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FALLING THROUGH THE CRACKS: THE IMPACT OF VAWA 2005'S UNFINISHED BUSINESS ON IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE

MARY B. CLARK*

I. INTRODUCTION

Immigrants to the United States constitute a complex and diverse population of ethnic and national groups with varied backgrounds.¹ While most are aware that our country is growing and changing, little attention is paid to domestic violence victims within immigrant communities.² Battered immigrant women often suffer in silence, afraid that protecting themselves from violence will compromise their presence in the United States.³ This paper will address the history of legal options available to battered immigrant women in the United States, ranging from the era of being at the mercy of a United States citizen or lawful permanent resident spouse, to the protections available under the 1994, 2000, and 2005 Violence Against Women Acts. Finally, this paper will address why these legislative enactments may not adequately protect immigrant domestic violence victims, and what attorneys can do to advocate for these women.

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1.

In the decade between 1990 and 2000 there was dramatic growth in immigration among specific populations. For example, in 1990 there were 7.3 million Americans of Asian origin but by the 2000 Census there were 10.2 million citizens and residents who identified themselves as of Asian descent. Even more dramatic was the growth in the Hispanic or Latino population in the United States, growing from 22.3 million in 1990 to 35.3 million in 2000.

SUDHA SHETTY & JANICE KAGUYUTAN, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: CULTURAL CHALLENGES AND AVAILABLE LEGAL PROTECTIONS 1 (2002) (citing U.S. Census Bureau, Overview of Race and Hispanic Origin: Census 2000 Brief (2001); U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION AND HOUSING (1990)).

2. *See id.*

3. For example, in the Arab-American community in New York City, advocates report that the battered women in the community were "petrified of losing their immigration status or being deported, which their husbands often used as a threat." Emira-Habiby Browne et. al., *Conference Revolutions Within Communities: The Fifth Annual Domestic Violence Conference: Issues in Representing Immigrant Victims*, 29 FORDHAM URB. L.J. 71, 74 (2001).

II. THE NEED TO ADVOCATE ON BEHALF OF BATTERED IMMIGRANT WOMEN

A. *Domestic Violence in Immigrant Communities*

Domestic violence involves “the abuse of power and control in an intimate relationship.”⁴ Batterers “use physical, sexual and psychological abuse, as well as isolation, intimidation and economic abuse to exert power and control over their wives.”⁵ Before recent legislative remedies were enacted, United States immigration laws increased the “power and control men [had] over women by giving one spouse control over the other spouse’s immigration status.”⁶

“In the United States, 34% to 49.8% of immigrant women are victims of domestic violence.”⁷ Narrowing the scope to married immigrant women, this figure rises to 59.5%.⁸ This number increases once more to 77% when we only consider married women whose immigration status is dependent upon their spouse.⁹ The need to advocate for these women is great and compounded by the obstacles they are likely to face in navigating United States laws without the benefit of counsel.

B. *Obstacles for Battered Immigrant Women*

The obstacles for battered immigrant women begin with cultural barriers. Cultural beliefs and practices can rationalize or deny the existence of domestic violence in immigrant and refugee communities, and also serve as barriers to battered immigrant women in need of the services provided by public and private social service programs.¹⁰ Many immigrant women are unwilling to contravene strong cultural

4. Karyl Alice Davis, Commentary, *Unlocking the Door by Giving Her a Key: A Comment on the Adequacy of the U-Visa as a Remedy?*, 56 ALA. L. REV. 557, 559 (2004) (quoting LETI VOLPP, FAMILY VIOLENCE PREVENTION FUND, WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES AVAILABLE 3 (1995)).

5. *Id.* (quoting Ryan Lilienthal, *Old Hurtles Hamper New Options for Battered Immigrant Women*, 62 BROOK. L. REV. 1595, 1596 (1996)).

6. *Id.* at 5-6.

7. *Id.* at 557 (citing *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 58 (2000) (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund)).

8. *Id.*

9. *Id.* at 558 (citing Uma Narayan, “Male-Order” Brides, FEMINIST ETHICS & SOC. POL’Y 143, 145 (1997)).

10. Shetty & Kaguyutan, *supra* note 1, at 1.

norms of what a wife and mother “should be” in order to seek help.¹¹ It is important that advocates understand the cultural barriers these women experience when they come to the United States, and particularly when they become victims of domestic violence.¹²

Many immigrant women are unaware that their experience of intimate partner abuse is against the law in the United States, as it is legal in many countries around the world.¹³ “Immigrant women may also be wary of requesting help from official institutions based on real or imagined experiences with similar institutions in their home country.”¹⁴ Even if a battered immigrant woman is aware that the abuse she is experiencing is against the law, she is unlikely to call the police. For example, if a client has seen women in her home country returned to her husband after reporting domestic violence to the police, she is unlikely to think the police will respond differently in the United States. These women may have been taught that domestic violence is a personal issue that should stay within the family and not appropriate for government intervention.¹⁵ Moreover, a battered immigrant woman may fear that she will be deported from the United States if she calls the police.¹⁶ These false beliefs are usually supplied by the batterer,

11. For example:

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

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

12. Browne et. al., *supra* note 3, at 72.

13. For example, in Haiti, violence against women can only be punished under general laws against assault and battery, depending on the circumstances of the attack and the degree of injury to the victim. See Walter J. Pierce & Erlange Elisme, *Suffering, Surviving, Succeeding: Understanding and Working with Haitian Women*, 7 RACE, GENDER & CLASS 60, 70 (2000).

