Non-Legal Barriers

One of the most obvious barriers for immigrant women is language. Due to their inability to speak English fluently, many immigrant women find it difficult to seek assistance from law enforcement authorities, domestic violence shelters, and attorneys, simply because they cannot communicate their problems.[3] Immigrant women also experience difficulty in understanding their legal rights and the various resources available to domestic violence victims. Furthermore, many domestic violence shelters do not offer multilingual services. If interpreters are available, immigrant women

1. Greta D. Stoltz, *The U Visa: Another Remedy for Battered Immigrant Women*, 7 SCHOLAR 127, 132 (2004).

2. *See* Nimish R. Ganatra, *The Cultural Dynamic in Domestic Violence: Understanding the Additional Burdens Battered Immigrants Women of Color Face in the United States*, 2 J.L. SOC'Y 109 (2001).

3. *See id.* at 114.

are often reluctant to speak with them out of fear that their private matters will not be kept confidential or that their "whereabouts may be disclosed to abusive spouses."[4] Some shelters even accept English-speaking victims over immigrant victims because they believe that English-speaking women will make better use of the shelter services.[5] This is primarily due to the fact that many immigrant women may not be eligible for public benefits. Additionally, many domestic violence shelters and legal aid services are unable to accept undocumented battered immigrant women because of government-imposed funding restrictions. As a result of these complications, some domestic violence shelters exhibit the bias of accepting English-speaking women over non-English speaking women.

A second challenge that battered immigrant women face in seeking relief is a cultural barrier. These cultural barriers consist of varying beliefs regarding the role of women within their unique communities and often have the effect of discouraging immigrant women from reporting or escaping abuse.[6] Some cultures disapprove of challenges to male domination.[7] Others cultures prohibit divorce and tend to reject divorced women or women who have left their husbands.[8] Some cultures and religions may even foster domestic violence due to well-established cultural norms or religious doctrine. For example, in certain Asian cultures, women are considered inferior to men and, as a result, are viewed as subservient to the men in their societies.[9] The belief that women are inferior to men creates acceptance within the Asian community for violence against women, thus making it more difficult for battered Asian women to defy cultural norms by challenging their abusers.[10]

Cultural barriers also exist within the Hispanic community due to patriarchal notions of a woman's role and identity. Latinas are

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4. Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 592 (1997).

5. Ganatra, *supra* note 2, at 114. (citing Leslye E. Orloff, Deeana Jang & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 316 (1995)). *See also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244-62 (1993).

6. Crenshaw, *supra* note 5, at 1248.

7. Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 140 (2002).

8. *Id. See also* Loke, *supra* note 4, at 591.

9. *See* Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L. J. 151, 161, 167-71 (1996).

10. Ganatra, *supra* note 2, at 119.

identified on the basis of their familial roles as mothers and wives.[11] They are viewed as interwoven pieces of the family unit. Consequently, Latina women are often less likely to break away from this family unit when faced with experiences of domestic violence.

Religious doctrines may also serve as cultural barriers to relief for immigrant women faced with domestic violence. Some assert that "in many Asian cultures, Confucianism requires women to obey their husbands."[12] The concept of fate within the Buddhist religion may also serve as a cultural barrier to Asian battered immigrants seeking relief because some Asian women believe that their experience with domestic violence must be accepted as an inevitable aspect of their fate.[13] Within the Muslim community, battered immigrant women may refrain from challenging their abusers because the Koran informs people of the Islamic faith that men are in charge of women and "good women are obedient."[14] In an effort to guide men on what actions should be taken in dealing with disobedient women, the Koran instructs men to "admonish them, banish them to beds apart and scourge them."[15] As a result, battered immigrant women may harbor fear that they will be punished for reporting domestic violence, as this may be viewed as an act of disobedience.

Many battered immigrant women face social challenges in reporting domestic violence to law enforcement authorities because of their unsupportive immigrant communities.[16] For many immigrants, domestic violence is not recognized as a crime in their homelands, leading battered women to believe that domestic violence is also not a crime in the United States.[17] Because domestic violence is not recognized as a crime in many countries abroad, immigrant communities in the United States often do not view domestic violence as a valid problem, and they are, consequently, unsupportive of women who choose to report incidents of the crime.[18] Furthermore, some immigrants view domestic violence as a private matter and public disclosure of the crime is often thought to bring shame upon a

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11. Sarah M. Wood, *VAWA's Unfinished Business: The Immigrant Women Who Fall Through the Cracks,* 11 DUKE J. GENDER L. & POL'Y 141, 151 (2004). *See also* Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense,* 43 STAN. L. REV. 1311 (1993).

12. Loke, *supra* note 4, at 590.

13. *Id.*

14. *Id.*

15. *Id.*

16. Ganatra, *supra* note 2, at 123.

17. *See* Loke, *supra* note 4, at 592.

18. *See generally* Ganatra, *supra* note 2, at 122.

family.[19] Many communities also believe that women who report domestic violence are attacking the integrity of the entire immigrant community.[20]

Therefore, language, culture, religion, and social norms may all create barriers for abused immigrant women seeking assistance.