14. Shetty & Kaguyutan, *supra* note 1, at 3.

15. See, e.g., Shelley Wiley, *A Grassroots Religious Response to Domestic Violence in Haiti*, 5(1) J. RELIGION & ABUSE 23, 26 (2003) (discussing muggers’ new approach of yelling at a female victim as though she is a lover or a wife, knowing that if others witness the attack they will assume it is “simply” a domestic matter and leave the mugger alone, to illustrate the lack of public intervention into domestic violence in Haitian society).

16. For example, a survey among Latina immigrants in the Washington, D.C. area found that 21.7% of the battered immigrant women survey participants listed “fear of being reported to immigration as their primary reason for remaining in an abusive relationship”. Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women and a History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL’Y & L.

himself. For these women, the threat of deportation to their home country may cause more fear than the threat of continued spousal abuse.¹⁷ Moreover, these women may fear that they will lose custody of their children through deportation.¹⁸ Faced with the perceived choice between seeking help and being separated from their children, women may choose to endure the abuse.

In addition to the difficulty of navigating United States laws, battered immigrant women face economic and social barriers to reporting their abuse. For example, a battered woman's only means of support may be her abusive husband, and she may lack the alternative support that extended family members could otherwise offer in the United States.¹⁹ Additionally, the client may be ashamed to seek support to leave her abuser from family in her home country, or even tell her family about the abusive relationship. If the client has no legal immigration status, it will be difficult for her to find gainful employment to provide for herself and her children without the economic support of her abuser. Moreover, a battered woman might see her immediate family as the one stabilizing force that enables her to "weather the turbulent process of migration to the United States."²⁰ This factor cannot be underestimated, as advocates must consider the impact on the client of being in a new place where she is unfamiliar with the laws—and possibly the language—and without a social support system. Therefore, the fear of economic devastation and social isolation in a foreign land can prevent many battered immigrant women from leaving their abusers.

The community to which the battered woman belongs may also inhibit her ability to leave her abuser: For example, immigrant communities "respond to some women's efforts to seek safety by shunning them or putting pressure on them to remain in the marriage."²¹ In some cultures, divorce stigmatizes a woman such that she cannot remarry within her community.²² A woman who leaves her abuser is often held responsible for the end of the marriage, even though she was the vic-

95, 98 (2001) (citing Marry Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 271 (2000)).

17. Sarah M. Wood, *VAWA's Unfinished Business: The Immigrant Women Who Fall Through the Cracks*, 11 DUKE J. GENDER L. & POL'Y 141, 142 (2004),

18. *Id.* at 153.

19. Shetty & Kaguyutan, *supra* note 1, at 1-2.

20. *Id.* at 2.

21. *Id.* at 2-3.

22. *Id.* at 3.

tim of violence.²³ “Her family of origin may or may not accept her return, because such an act may bring disgrace to the entire family.”²⁴ In addition, the presence of relatives who witness episodes of violence may not dissuade the batterer, as family members may close their eyes to, or excuse, the violence.²⁵ Therefore, the possibility of community rejection further hinders the likelihood that a client will seek help.

One of the most obvious barriers facing battered immigrant women is language.²⁶ Language barriers have a significant effect on a battered woman’s access to social and legal services.²⁷ A battered woman may have difficulty communicating with law enforcement and social service providers, exacerbating her feelings of isolation. The lack of proficient translators throughout the United States criminal justice system may leave the battered immigrant woman unable to describe her situation to the police; her only translator may be the batterer, himself.²⁸ Further, if a client seeks help from a crisis hotline, a women’s shelter, or an attorney with whom she is unable to communicate, the inability to communicate may only increase her feelings of isolation and further discourage her from seeking help to escape her batterer.

III. THE HISTORY OF LEGISLATIVE RESPONSES TO DOMESTIC VIOLENCE IN IMMIGRANT COMMUNITIES

A. Dependency

Throughout our nation’s history, a woman’s immigration status has been dependent upon her husband’s status: “Early United States immigration laws incorporated the concept of coverture,²⁹ which was ‘a legislative enactment of the common law theory that the husband is the head of the household.’”³⁰ For example, an 1855 law granted Unit-

23. *Id.*

24. *Id.* at 3.

25. Shetty & Kaguyutan, *supra* note 1, at 3.

26. Wood, *supra* note 17, at 150.

27. *Id.* at 151.

28. Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137, 142 (2002).

29. Coverture is the legal principle under which “the very being or legal existence of the woman is suspended during marriage, or at least incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs everything.” Orloff & Kaguyutan, *supra* note 16, at 100 (quoting W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432 (1765)).

30. *Id.*

ed States citizenship to immigrant women who married United States citizens; however, a 1907 law made it so that a United States citizen woman revoked her citizenship when she married an immigrant man.³¹ Coverture as a state-sanctioned legal principle created a social climate that condoned, and even encouraged, domestic violence, as the doctrine gave a husband the right to “chastise or even kill his wife if he deemed it necessary punishment.”³² This archaic principle influenced United States immigration law for decades, leaving immigrant victims of domestic violence with nowhere to turn for help.

B. The 1952 Immigration and Nationality Act

In 1952, the Immigration and Nationality Act (INA) made immigration laws gender-neutral, enabling a woman to confer legal immigration status on her husband.³³ Further, this legislation removed the “exclusionary quotas on the number of husbands and wives who could sponsor a spouse.”³⁴ While this legislation was gender-neutral on its face, the problems of coverture still remain rooted in immigration law and the ramifications of sponsorship are most serious for women because “the power of sponsorship and autonomous action lies with the citizen or lawful permanent resident spouse, and because the majority of immigrant spouses and victims of domestic violence are women.”³⁵ This disparate impact resulted in the law being an ineffective effort to equalize the power between men and women under immigration law.