B. U.S. Immigration Laws as an Additional Barrier to Relief

Notwithstanding the language, cultural and social barriers discussed above, perhaps the most significant barrier preventing battered immigrant women from seeking relief is the one created by United States immigration laws. Although the legislative intent of immigration laws in the United States was not to foster domestic violence, the laws have historically had the negative effect of preventing battered immigrant women from escaping their abusers. English common law doctrines, which were facially discriminatory against women, evolved into provisions in the Immigration Code that effectively place total control of a married immigrant's legal status in the hands of her United States citizen or legal, permanent resident spouse. As most spouses immigrating to the United States are female, the Immigration Code then traps "a large number of battered immigrant women in violent homes with husbands who use the promise of legal status or the threat of deportation as a means of exerting power and maintaining control over their wives."[21] Congress has even recognized that "current [immigration] law fosters domestic violence."[22] This sub-section explains the impact of immigration laws on battered women, traces the discriminatory history of immigration laws from English common law, and describes how these laws present an additional barrier to battered immigrants seeking relief.

1. Immigration Laws in the United States Have the Greatest Impact on Women

Immigration laws, despite apparent gender-neutrality, disproportionately impact women because of the prevalence of spouse-based immigration, where most of the immigrating spouses are female. An increasing number of immigrants are entering the country through

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19. *See id.* at 123.
20. *See id.*
21. Loke, *supra* note 4, at 591.
22. *See* Hernandez v. Ashcroft, 345 F.3d 824, 838 (9th Cir. 2003) (citing H.R. REP. No. 103-395, at 26 (1993)).

their American citizen or resident spouse based on marital status.[23] There has always been a strong presence of spouse-based immigration in the United States, and it is well accepted that spouse-based immigration is one of the main methods of immigration.[24] According to United States immigration laws, spouses of citizens and spouses of permanent residents are eligible to become permanent residents.[25] The Immigration and Nationality Act provides that family-sponsored immigrants include spouses of permanent resident aliens.[26] The Act also permits fiancées of citizens to obtain a visa to conclude their marriage in the United States within ninety days of entering the country.[27] Thus, the ability of a non-citizen immigrant spouse to enter the United States and become a legal resident is primarily controlled by the citizen or resident spouse.

Furthermore, statistics indicate that most of the immigrants entering the country based on their marital status are female.[28] Sixty-six percent of the total number of spouses immigrating to the United States in 1997 were women.[29] The same study indicates that an overwhelming eighty-seven percent of the spouses of legal permanent residents were women and approximately seventy-nine percent of fiancées entering the country were women.[30] More recent statistics show that the same trend has continued over the years. According to the Department of Homeland Security database, in 2004 fifty-seven percent of the total spouses that immigrated to the United States were female.[31] As a result, spouse-based immigration laws have a greater impact on immigrant women.

2. U.S. Immigration Laws are Rooted in Discriminatory, English Common Law Doctrine

The discriminatory, English common law doctrine of coverture has some remnants in current immigration law, thus contributing to the

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23. *See generally* Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153 (2004).

24. *See id.* at 156.

25. *See* Immigration and Nationality Act, 8 U.S.C. §§ 1151 (b)(2)(A)(i), 1153(a)(2) (2005). *See also* Immigration and Nationality Act, 8 U.S.C. § 1151(a)(1) (2000).

26. Immigration and Nationality Act, 8 U.S.C. § 1153(a)(2) (2005).

27. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(K) (2005).

28. Calvo, *supra* note 23, at 156.

29. *Id.*

30. *Id.*

31. U.S. Department of Homeland Security, *Yearbook of Immigration Statistics 2004*, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/YrBk04Im.htm (last visited Jan. 28, 2006).

barriers faced by battered immigrant women.[32] Coverture referred to "the legal notion that a husband and wife are one entity, and the husband represents that one" entity.[33] According to the doctrine of coverture, upon marriage, a wife's legal identity was merged with that of her husband. For example, once married, a woman could no longer independently file a law suit or enforce contracts because she did not retain her own legal identity.[34] Further, the doctrine of coverture essentially provided a husband with legal ownership of his wife, including the right to control her income, property, and behavior.[35] Under the doctrine of coverture, husbands were also permitted to discipline their wives in the event that their wives were disobedient, even through the use of physical force.[36] In fact, English common law permitted a husband to beat his wife as long as he did not use a rod thicker than his thumb.[37] Similarly, the doctrine of coverture provided that children were marital property subject to control of the father.[38] The mother had no power or control over the children. As a result, the common law doctrine of coverture established the strong notion that a husband maintained control over his wife.

In turn, early United States immigration laws incorporated concepts of the common law doctrine of coverture.[39] For example, past United States immigration laws did not afford American citizen women the right to petition for the legal immigration of their non-citizen husbands, while the laws did allow American citizen men to petition for their non-citizen wives.[40] Furthermore, American women who married non-citizen men automatically lost their United States citizenship since their identities had been merged with their husbands' under the doctrine of coverture.[41] Facially discriminatory immigration

32. *See* Calvo, *supra* note 23, at 160.

33. Calvo, *supra* note 23, at 160.

34. *Id. See also* Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 460 (2002).

35. Calvo, *supra* note 23, at 160.

36. *See* Zaher, *supra* note 34, at 475.

37. Calvo, *supra* note 23, at 162 (noting that this rule, known as the "rule of thumb," continued with acceptance in the United States until the Twentieth Century).

38. *Id.* at 160.

39. Leslye E. Orloff & Janice Kaguyutan, *Offering A Helping Hand: Legal Protections For Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 100 (2002).

40. Wood, *supra* note 11, at 142.

41. *Id.*

laws against women continued through the 1940s and the postwar period.[42]

In 1952, Congress enacted the Immigration and Nationality Act (INA) in an effort to codify immigration law.[43] Through its enactment of the INA, Congress attempted to create facially gender-neutral immigration laws by refraining from using the terms "husband" and "wife" and instead using the gender-neutral term "spouse" throughout the statute.[44] Despite the change in language, the concept of one dominant spouse controlling the immigration status of a subservient spouse remained throughout provisions of the INA.

Congress also created additional burdens for battered immigrant women by passing the Immigration Marriage Fraud Amendment in 1986 (IMFA).[45] The Immigration Marriage Fraud Amendment was enacted in response to congressional findings showing that immigrants engaged in fraudulent marriages in order to bypass immigration law.[46] Through the IMFA, Congress created criminal penalties for citizens and non-citizens entering into a marriage solely for the purpose of side-stepping immigration laws.[47] Congress also created a two-year conditional period for immigrant spouses, whose permanent residency status could only be approved subject to both spouses establishing that the marriage was entered into in good faith.[48] Under the Amendment, the spouses were required to file a second joint petition to remove the conditional status within ninety days of the second anniversary of approval of the initial petition. In addition, they were required to participate in an interview with the Immigration and Naturalization Service (INS) within ninety days of the approval of the second petition.[49]

Although the reasons for its enactment were legitimate, the Immigration Marriage Fraud Amendment of 1986 created additional burdens for battered immigrant women by providing more control to their dominant husbands and making it more difficult for them to flee

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42. *Id.*

43. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 166 (1952) (codified as amended throughout various sections in 8 U.S.C.).

44. *See, e.g.*, Immigration and Nationality, Act 8 U.S.C. §1154(a) (2005).

45. The Immigration Marriage Fraud Amendment of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

46. H.R. REP. No. 99-906, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978.

47. *Id.*

48. *Id.*

49. The Immigration Marriage Fraud Amendment of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

the abusive relationship.[50] The additional requirements set forth in the Amendment—particularly the two-year waiting period, the filing of a second joint petition, and the INS interview—increased the power that the citizen or resident husband maintained over the immigration status of his non-citizen wife.[51] Under the Amendment, the sponsoring spouse, in most cases the husband, was required to file the second petition in order to obtain permanent resident status for his non-citizen wife. The sponsoring husband was also required to appear in the joint interview before the non-citizen wife could obtain permanent resident status. The 1986 Amendment essentially provided the abusive husband with ultimate control of his wife's immigration status for an entire two year period. As a result of the two-year conditional residency period, the IMFA made it nearly impossible for a battered immigrant woman to leave her abuser for two full years, since her immigration status was contingent upon the husband's cooperation throughout the conditional period. Battered immigrant women were thereby forced to remain with their abusers for at least two years while awaiting permanent resident status at the end of the conditional period.

Thus, the English common law doctrine of coverture, which provided husbands legal control of their wives, influenced the development of American immigration laws.

3. By Providing More Control to the Abusive Husband, Immigration Laws Essentially Foster Domestic Violence

In the area of domestic violence, it is widely recognized that perpetrators use "tactics of control" to maintain the abusive relationship.[52] As explained in the sub-sections above, spouse-based immigration laws in the United States have historically placed an inordinate amount of control of the immigrant spouse's legal status in the hands of the citizen or resident spouse. In most cases of domestic violence, this translates to providing the abusive husband with more control over his immigrant wife.

The battered immigrant spouse is therefore faced with a difficult decision: "either remain in the abusive relationship, or leave, become an undocumented immigrant and be potentially deprived of home, livelihood and perhaps child custody."[53] The fear of deportation is immense for immigrant women, especially those women

50. Wood, *supra* note 11, at 144.
51. *Id.*
52. Hernandez v. Ashcroft, 345 F.3d 824, 837 (9th Cir. 2003).
53. Orloff *supra* note 39, at 101.

who have fled persecution in their homeland. Deportation, in those instances, could easily mean "torture, jail or death."[54] In other cases, deportation could result in immigrant women returning to impoverished countries with poor health conditions and weak economies.[55]

Recognizing the barriers to relief for battered immigrant women created by immigration laws, Congress then attempted to remedy the problem, as discussed in the next section.

III. CONGRESSIONAL ATTEMPTS TO PROVIDE RELIEF FOR BATTERED IMMIGRANT WOMEN

It was not until the early 1990s when public attention turned to the societal and legal problem of domestic violence. In an attempt to address some of the unique challenges that battered immigrant women were enduring, Congress enacted several new statutes aimed at deconstructing the barriers to relief created by immigration laws in the United States. The statutes responded to Congressional findings that society had failed to adequately address the problems of domestic violence and, more specifically, that immigration laws in the United States had the effect of fostering domestic violence against immigrant women. This section discusses the Congressional findings that led to the enactment of legislation aimed at providing relief for battered immigrant women, as well as the primary statutes that were subsequently enacted: the 1990 Battered Spouse Waiver Amendments, the Violence Against Women Act of 1994 (VAWA I), and the Violence Against Women Act of 2000 (VAWA II).