C. The 1986 Immigration Marriage Fraud Amendments

In 1986, Congress enacted the Immigration Marriage Fraud Amendments³⁶ (IMFA). These amendments limited the right to apply for permanent residency after marrying a United States citizen or lawful permanent resident “by conditioning a spouse’s receipt of permanent residency upon the length of the marriage.”³⁷ This “significantly enhanced the control a citizen or lawful permanent resident spouse had

31. Davis, *supra* note 4, at 560 (citing Lori Romeyn Sitowski, *Congress Giveth, Congress Taketh Away, Congress Fixeth its Mistake? Assessing the Potential Impact of the Battered Immigrant Women Protection Act of 2000*, 19 LAW & INEQ. 259, 266 (2001)).

32. Orloff & Kaguyutan, *supra* note 16, at 100-01.

33. *Id.* at 101.

34. Davis, *supra* note 4, at 560.

35. Orloff & Kaguyutan, *supra* note 16, at 101.

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

37. Davis, *supra* note 4, at 560-61 (citing Sitowski, *supra* note 31, at 268).

over his alien spouse's immigration status."³⁸ This Congressional effort to expose "sham marriages" also jeopardized the immigration status of any children whose basis for seeking permanent residency was their mother's marriage to a citizen or lawful permanent resident.³⁹ Thus, the IMFA effectively trapped women in abusive relationships by increasing the power an abuser has over his wife and step-children.

The IMFA provided limited opportunities for securing permanent residence to spouses who left their abusive sponsor spouses. Without the sponsorship of the citizen or legal permanent resident spouse, an immigrant spouse could not gain permanent residency unless she qualified for one of two waivers under the IMFA.⁴⁰ The IMFA gave the Attorney General discretionary power to grant permanent residency to a battered conditional resident without the joint petition and interview if she satisfied the criteria for "extreme hardship" or "good faith/good cause."⁴¹

The "extreme hardship" waiver granted relief if the alien spouse "failed to meet the petition and interview requirements but demonstrated that she would suffer extreme hardship if deported."⁴² Under legacy-INS regulations, "extreme hardship" was narrowly construed and included only suffering that the alien spouse faced were she deported—not suffering she faced if she remained married to her abusive spouse.⁴³ Some legacy-INS officials interpreted the "extreme hardship" waiver as inapplicable to battered immigrant women on the belief that their "hardship" was suffered in the United States and deportation was unlikely to increase this hardship.⁴⁴ Thus, past abuse did not factor into the decision of whether to grant an "extreme hardship" waiver.

Under the "good faith/good cause" waiver, the immigrant spouse had to demonstrate that she had married in good faith, had good cause (domestic violence), and had initiated divorce proceedings herself.⁴⁵ The "good faith/good cause" waiver ignored the reality that battered immigrant women may have difficulty leaving an abusive marriage, finding a lawyer, and obtaining the resources to finance di-

38. Orloff & Kaguyutan, *supra* note 16, at 101-02.

39. *Id.* at 102.

40. Davis, *supra* note 4, at 561.

41. Orloff & Kaguyutan, *supra* note 16, at 102 (citing 8 U.S.C. § 1186(a)(c)(4) (1990)).

42. Davis, *supra* note 4, at 561-62.

43. Davis, *supra* note 4, at 562 (citing Sitowski, *supra* note 31, at 271).

44. Orloff & Kaguyutan, *supra* note 16, at 103 (citing Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 583, 610 (1991)).

45. *Id.* at 104-05.

voiced litigation.⁴⁶ Thus, the “extreme hardship” and “good faith/good cause” waivers failed to give meaningful relief to battered immigrant women.

D. 1990 Battered Spouse Waiver

As Shetty and Kaguyutan discuss, “[t]he early 1990s reflected a growing recognition of the devastating impact immigration law and procedure had on” battered immigrant women.⁴⁷ The Immigration Act of 1990 (“IA”) eliminated the requirement that an alien spouse file for divorce under the “good faith/good cause” waiver and created the Battered Spouse Waiver.⁴⁸ The Battered Spouse Waiver defined domestic violence as “battering or extreme cruelty.”⁴⁹ The Waiver’s definition of domestic violence was based on international law, rather than federal or state law.⁵⁰ In order to qualify for a Battered Spouse Waiver, “the abused spouse had to prove that she entered into the marriage in good faith and that she or her child was battered or subjected to extreme cruelty.”⁵¹

Although the 1990 Battered Spouse Waiver showed progress in legislative awareness of the realities of domestic violence in immigrant communities, problems still remained. For example, an immigrant spouse still could not become a permanent resident unless her citizen or permanent resident spouse sponsored her.⁵² This ignored the common reality that in order to increase his control over his spouse, an abuser would not petition for lawful status on his wife’s behalf. Moreover, Battered Spouse Waiver applicants had to submit evidence from a licensed mental health professional.⁵³ This evidentiary requirement was insurmountable for many battered women due to financial, community and linguistic constraints.⁵⁴ Although the Battered Spouse

46. *Id.* at 105.

47. Shetty & Kaguyutan, *supra* note 1, at 3.

48. Davis, *supra* note 4, at 562 (citing Sitowski, *supra* note 31, at 271; Immigration Act, Pub. L. No. 101-649, 104 Stat. 4978 (1990)).

49. Orloff & Kaguyutan, *supra* note 16, at 106 (citing Calvo, *supra* note 44, at 610; 8 U.S.C. § 1186a(c)(4)(C) (1990)).

50. The Battered Spouse Waiver’s definition of domestic violence “was more inclusive than the domestic violence definition used in most state protection orders and criminal domestic violence statutes, which only covered actions that violated criminal laws including threats, attempts, and violation of civil protection orders.” *Id.* at 106.