A. Congressional Findings

In the early 1990s, Congress launched an investigation into the failure of society and the legal community to address the problems of domestic violence adequately. Congress found that the nation generally harbored an attitude of acceptance towards domestic violence.[56] In its report, Congress stated, "Violence against women reflects as much a failure of our nation's collective willingness to

54. Loke, *supra* note 4, at 592.
55. *See id.*
56. S. REP. NO. 101-545, at 37 (1993).

confront the problem as it does the failure of the Nation's laws and regulations."[57]

The Congressional reports also highlighted the costs of domestic violence to society at large.[58] First, domestic violence results in higher health care costs to the nation. According to the report, approximately one million women each year seek medical treatment for injuries sustained as a result of domestic violence.[59] Congress noted that sixty-three percent of these women were the victims of abuse while pregnant.[60] Second, the Congressional reports noted the adverse effect that domestic violence had on children. For example, the reports found that children are sometimes the victims of direct violence by an abusive parent. In addition, Congress recognized the indirect harm to children from observing violence against their mothers. Third, the reports indicated that domestic violence results in homelessness and absenteeism from employment.[61] Overall, Congress concluded that society spends approximately five to ten billion dollars a year on health care, criminal justice and other social costs resulting from domestic violence.[62]

During the course of these studies on domestic violence, Congress discovered that current provisions within the immigration laws had the effect of fostering domestic violence against female immigrants.[63] One Congressional report noted that domestic violence is "terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen's legal status depends on his or her marriage to the abuser."[64] Congress found that current immigration laws contributed to the continuance of domestic violence against female immigrants by placing control of their ability to gain permanent legal status in the hands of their abusers.[65] Congress recognized that "many immigrant women live trapped and isolated in violent homes afraid to turn to anyone for help."[66] It was clear that immigrant women remained fearful of deportation, thus causing them to remain with their abusers and sustain further abuse.

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57. *Id.*
58. *See id.* at 41.
59. S. REP. NO. 103-108, at 41 (1993).
60. *Id.*
61. Calvo, *supra* note 23, at 165.
62. S. REP. NO. 103-138, at 41 (1993).
63. *See* Calvo, *supra* note 23, at 165.
64. H.R. REP NO. 103-395, at 26 (1993).
65. *See id.*
66. H.R. REP. NO. 103-395, at 26 (1993).

As discussed in the previous section, United States immigration laws provide the citizen or resident spouse with significant control over the immigration of his non-resident spouse. As a result, in the context of domestic violence, immigration laws have the effect of providing the citizen or resident husband with control over the legal status of his immigrant wife. Consequently, the immigrant wife is completely dependent on her husband for immigration to the United States. The fact that an abusive husband can control his wife's immigration status plays a significant role in the continuance of domestic violence against immigrant women. Congress eventually recognized this reality during its study of domestic violence in the early 1990s.

In response to its conclusion that current immigration laws contribute to domestic violence against immigrant women, Congress attempted to create a solution through the enactment of various legislation.

B. 1990 Battered Spouse Waiver Amendments

Congress first attempted to ameliorate the hardship against battered immigrants created by the two year conditional residency requirement of the Immigration Marriage Fraud Amendment. In an effort to relieve battered immigrant women from staying in abusive relationships for the entire two year conditional period, Congress enacted the 1990 Battered Spouses Waiver Amendments (BSWA).[67] The BSWA waived the two-year conditional period if the non-citizen spouse could demonstrate that she was subject to battering or extreme cruelty by her citizen or resident spouse. The legislation also gave battered immigrants the right to self-petition in order to remove the conditional status. The Amendments thus allowed victims to escape their abusers immediately.

The 1990 Battered Spouse Waiver Amendments represent the first piece of legislation that recognized domestic violence as a serious problem experienced by immigrant wives who are dependent on their abusive spouses for immigration status.[68] However, significant problems persisted. In particular, the BSWA created a very high burden of proof for battered immigrant women applying for a waiver based on extreme cruelty, requiring applicants to submit evidence from a licensed mental health professional showing they had been subject to

67. Immigration Act of 1990, Pub. L. No. 101-649, § 701, 104 Stat. 4978, 5083 (1990).
68. Orloff, *supra* note 39, at 105.

extreme cruelty.[69] Obtaining evidence from a mental health professional proved very difficult for battered immigrant women because of the small number of mental health professionals trained in domestic violence and the even lower number of bilingual mental health professionals.[70]

Furthermore, while the Battered Spouse Waiver Amendments were certainly steps in the right direction, the legislation did not remedy a fundamental problem that United States immigration laws created for battered immigrant women: the abusive husband's control over the initial petitioning process for immigration status. A battered immigrant woman still depended entirely on her abuser to initiate the immigration process, and she could only become a resident if her citizen or resident spouse filed a petition to sponsor her.[71] In fact, the 1990 Amendments only waived the two year conditional residency requirement of the Immigration Marriage Fraud Amendment. The immigration status of battered immigrant women was still largely controlled by their abusive husbands.

C. Violence Against Women Act 1994

In 1994, Congress attempted to provide more substantial relief to battered immigrant women through the enactment of certain immigration provisions in the Violence Against Women Act (VAWA I).[72] The main goal of VAWA I was to enhance justice system protections for battered women and to expand collaboration and cooperation between battered women's support services and the criminal and civil justice systems.[73] Specifically, VAWA I enhanced penalties for domestic violence in federal court and authorized grants to fund programs geared toward combating violence against women.[74] Section 14045 of VAWA I explicitly provided the following:

> [T]he Attorney General, acting through the Director of the Office on Violence Against Women,

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69. Conditional Basis of Lawful Permanent Resident Status, 8 C.F.R. §§ 216.5(e)(3)(iv)-(vii) (2001).

70. Orloff, *supra* note 39, at 107.

71. *Id.*

72. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat.1941-1942. Note that VAWA was passed as Title IV of the *Violent Crime Control and Law Enforcement Act of 1994*.

73. Orloff, *supra* note 39, at 108 (citing 146 CONG. REC. S10192 (Oct. 11, 2000) (statement from Joint Managers) (discussing the purpose of the original VAWA of 1994)).

74. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat.1941-1942.

> shall award grants to eligible entities . . . to carry out local, regional, or national public information campaigns focused on addressing adult, youth, or minor domestic violence, dating violence . . . within tribal and *underserved populations and immigrant communities*, including information on services available to victims and ways to prevent or reduce domestic violence, dating violence, sexual assault, and stalking.[75]

VAWA I provided relief to battered immigrant women by directly amending the Immigration and Nationality Act (INA). The two most important remedies for battered immigrant women created by VAWA I were (1) self-petitioning and (2) suspension of deportation. First, VAWA I allowed battered immigrants married to citizens or lawful permanent residents the ability to self-petition for permanent resident status, provided the marriage was entered into in good faith, the immigrant was of good moral character, and deportation would result in extreme hardship to the immigrant or her child.[76] The ability to self-petition for her own residency status was a significant change in the immigration laws because it took one of the main controls away from the abusing husband, i.e., he was no longer the only one who could file her petition for permanent residency.

Second, VAWA I created the possibility that deportation of battered immigrants could be suspended under certain circumstances. As a result of the passage of VAWA I, section 244(a)(3) providing for suspension of deportation based on domestic violence was added to the INA.[77] Section 244(a)(3) provided that the Attorney General had the discretion to suspend deportation proceedings against any individual who met the following four requirements:

> (1) has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; (2) has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident; (3) proves that during all of such time in the United States the alien was and is a person of good moral character; (4)

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75. Violence Against Women Act, 42 U.S.C. § 14045 (2005) (emphasis added).
76. *See* Immigration and Nationality Act, 8 U.S.C § 1154 (2005).
77. *See Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003).

> and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.[78]

The immigrant seeking suspension of deportation had the burden of establishing all four of these factors.[79]

Although VAWA I was a source of relief for many battered immigrants, it was not without its flaws. For example, in *Hernandez v. Ashcroft*, the Ninth Circuit applied provisions of VAWA I to grant relief to a battered immigrant woman who fled Mexico to be free of her abusive husband; however, Mrs. Hernandez faced significant obstacles in winning her case.[80] In this case, Laura Luis Hernandez suffered years of physical abuse in Mexico at the hands of her husband, an American citizen, who repeatedly engaged in acts of hitting, kicking and insulting her.[81] The abuse included instances when her husband smashed a pedestal fan over her head and stabbed her repeatedly with a knife.[82] On all occasions, her husband prevented her from seeking medical attention by padlocking the doors of the home, thereby keeping her constrained indoors for days following the abuse. [83] As a result of the domestic violence, Mrs. Hernandez feared for her life and decided to flee her husband in Mexico. She migrated to the United States; however, after numerous calls, apologies and cries from her husband, Mrs. Hernandez returned to her husband in Mexico. Eventually, she became subject to similar horrific abuse and was convinced that her husband would kill her if she stayed with him any longer. Once again, Mrs. Hernandez fled to the United States, but she was subsequently detained by INS, who threatened to deport her because she had not yet obtained permanent resident status through her citizen husband.

Mrs. Hernandez sought relief through the suspension of deportation provision created by VAWA I. However, the Board of Immigration Appeals (BIA) denied Mrs. Hernandez' request because she did not meet the "extreme cruelty" prong of the test.[84] The BIA argued that Mrs. Hernandez did not suffer extreme cruelty within the

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78. Immigration and Nationality Act, 8 U.S.C. § 1254(a)(3) (2005).
79. *Hernandez*, 345 F.3d at 832.
80. *Id.*
81. *See id.* at 830.
82. *Id.* at 830-31.
83. *Id.* at 830.
84. Note that Congress has since repealed the requirement that extreme cruelty must occur within the United States.

United States, as the law required, since all of the physical abuse she endured had occurred in Mexico.[85] Furthermore, the BIA argued that the phone calls Mrs. Hernandez received from her husband constituted the only contact she had with him while in the United States, and these communications did not rise to the level of "extreme cruelty."