51. Davis, *supra* note 4, at 562 (citing Sitowski, *supra* note 31, at 272; Immigration Act, Pub. L. No. 101-649, 104 Stat. 4978 (1990)).

52. Orloff & Kaguyutan, *supra* note 16, at 107.

53. *Id.* (citing 8 C.F.R. §§ 216(e)(3) (iv)-(vii) (2001)).

54. Davis, *supra* note 4, at 562.

Waiver was a significant improvement to the immigration relief available to abused spouses, it fell short of aiding women and children who were never sponsored by their batterers.

E. 1994 Violence Against Women Act

In passing the Violence Against Women Act of 1994 (VAWA 1994), “Congress sought to address some of the inequities inherent in United States immigration law as part of its larger goal of preventing violence against women.”⁵⁵ This was the first comprehensive legislation enacted to specifically address the issue of violence against women.⁵⁶ In particular, the immigration provisions of VAWA 1994 offered greater protection and benefits for battered immigrant women and children.⁵⁷

1. The Self-petition Process

VAWA 1994 allowed battered immigrants married to United States citizens or lawful permanent residents to self-petition for lawful immigration status, rather than relying on their abusive spouses to sponsor them.⁵⁸ Upon approval of a VAWA self-petition, the applicant and her derivatives have “deferred action” status where they are eligible to apply for employment authorization.⁵⁹ This is a significant benefit for battered immigrant women and children as the authorization to work legally in the United States starts the self-petitioner on the road to independence and self-sufficiency. Depending on the status of the abuser (whether the abuser is a United States citizen or a lawful permanent resident) and the applicant’s immigrant history, the applicant may be eligible to immediately adjust status to become a lawful permanent resident.⁶⁰

The self-petition process requires the applicant to prove she is of good moral character, that the marriage was entered into in good faith, and that deportation would result in extreme hardship to the immigrant or her child(ren).⁶¹ In addition, during the marriage, the peti-

55. Wood, *supra* note 17, at 145 (citing Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941-42 (1994) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter VAWA 1994]).

56. Kwong, *supra* note 28, at 137 (citing VAWA 1994).

57. Wood, *supra* note 17, at 145-46.

58. *Id.* at 146.

59. See CATHOLIC LEGAL IMMIGRATION NETWORK & IMMIGRANT LEGAL RESOURCE CENTER, THE VAWA MANUAL: IMMIGRATION RELIEF FOR ABUSED IMMIGRANTS 4-30 (2006).

60. *Id.* at 4-32.

61. *Id.* (citing 8 C.F.R. § 204.2(c)(H) (2003); 8 C.F.R. § 204.2(c)(D) (2003)).

tioning immigrant or her child must have been battered by a spouse who is a United States citizen or lawful permanent resident, and the battered immigrant must have resided with the battering spouse.⁶² VAWA 1994 amended the INA to “require the Attorney General to consider any credible evidence relevant to the applicant’s petition for legal residency.”⁶³ The Attorney General was given the sole discretion to determine both the credibility of the evidence and the weight given to that evidence.⁶⁴

2. *Suspension of Deportation & Cancellation of Removal under VAWA*

VAWA 1994 also offered relief for battered immigrant women who had already been placed in deportation proceedings.⁶⁵ Under this statute, a woman can apply for suspension of deportation and lawful permanent residency by demonstrating three years of continuous physical presence in the United States; that she will suffer extreme hardship were she deported; that she is or was married to a citizen or lawful permanent resident; that she is of good moral character; and resided with the abuser and married him in good faith.⁶⁶ The applicant must also prove that her deportation would result in extreme hardship to herself, her parent, or child.⁶⁷ Factors contributing to extreme hardship may include custody and protection orders, the age of the applicant (both at entry and the time of requested relief), any medical needs the applicant may have, the applicant’s medical status and ties to the community, the applicant’s length of residence in the United States and abroad, the economic and political condition in the home country, the adverse psychological impact of deportation, and the applicant’s immigration history.⁶⁸ In addition to the documents supporting the applicant’s good moral character, an advocate can submit affidavits from community members, doctors, and psychologists, as well as hospital

62. *Id.* (citing 8 C.F.R. §§ 216(e)(3)(iv)-(vii) (2003)); Orloff & Kaguyutan, *supra* note 16, at 114.

63. Kwong, *supra* note 28, at 144 (citing VAWA 1994 § 40702(a)).

64. *Id.*

65. Orloff & Kaguyutan, *supra* note 16, at 115 (citing VAWA 1994 § 40703(a), 8 U.S.C. § 1254(a) (repealed in 1997); INA § 244(a)(3), *as in effect before* April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)).

66. *Id.*

67. Wood, *supra* note 17, at 146 (citing VAWA 1994 § 40702, 8 U.S.C. § 1186a(c)(4) (2000)).

68. *See* CLINIC & ILRC, *supra* note 59, at 10-15.

bills, and State Department country reports to demonstrate how deportation would result in extreme hardship.⁶⁹

The impact of domestic abuse on children was of significant concern to Congress in designing VAWA 1994's immigration provisions.⁷⁰ The drafters were concerned that current immigration laws trapped women in abusive marriages where they were forced to raise their children in an environment that allowed violence as an appropriate means of expressing anger and frustration.⁷¹ VAWA 1994 contained two provisions crafted to "help immigrant children living in abusive homes."⁷² First, "VAWA offered immigration protection to abused immigrant children and extended immigration protection to the immigrant parents of child abuse victims" to encourage the reporting of child abuse and removal of the child from the home of the abuser.⁷³ Second, the legislation explicitly authorized battered immigrant mothers to "assist their minor children in obtaining immigration benefits by including any of their children who were undocumented as derivative applicants in the mothers' VAWA self-petitions."⁷⁴ These provisions made a significant effort to break the cycle of domestic violence for battered immigrant children and immigrant children of battered immigrant women.