In rejecting the BIA's argument, the Court interpreted the term "extreme cruelty" as a matter of first impression. In doing so, the Court clarified the meaning of the term "extreme cruelty" in the context of domestic violence and VAWA I. The Court held that "extreme cruelty" provides an inquiry into an individual's experience of mental and psychological cruelty.[86] In accordance with the principles of statutory interpretation, the Court found that it does not involve considerations of physical battery since the word "battery" is already included within the provisions of VAWA. VAWA required considerations of whether the female has been the victim of battery *or* extreme cruelty. Thus, battery and extreme cruelty are not the same experience.

In concluding that extreme cruelty constitutes an experience of psychological and mental distress, the Court considered information available from experts in the field of domestic violence. It is well-established that domestic violence consists of a continuous cycle of abuse and not simply a series of discrete events.[87] Within this cycle of violence is the "contrite" phase, during which the batterer uses promises and gifts to lure the victim back into his life. This phase is followed by additional physical abuse to the victim. The contrite phase is part of the psychological abuse, coercive behavior, manipulation and control that is characteristic of domestic violence. In applying this concept to *Hernandez*, the Court held that Mrs. Hernandez was in fact subjected to extreme cruelty in the United States because her conversations with her abuser were part of the psychological abuse that is characteristic of the contrite phase of domestic violence.[88]

Hernandez v. Ashcroft is an important case because it illustrates some of the flaws of VAWA I, one being that the statute required extreme cruelty to have occurred within the United States. This requirement made it difficult for battered immigrant women to

85. *Hernandez*, 345 F.3d at 832.

86. *Id.* at 834.

87. *Id.* at 836-37 (citing Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993)).

88. *Hernandez*, 345 F.3d at 836-37.

obtain relief if they had experienced abuse in their homelands.[89] In *Hernandez,* the Court struggled to articulate a reason that would overcome this requirement in order to provide Mrs. Hernandez with the relief she needed. Consequently, the provision requiring that extreme cruelty occur within the United States was later removed.

A second noteworthy shortcoming of VAWA I was that it placed a very high burden of proof on the battered immigrant woman. Under VAWA I, in order to self-petition for residency, a battered immigrant woman was required to prove the abuser's status as a United States citizen or lawful permanent resident, which often required battered immigrant women to provide documents to which they did not have access.[90] In *Hernandez,* for instance, Mrs. Hernandez had difficulty in obtaining the appropriate documents for INS because she fled from her own home in order to escape her abusive husband. Women who flee from their abusers will not have access to documents for several different reasons. For battered immigrant women who flee suddenly, obtaining important immigration documents is certainly the least of concerns at that critical moment. Furthermore, in many immigrant homes, the dominant husband is responsible for keeping important papers and records for the family. As a result, many immigrant women are not able to obtain the appropriate documentation without the assistance of their abusers.

A third flaw with VAWA I is the requirement for proof of a good faith marriage in order to self-petition for immigration. This requirement essentially means that battered women could not divorce their abusers before properly filing a self-petition. In addition, some battered immigrant women could not meet the good faith marriage requirement because their husbands were bigamists and failed to obtain proper divorces from previous marriages. Thus, the fact that the husband was legally married to more than one woman at the same time raised questions as to whether his marriage with the battered immigrant woman was created in good faith.

A fourth problem existed with the "good moral character" requirement of VAWA I. There were some instances in which battered immigrant women could not prove their own good moral character because reports had been filed against them when they acted in self-defense against domestic violence. VAWA I did not provide an

89. Congress has since removed the requirement that extreme cruelty occur *within* the United States.

90. Kwong, *supra* note 7, at 140.

exception for criminal reports filed against battered immigrant women who acted in self-defense.

Therefore, while VAWA I was a significant step towards providing relief for battered immigrant women, barriers remained, and Congress attempted once more to remedy the problems.

D. Violence Against Women Act 2000 (Battered Immigrant Women Protection Act)

In an attempt to address the shortcomings of the 1994 Violence Against Women Act, Congress enacted additional immigration provisions through the Violence Against Women Act of 2000 (VAWA II), which is also known as the Battered Immigrant Women Protection Act.[91] VAWA II attempted to close many of the loopholes and gaps created by VAWA I.

First, VAWA II provides greater relief because it extends immigration protections to many battered immigrant women and children of battered immigrant women who previously did not qualify under VAWA I. VAWA II covers battered children and children included in their abused parent's VAWA claim who turn twenty-one years of age before they can be granted lawful permanent residence.[92] In addition, VAWA II protects battered immigrant women living abroad who are abused by their citizen or lawful permanent resident spouses or parents who are United States government employees or who are members of the United States uniformed services.[93]

Second, VAWA II allows divorced women to self-petition for residency within two years of their divorce.[94] As a result of this change, battered immigrant women are no longer forced to stay with their abusers in order to self-petition. The law no longer penalizes battered immigrant women for choosing divorce over abuse. VAWA II does, however, require divorced battered immigrant women who choose to self-petition to show a connection between the dissolution of the marriage and the domestic violence occurrences.

Third, in response to the loopholes that existed with the good faith marriage requirement under VAWA I, Congress enacted new provisions in 2000 that make it easier for battered immigrant women

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91. Battered Immigrant Women Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified throughout various sections in 8 U.S.C.).

92. Violence Against Women Act of 2000, 8 U.S.C. § 1154(a)(1)(D) (2005) (VAWA II).

93. VAWA II, 8 U.S.C. § 1154(a)(1)(A)(v) (2005).

94. VAWA II, 8 U.S.C. § 1154 (2005).

who are the victims of bigamy to satisfy the "good faith marriage" prong of the test. The new rule provides that battered immigrant women who married a bigamist in good faith are still permitted to self-petition for residency, provided that the bigamist spouse is a United States citizen.[95]

Fourth, to remedy the high burden of proof and difficulties faced by battered immigrant women in collecting and producing documentation,[96] VAWA II reduces some of the evidentiary requirements.[97] VAWA II instructs the Attorney General to consider "*any* credible evidence relevant to the petition."[98] In addition, battered immigrant women are no longer required to submit proof that their husbands had not been previously married or had obtained legal divorce from any previous wives.[99]

Similarly, in response to the difficulties that battered immigrant women faced in proving "good moral character," Congress created an exception in VAWA II for women who were convicted of crimes related to their abuse, provided that the woman was not the primary perpetrator of violence in the relationship, that she acted in self-defense, that she had not violated a protective order designed to protect her and that the crime did not result in serious bodily injury.[100]

VAWA II also removes the "extreme hardship" requirement,[101] the evidentiary standard in VAWA I that proved the most difficult because it often required the assistance of an attorney and prevented many battered immigrant women from receiving approval of their petitions. The new provision allows battered immigrants who have already demonstrated that they are victims of battery or extreme cruelty by their spouses to self-petition without having to show that they will suffer extreme hardship if they are forced to leave the United States.

Finally, perhaps the most novel addition to VAWA II is the creation of a "U-Visa," which serves as a new form of relief for battered immigrant women who might not otherwise qualify for self-petitioning. Congress created the U-Visa to encourage immigrants to come forward with information relating to crimes. The U-Visa is

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95. VAWA II, 8 U.S.C. § 1154 (2005).

96. Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act.* 92 NW. U.L.REV. 665, 667 (1998).

97. Wood, *supra* note 11, at 149.

98. VAWA II, 8 U.S.C. § 1154(b) (2005) (emphasis added).

99. Wood, *supra* note 11, at 149.

100. VAWA II, 8 U.S.C. 1227(a)(7)(A) (2005).

101. *See* VAWA II, 8 U.S.C. §§ 1101, 1154, 1184, 1430 (2005).

available for up to 10,000 individuals per year who cooperate with the investigation or prosecution of perpetrators of criminal offenses.[102] Under VAWA II, U-Visas may be issued to battered immigrant women who cooperate with law enforcement authorities in convicting perpetrators of domestic violence.

In order to qualify for a U-Visa, an applicant must do the following: (1) establish that she has suffered substantial physical or mental abuse due to being a victim of a crime; (2) show that she possesses information concerning the criminal activity; (3) obtain certification from a law enforcement official that she is, was or will be helpful to law enforcement officials; and (4) show that the crime violated United States laws or occurred within the United States.[103] The U-Visa provisions allow victims who have received approval to remain in the United States and apply for permanent residency within three years.

Although the purpose of creating U-Visas was to facilitate the prosecution of crimes of domestic violence,[104] the effect of this new legislation is to provide another avenue of relief for battered immigrant women who may not otherwise qualify. For instance, U-Visas may provide relief for battered immigrant women who are unmarried because the current VAWA II immigration provisions only apply to married women. More importantly, U-Visas serve as a critical remedy for non-citizen and undocumented victims of domestic violence.[105] In *Zhen v. Gonzales,* although the Ninth Circuit denied petitioner's request to remain in the United States because she feared deportation to China, the Court noted that petitioner would probably qualify for relief under the U-Visa provision of VAWA II because she suffered from domestic violence.[106] In cases like *Zhen*, the U-Visa provides a critical new avenue of relief for battered immigrant women.

Thus, after determining that United States immigration laws contributed to domestic violence, Congress made significant strides in remedying the system and providing relief for battered immigrant women.

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102. Stoltz, *supra* note 1, at 133.
103. *See* VAWA II, 8 U.S.C. §§ 1101, 1154, 1184, 1430 (2005).
104. *Id.* at 130-31.
105. *Id.* at 128.
106. Zhen v. Gonzales, 137 Fed. Appx. 106 (9th Cir. 2005).

IV. THE LAW STILL DOES NOT ADEQUATELY PROTECT BATTERED IMMIGRANT WOMEN

Through its enactment of the Battered Spouse Waiver Amendments, the Violence Against Women Act of 1994 and the Violence Against Women Act of 2000, Congress has made great progress in deconstructing the barriers to relief created by immigration laws for battered immigrant women. However, the current immigration laws still do not protect battered immigrant women adequately due to several remaining flaws: the exclusion of unmarried and undocumented immigrant women, the lack of implementation for U-Visas, and the existence of a still high evidentiary burden.