F. VAWA 2000 Reforms: The Battered Immigrant Women Protection Act

VAWA was amended in 2000 due largely to the unintended consequences of the welfare and immigration reforms of 1996, and the gaps left open by VAWA 1994.⁷⁵ In addition to the confusion sur-

69. *Id.*

70.

In over fifty percent of domestic violence homes where women are abused, so are the children. Children were involved or present during forty-three percent of all domestic violence offenses in 1996. It is estimated that almost ten million children in America are at risk of being exposed to domestic violence each year. As violence against the mother becomes more severe and more frequent, children experienced three thousand percent increase in physical violence by the male batterer.

Orloff & Kaguyutan, *supra* note 16, at 111 n.91 (citing ADVISORY COUNCIL ON DOMESTIC VIOLENCE, CHILDREN AND DOMESTIC VIOLENCE REPORT 1-3, 5 (1998)).

71. *Id.* at 111.

72. *Id.* at 112.

73. *Id.*

74. *Id.* at 112-13.

75. Although IIRAIRA explicitly authorized access to publish benefits for battered immigrants, many were still under the misconception that they could not apply for benefits without being deemed a public charge, making them ineligible for lawful permanent residency. *See*

rounding whether battered immigrants could receive public benefits without being deemed a public charge (and suffering the possible immigration consequences of such a finding), VAWA 1994 did not offer any protection to several categories of battered immigrants, including: “those abused by citizen and lawful permanent resident boyfriends; immigrant spouses and children of abusive non-immigrant visa holders or diplomats; immigrant spouses, children and intimate partners abused by undocumented abusers; and non-citizen spouses and children of abusive United States government employees and military members living abroad.”⁷⁶ Many of these problems were solved with the 2000 amendments.

1. *Expanded Protection*

The increased protection available to battered immigrant women was one of the most significant changes in VAWA 2000. Although the legislation still required the abuser to be a United States citizen or lawful permanent resident, “a battered immigrant woman [was] now eligible to self-petition if her batterer was a United States citizen who died within the past two years, or if her batterer lost or renounced his immigrant status within the past two years due to an incident ‘related’ to domestic violence.”⁷⁷ Although this amendment increased the protection available for battered immigrant women, establishing a relationship between an abuser’s loss of status and a domestic violence incident has proven difficult.⁷⁸ Further expanded categories of protected abuse victims under VAWA 2000 include:

- battered spouses who unwittingly married bigamists;

- children of battered immigrants granted VAWA cancellation of removal or VAWA suspension of deportation who could receive humanitarian parole;

- spouses and children of Cuban, Haitian and Nicaraguan abusers by allowing abused spouses and children to self-petition who are granted access to protections of Nicaraguan Adjustment and Central American Relief Act of 1997

Orloff & Kaguyutan, *supra* note 16, at 141; *see also* Wood, *supra* note 17, at 147 (citing Victims of Violence and Trafficking Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections in 42 U.S.C.) [hereinafter VAWA 2000]).

76. Orloff & Kaguyutan, *supra* note 16, at 143-44.

77. Kwong, *supra* note 28, at 145 (citing VAWA 2000 § 1503(b)(1)(a)).

78. *Id.* at 146.

(NACARA) and Haitian Refugee Immigration Fairness Act (HRIFA).⁷⁹

2. *Burden of Proof*

VAWA 2000 eased the high evidentiary standard required to prove a battered immigrant woman would suffer extreme hardship if deported back to her home country.⁸⁰ Without requiring extensive documentation of extreme hardship, it became easier for battered immigrant women to win approval of their self-petitions.⁸¹ In addition to eliminating the extensive documentation and extreme hardship requirements, the burden of proof was lowered for petitioners.⁸² The Senate Conference Report on VAWA 2000's discussion of this provision explained that the amendment:

allows abused spouses and children who have already demonstrated to the INS that they have been the victims of battery or extreme cruelty by their spouse or parent to file their own petition for a lawful permanent resident visa without also having to show they will suffer "extreme hardship" if forced to leave the U.S., a showing that was not required if their citizen or lawful permanent resident spouse or parent files the visa petition on their behalf.⁸³

3. *"Good Moral Character"*

The modification of VAWA 1994's "good moral character" requirement was another significant amendment in VAWA 2000. VAWA 2000 authorized the Attorney General to determine that a battered immigrant woman had shown good moral character even if she has been convicted of crimes, as long as they were related to her abuse and she was not the primary perpetrator of violence in the relationship, that she "acted in self-defense, that she ha[d] not violated a protective order designed to protect her, and that the crime did not result in serious bodily injury."⁸⁴ Thus, a battered woman could defend herself

79. Orloff & Kaguyutan, *supra* note 16, at 146 (citing VAWA 2000 § 1503(c)(1), 8 U.S.C. § 1154).

80. *Id.* at 145 (citing VAWA 2000 § 1503, 8 U.S.C. §§ 1101, 1154 & 1430).

81. *See id.*

82. Wood, *supra* note 17, at 148-49.

83. 146 Cong. Rec. S10, 188-03 (daily ed. Oct. 11, 2000) (statement of Sen. Hatch); Wood, *supra* note 17, at 149.

84. Wood, *supra* note 17, at 149 (citing VAWA 2000 § 1505(b)(1)(8), 8 U.S.C. § 1227(a)(7)(A) (2000)).

and her children from violence without putting her immigration status at risk.

4. *The Creation of the U Visa*

Perhaps the most significant amendment in VAWA 2000 was the creation of the U Visa as a remedy available to immigrant victims of domestic violence. Congress created the U Visa to help domestic violence and other crime victims who could not file a self-petition under VAWA 1994 because they were not married to a citizen or lawful permanent resident.⁸⁵ This remedy is available to non-citizens who demonstrate that they have: (1) “suffered substantial physical or mental abuse” (2) as the result of criminal activities including rape, torture, trafficking, incest, domestic violence, sexual assault, prostitution, kidnapping, and murder (in addition to many other crimes).⁸⁶ The U Visa grants these victims an interim relief status in the United States, employment authorization eligibility, and the possibility⁸⁷ of receiving permanent residency in the future.⁸⁸ The petitioner must provide evidence that she has been, is, or will likely be helpful to the federal, state or local authorities investigating or prosecuting the crime of which she was victim.⁸⁹ This requires advocates to obtain certification from police or prosecution that their client was helpful in the investigation of the crime. Obtaining certification may present a challenge in some cases where the police choose not to arrest the abuser or press charges. Further, many advocates could face challenges if their client chooses to drop the charges against her batterer or even refuses to testify in court. Interviewing and counseling clients appropriately is important to surmount these obstacles in order to obtain certification and eventual relief.

In order to adjust status to become a permanent resident, a U Visa holder must demonstrate that: (1) she has not unreasonably refused to provide assistance in a criminal investigation or prosecution of the crime committed against her; (2) she has been continuously

85. “The purposes of this title are – (1) to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children and (2) to offer protection against domestic violence.” Davis, *supra* note 4, at 566, (quoting Battered Immigrant Women Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter BIWA]).

86. Wood, *supra* note 17, at 149 (quoting INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2000)).

87. Regulations for the U visa have yet to be issued. See VAWA 2005, 109th Cong. § 828 (2005).

88. Davis, *supra* note 4, at 566 (citing BIWA § 1513(f)).

89. *Id.* (citing BIWA § 1513(b)(3)).

present in the United States for a three-year period; and (3) humanitarian reasons, family unity, or the public interest justifies her continued presence in the United States.⁹⁰ The creation of the U Visa is an extremely important advance for the rights of battered immigrant women as it offers protection to female domestic violence victims who are ineligible for VAWA self-petitions because of their abuser's lack of a marital relationship or lawful immigration status.⁹¹

G. *Convention Against Torture*

Another viable alternative for providing relief to immigrant victims of domestic violence is the Convention Against Torture (CAT), implemented in the United States in March, 1999.⁹² Article 3 of the CAT prohibits the deportation of any "person to another state where there are substantial grounds for believing that (s)he would be in danger of being subjected to torture."⁹³ In order for this remedy to assist immigrant victims of domestic violence, the United States government must be willing to recognize that particularly egregious domestic violence is, in essence, torture.⁹⁴ Although the CAT does not explicitly conceptualize domestic violence as torture, other international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, the Universal Declaration of Human Rights, and the International Convention on Civil and Political Rights include principles of international law relevant to domestic violence victims.⁹⁵ Relief under the CAT, called "withholding of removal", is not ideal for victims of domestic violence as it does not offer the same benefits as VAWA. For example, whereas VAWA allows the self-petitioner to eventually become a lawful permanent res-

90. *Id.* (citing BIWA § 1513(f)(1)).

91. Kwong *supra* note 28, at 150 (citing NOW Legal Defense and Education Fund, U-Visa Fact Sheet (2001)).

92. Barbara Cochrane Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895, 903 (2000) (citing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113, 114).

93. CAT art. 3.

94. Cochrane Alexander, *supra* note 92, at 908.

95. *Id.* at 909 (citing United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 at 13; Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR 3d Sess., U.N. Doc. A/811 (Dec. 10, 1948) (establishing in Article 5 a universal right to be free from torture and cruel, inhuman or degrading treatment or punishment); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 6 I.L.M. 368).

ident and therefore petition for her family members in and outside the United States,⁹⁶ withholding of removal does not provide any of these benefits.⁹⁷ However, this remedy could be the most promising alternative for women who are not married to their abusers, women whose abusive spouses are not United States citizens or lawful permanent residents, or women who cannot obtain the law enforcement certification necessary to obtain a U Visa.

IV. THE 2005 VIOLENCE AGAINST WOMEN ACT

Although the 2000 VAWA amendments expanded the relief available to battered immigrant women, there were still many deficiencies in the act. The VAWA 2005 amendments have attempted to address the loopholes left by previous legislation.

A. Good Moral Character

VAWA 2005 further reduced self-petitioners' burden in establishing their good moral character. Prior to the passage of VAWA 2005, the United States Citizen and Immigration Services (CIS) issued a memo regarding VAWA and good moral character.⁹⁸ This memo required CIS adjudicators to determine the good moral character of self-petitioners by determining if the applicant is subject to the inadmissibility bar under section 101(f) of the INA.⁹⁹ If the self-petitioner is subject to such a bar, the CIS adjudicator must determine whether the barred act is waivable.¹⁰⁰ Section 204(a)(1)(C) of the INA provides CIS with the discretion to make a finding of good moral character if

96. See Orloff & Kaguyutan, *supra* note 16, at 154-155 ("Under section 1503 of VAWA 2000, battered self-petitioners are allowed to adjust their status under sections 245(a) and (c) of the Immigration and Nationality Act.").

97. See 8 C.F.R. § 208.16(f) (1999) (establishing that withholding of removal under the Convention Against Torture (CAT) does not prevent the status-holder's return to a "safe" third country); 8 C.F.R. § 208.16(e) (1999) (noting that withholding of removal under the CAT does not create a basis for an asylee's spouse and minor children to join the asylee, but providing reconsideration for those individuals whose request for asylum was denied "solely in the exercise of discretion.").