One of the major flaws of VAWA II is that it does not afford protection to all battered immigrant women. VAWA II specifically provides relief for married women and widows, or those who are divorced within the past two years due to incidences of domestic violence. However, VAWA II does not provide relief to unmarried battered immigrant women. Thus, battered immigrant women who are not legally married cannot obtain any protection under VAWA II.

In addition, VAWA II does not provide protection to undocumented or illegal battered immigrants. Some argue that all battered immigrants residing in the United States are entitled to assistance from the United States government because no human being should be subject to the cruelties of domestic violence.[107] This argument is particularly strong in the situation of domestic violence because battered immigrant women, like all victims of domestic violence, do not retain any control over their lives. Domestic violence is a very unique phenomenon in which the victims are subject to the complete control of their abusers. Consequently, battered immigrant women do not have the free will to remain in their homelands while their abusive husbands choose to move to the United States. Because battered immigrants are subject to the will, control and decisions of their abusive husbands, there is a strong argument to be made that they should not be penalized for entering the country illegally, especially when it is highly likely that they did not choose to enter the country.[108]

Although the creation of the U-Visa may appear to provide new relief to groups such as undocumented immigrants, the reality is that U-Visas are not operating to assist battered immigrant women. While the U-Visas appear to be an available remedy in theory, the fact

107. *See* Wood, *supra* note 11, 141.
108. *Id.*

remains that no U-Visas have ever been issued by the United States government. This is primarily the result of the Department of Homeland Security's failure to promulgate regulations regarding the U-Visa. In fact, a group of lawyers representing undocumented immigrants in California, Texas and Arizona filed a class action suit against the United States government in October 2005 for failing to issue the U-Visas that Congress created five years prior.[109] In order for the U-Visa to actually provide a benefit for battered immigrant women, the United States government must promulgate regulations and begin issuing U-Visas. Otherwise, there will be no avenue of relief for undocumented battered immigrant women.

Furthermore, while the U-Visa is a critical remedy for undocumented immigrants, Congress will eventually be required to address the issue of undocumented battered immigrants more directly. The U-Visas were not created to help undocumented battered immigrant women; they simply have the effect of providing relief to undocumented immigrants. It is important for Congress to study and understand the very unique control phenomenon of domestic violence and how it leads to the entry of undocumented battered immigrant women in the United States. One potential solution is for Congress to include undocumented battered immigrant women as a protected class under VAWA, as these women were likely subject to the complete control of their abusers and may not have exerted free will in entering the United States illegally.

Finally, although Congress has created statutory remedies for battered immigrant women, the evidentiary burden placed on the immigrant victim is still unrealistically high given that these women do not have access to their essential belongings, much less important pieces of documentation, once they flee their abusive husbands. VAWA II still requires that battered immigrants produce documents, such as a marriage certificate or a social security card. The problem remains that when a battered immigrant woman flees her home, she cannot return to gather the necessary documents for filing her VAWA petition. Furthermore, if a woman is habitually dependent on her husband because of cultural norms, then she will not even have knowledge of where her husband may keep the important documents. Additionally, a battered immigrant woman, due to fear of law enforcement authorities and language barriers, will not likely

109. *Lawyers File Suit to Demand Visas for Immigrants*, (Oct. 21, 2005), *available at* http://www.hispanicbusiness.com/forum/topic.asp.

understand the process for obtaining new copies of the required documents from government agencies.

Congress could ameliorate this problem by shifting the evidentiary burden to the immigration service. Government officials are very familiar with the laws and procedures for obtaining documents. In fact, government agencies have the resources, capability and sophistication to obtain the documentation more easily. Consequently, the burden should be shifted to the government.

Congress is currently in the process of approving new amendments to the Violence Against Women Act (VAWA 2005).[110] The new amendments will allow for the protection of abused parents and abused adopted children. However, these new amendments still will not address the issues surrounding unmarried and undocumented immigrant women, the lack of issuance of U-Visas, or the excessively high evidentiary burden discussed above.

V. CONCLUSION

Domestic violence presents significant challenges for all victims seeking to escape their abusers. However, the obstacles to obtaining relief are even greater for battered immigrant women because this group faces many additional challenges due to language, cultural, religious and social differences. In recent years, it has come to the attention of Congress that immigration laws within the United States also play a role in fostering domestic violence against immigrant women and serve as an additional barrier to relief.

Congress has recently attempted to deconstruct the barriers for battered immigrant women created by immigration laws, primarily through its enactments of certain provisions in the Violence Against Women Acts of 1994 and 2000. Although Congress has made significant progress in providing relief to battered immigrant women, the current immigration laws still do not adequately protect battered immigrant women. In the future, Congress should expand protections to include all battered immigrant women, including those who are unmarried or undocumented; promulgate regulations and begin issuance of the U-Visa; and further reduce the evidentiary burden

110. National Task Force to End Sexual and Domestic Violence Against Women, *Violence Against Women Act 2005, available at* http://www.vawa2005.org/title8.pdf (last visited Jan. 28, 2006). At the time of manuscript preparation, VAWA 2005 has not yet been approved.

present in VAWA II. Thus, there is still ample room for Congress to continue working towards providing adequate relief for battered immigrant women.