98. Interoffice Memorandum from William R. Yates, Associate Director of Operations, U.S. Citizenship & Immigration Serv., to Paul E. Novak, Director, Vermont Serv. Ctr., Determinations of Good Moral Character in VAWA-Based Self-Petitions (Jan. 19 2005).

99. Such grounds of inadmissibility under INA section 101(f) include, but are not limited to, habitual drunkenness, engaging in prostitution within the previous ten years, assisting another alien in entering the United States illegally, having a prior removal order, committing a crime involving moral turpitude or an aggravated felony, or giving material false testimony for immigration benefits. *Id.* at 2, attachment 1; INA § 101(f), 8 U.S.C. § 1101(f).

100. Interoffice Memorandum, *supra* note 98, at 2-3.

the act or conviction is waivable under INA sections 212 or 237, and if the act or conviction was connected to the abuse suffered by the self-petitioner.¹⁰¹ VAWA 2005 amended the “good moral character” definition by striking reference to INA section 212(a)(9)(A) (inadmissibility based on a prior removal order) and inserting section (10)(A) (inadmissibility based on polygamy).¹⁰² This amendment is not VAWA-specific.

B. Relief Available for Children and Elderly

VAWA 2005 expands relief to abused parents of United States Citizens.¹⁰³ Section 805 changes the INA to extend eligibility for relief to child domestic violence victims whose permanent resident parent abuser petitioned for the child prior to the child becoming twenty-one years-old, even though the child has since “aged out.”¹⁰⁴ This provision also permits a son or daughter who qualified to file a petition for immigrant status before aging out at the age of twenty-one but did not do so, to petition for such status before reaching twenty-five years of age, if the person can show a connection between such delay and having been battered.¹⁰⁵ This rationale requires the petitioner to show that the abuse was “one central reason” behind the delay in filing.¹⁰⁶ To date, there have been no regulations issued to help practitioners make this argument. Therefore, advocates have had trouble using this new provision as an avenue of relief for their clients.

VAWA 2005 also extends greater protections to adopted child victims of domestic violence. Section 805(d) further amends the definition of “child” found in INA section 101(b) by eliminating the two-year residency and custody requirement for adopted children where the adopted child “has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household.”¹⁰⁷ As a result, an adopted child can self-petition when abused by a United States citizen or lawful permanent resident even where the child has not been in the physical and legal

101. For example, there is a VAWA-specific waiver to the bar for using fraudulent immigration documents. VAWA self-petitioners are eligible for an INA section 212(i) waiver if they can show “extreme hardship” to themselves or to their United States citizen, lawful permanent resident, or “qualified alien” parent or child. *Id.*

102. H.R. 3402, 109th Cong. § 822 (2005) [hereinafter VAWA 2005].

103. VAWA 2005 § 817.

104. VAWA 2005 § 805.

105. VAWA 2005 § 805(c).

106. VAWA 2005 § 805(c)(1).

107. INA § 101(b)(1)(E)(i), 8 U.S.C. § 1101(b)(1)(E)(i); VAWA 2005 § 805(d).

custody of the abusing parent for two years. Further, a parent may petition for an abused adopted child without meeting residence and/or custody requirements where the child is abused by family members of the parent who live in the same household.

C. Remedies for Clients in Removal Proceedings

VAWA 2005 affords domestic violence victims who have been ordered deported additional opportunities to have their cases reopened. A Motion to Reopen is used by an immigrant ordered removed from the United States to present new evidence to the immigration judge that was not available when her case was pending in the immigration court. VAWA 2005 exempts certain domestic violence-related motions to reopen filed under VAWA from the general time and numerical caps.¹⁰⁸ Further, there is an automatic stay of removal until all appeals are exhausted if the petitioner can establish on this motion that she is a “qualified alien”¹⁰⁹ under VAWA.¹¹⁰ VAWA 2005 also gives relief and exempts from civil penalty self-petitioners who have overstayed orders granting voluntary departure.¹¹¹ The petitioner seeking adjustment of status or cancellation/suspension under VAWA must show that the abuse suffered was “at least one central reason” for the overstay.¹¹² The amendments also include “battery or extreme cruelty to the alien of any child or parent of the alien” as an “exceptional circumstance” beyond the control of the alien that could reopen in absentia orders.¹¹³

D. Relief for K Fiancé Visa Self-Petitioners

Under VAWA, relief is available to women who have been brought to the United States on K Fiancé Visas. VAWA 2005 institutes new limitations on K Fiancé Visa petitioners. These limitations require a K-Visa non-immigrant petitioner to disclose his or her crimi-

108. VAWA 2005 § 825. Typically, there is a ninety-day window to file a motion to reopen and a numerical cap of one per case. *See* INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (as redesignated by section 101(d)(1) of the REAL ID Act of 2005, Pub.L. 109-13, 119 Stat. 302 (2005)).

109. “Qualified alien” is a public benefits eligibility term which includes battered individuals who have demonstrated prima facie eligibility for permanent residency (as self-petitioners) or cancellation of removal. *See* 8 U.S.C. § 1641(c)(1)(B) (1996).

110. VAWA 2005 § 825.

111. VAWA 2005 § 812 (codified as amended at 8 U.S.C. § 1229c(d)).

112. VAWA 2005 § 825.

113. VAWA 2005 § 825 (codified as amended at 8 U.S.C. § 1229a(e)(1)).

nal convictions for specified crimes¹¹⁴ in the visa petition.¹¹⁵ Further, VAWA 2005 prohibits approval of a petition absent verification that the petitioner has not previously petitioned two or more times.¹¹⁶ Where there have been more than two petitions filed, VAWA 2005 requires that two years elapse from the approval of the previous petition.¹¹⁷ To implement this provision, VAWA 2005 provides for a database for tracking multiple K petitions and giving notification to both the petitioner and beneficiary where the petitioner has had more than two petitions approved.¹¹⁸

E. U Visa Amendments

VAWA 2005 expanded the relief available to derivative family members under the U Visa. The amendments allow unmarried siblings under eighteen years-old to be listed as derivatives under the principal's application.¹¹⁹ Further, the extreme hardship requirement for derivatives was eliminated and derivatives were no longer required to show that the underlying investigation would have been harmed without the assistance of the derivative applicant, herself.¹²⁰

F. Employment Authorization for Approved Self-Petitioners and Battered Spouses of Certain Non-Immigrants

VAWA 2005 grants immediate eligibility for work authorization to self-petitioners solely based on their I-360 petition approval, and it is not necessary to wait until deferred action is granted.¹²¹ VAWA 2005 also grants eligibility for employment authorization to spouses (admitted under INA sections 101(a)(15)(A), (E)(iii), (G) or (H)) accompanying or following to joining the principal admitted un-

114. VAWA 2005 § 832. The specified crimes include domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse and stalking, homicide, murder, manslaughter, rape, abusive sexual contact, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or an attempt to commit any of these crimes, or at least 3 convictions for crimes relating to controlled substance or alcohol, not arising from a single act. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* A waiver is available for this waiting period but is limited where petitioner has a record of violent criminal offenses. *See* VAWA 2005 § 832(a)(2)(B).

118. VAWA 2005 § 832(a)(4)(A).

119. VAWA 2005 § 801(b).

120. *Id.* *See also supra* Part III.F.4.

121. VAWA 2005 § 814(b).

der sections A, E(iii), (G) or (H).¹²² These applicants must demonstrate that either the applicant or the applicant's child was subject to battery or extreme cruelty, perpetrated by the spouse, during the marriage.¹²³ Although no benefit aside from employment authorization is conferred by this amendment, permission to work is an important vehicle for these applicants' economic self-sufficiency. It is unknown how the expiration of the applicant's nonimmigrant status will impact her eligibility for employment authorization.

G. NACARA, HRIFA and Cuban Adjustment Amendments

VAWA 2005 provides adjustment of status where the spouse, her child, a child of the spouse of an alien who adjusted (or was eligible to adjust) under the Nicaragua Adjustment and Central American Relief Act of 1997 (NACARA) was battered or suffered extreme cruelty by the spouse who filed for adjustment.¹²⁴ The amendment required that the petitioner file for relief within eighteen months of VAWA 2005's enactment.¹²⁵ VAWA 2005 also amends the Haitian Refugee Immigration Fairness Act (HRIFA) to allow adjustment for a spouse, child, or the child of a spouse who was battered or subjected to extreme cruelty by an alien who is or was eligible for classification under HRIFA.¹²⁶ VAWA 2005 provides benefits for spouses of Cubans eligible for relief under the Cuban Adjustment Act for up to two years after the death of the spouse or termination of the marriage if there is a nexus between termination of the marriage and the abuse.¹²⁷

122. *Id.* Section 101(a)(15)(A) of the INA includes non-immigrants and immediate family members of those who are ambassadors, public ministers, career diplomats, consular officers, other foreign government officials and employees, or an attendant personal employee of one of the above. INA § 101(a)(15)(E)(iii) includes non-immigrants who are nationals of the Commonwealth of Australia who enter the United States to perform services in a "specialty occupation." INA § 101(a)(15)(G) includes non-immigrants and immediate family members of personal or other resident representatives of recognized foreign member government international organization, representative of non-recognized foreign member government international organization, an international organization officer or employee, or an attendant personal employee of one of the above. INA § 101(a)(15)(H) includes temporary workers or trainees as well as their spouses and children.

123. VAWA 2005 § 814(b).

124. VAWA 2005 § 815 (codified as amended at 8 U.S.C. § 1255).

125. *Id.*

126. VAWA 2005 § 824 (codified as amended at 8 U.S.C. § 1255).

127. VAWA 2005 § 823(a); Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161, (1966) (codified as amended at 8 U.S.C. § 1255).

H. VAWA 2005's Unfinished Business

Further legislative measures need to be taken to address the unfinished business of VAWA 2005. Self-petitioning needs to be available as a remedy for widows of lawful permanent residents and parents abused by their lawful permanent resident child. Guidance needs to be issued to determine the scope of relief for spouses of non-immigrant visa holders and the consequence of the expiration of the non-immigrant visa on their employment eligibility. Self-petitioners should also be exempt from the public charge inadmissibility ground under the INA, for their dependence on public benefits is a consequence of the battery and extreme cruelty they have suffered. Moreover, there is a need for greater protections for immigrant domestic violence victims against deportation and detention.

IV. CONCLUSION

Although VAWA 2005 and previous legislative amendments have greatly improved the protection available to battered immigrant women, these enactments are meaningless if affected women do not know their rights. This is where the role of advocates comes in. In order for abused women to sufficiently understand the options available to them, advocates must increase community outreach and education. For example, educational programs can be given at churches and community centers. Battered women's shelters can partner with legal services providers and allow advocates to meet with these women in a place where clients feel safe. It is also important that advocates providing these critical services understand the unique cultural restraints that the battered immigrant woman is faced with. This sensitivity, coupled with education, outreach, and advocacy, gives real meaning to the expansive protections available under United States law and prevents battered immigrant women from falling through the cracks of the legal system.