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**REFLECTIONS ON VAWA'S STRANGE BEDFELLOWS:
THE PARTNERSHIP BETWEEN THE BATTERED
IMMIGRANT WOMEN'S MOVEMENT
AND LAW ENFORCEMENT**

Alizabeth Newman*

“[T]his is our failure and our challenge for the twenty-first century: to reclaim a movement, to reform a vision, and to resituate ourselves within a feminist politic that refuses to sacrifice women’s experience and autonomy to the prerogatives of the state.”¹

INTRODUCTION

During the same two decades in which immigrants in the U.S. have seen their rights and options severely diminished, a small subset of immigrant victims of domestic abuse and other crimes received heightened attention and have continued to benefit from strengthened and widening pathways to legal immigration status.² Since 1996 Congress has passed a series of monumentally restrictive legislative changes, significantly altering the immigration system as we knew it.³ Established concepts in immigration law from “entry” and “lawfulness” were revamped, making it increasingly difficult for newcomers to arrive or others to remain within U.S. borders.⁴ Those seeking safe haven in the U.S. faced stringent regulations and applicants for immigration status with even minor criminal convictions confronted unforgiving penalties.⁵ For over a decade, immigration reform has appeared consistently on the national

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1. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 323 (2005).
2. *See infra* Parts I.A, II.
3. *See infra* Parts I.A–B.
4. *See infra* Parts I.A–B.
5. *See infra* Part I.A.

agenda,⁶ but all attempts at passing either comprehensive or piecemeal legislation failed, revealing little political will for reform.⁷ Only recently after the 2013 elections has there been a renewed energy toward reform with viable, bipartisan proposals in play in both congressional houses.⁸ Yet in the midst of the downward spiral from 1996 to present, thousands of immigrant survivors of domestic violence have found safety and independence from their abusers through legalization exemptions created by the Violence Against Women Act (VAWA) and its reauthorizations.⁹

Strategic choices within the women's rights movement to partner with law enforcement made these advances possible. As was the case of the battered women's movement in the 1960s and 1970s,¹⁰ battered immigrant women benefited substantially from this partnership but at the same time, sacrificed some key movement goals.¹¹ A conservative, law enforcement framing of the law has led to a sharp deviation from the fundamental principles of the battered women's movement in terms of defining which battered women can secure relief, and in the degree of agency they are afforded in the process.¹² The focus in the more recent VAWA provisions for immigrant women has strayed from the initial political and social message that no woman should be trapped in an abusive home, and has returned to archaic conceptions of domestic abuse that demand deserving victims and dependence in order to access relief.¹³ The contentious debates

6. See *infra* Part II.

7. Ashley Parker, *On Immigration, Obama Draws Bipartisan Praise*, N.Y. TIMES, Feb. 14, 2013.

8. Julia Preston, *Obama Will Seek Citizenship Path in One Fast Push*, N.Y. TIMES, Jan. 13, 2013, at A1; Julia Preston, *Republicans Reconsider Positions on Immigration*, N.Y. TIMES, Nov. 10, 2012, at A12; Rosalind Helderma & Sean Sullivan, *Bipartisan Group Of Senators To Unveil Framework For Immigration Overhaul*, WASH. POST (Jan. 28, 2013), http://articles.washingtonpost.com/2013-01-28/politics/36583603_1_illegal-immigrants-immigration-laws-immigration-system; Julia Preston, *Showing Grassroots Support for Immigration Overhaul*, N.Y. TIMES, May 2, 2012, at A11.

9. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994) [hereinafter VAWA 1994]; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter VTVPA]; Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) [hereinafter VAWA 2005]; see *infra* Part II.

10. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 157-61 (1982).

11. See *infra* Parts III, IV.A.2.

12. See *infra* Part IV.

13. See *infra* Part IV.B.

over the recent 2013 VAWA Reauthorization split the issues directly along party lines.¹⁴

This article adds to the wealth of retrospective examinations of the early women's movement choices to partner with law enforcement by extending that reflection to the parallel course charted by battered immigrant women. The analysis of the history of VAWA and its progeny studies an anomaly of emerging protections for some immigrants amid the storm of restrictive immigration revisions for the majority. Part I provides background to the article with an overview of the erosion of rights in the immigration schema since the 1990s. Part II describes the exceptional tools VAWA made available to immigrant survivors of domestic violence during that same timeframe. Part III compares the controversial choices made first by the women's movement with those of the battered immigrant women's advocates to create alliances with law enforcement. Each group overcame deep concerns to strategically partner with the power of the state for specific gains.¹⁵

Part IV probes the unintended consequences of these partnerships. In achieving their goals, each group of advocates compromised some of the core movement values.¹⁶ Commendably more legislative pathways to legal status were created for immigrant survivors of domestic violence, however, many requirements to access status are anathema to the movement's feminist roots.¹⁷ This section examines the substance of the law in its definition of the survivor/victim and in the level of dependence demanded to utilize the law. Part V concludes the article with an invitation for advocates and lawyers to rise to the challenge posed above by Professor Miccio to engage together in reflective conversations as we proceed in this work, with the hope of reclaiming the foundational principles of the women's movement.

14. Times Topics, *Violence Against Women Act*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/d/domestic_violence/index.html (last visited Feb. 18, 2013).

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part IV.

I. REDUCTION OF IMMIGRATION PATHWAYS IN THE 1990s

A. Restrictive Legislative Changes

In 1996 long-established constructs of immigration were upset by two major pieces of legislation, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA).¹⁸ “Deportation”¹⁹ ceased to exist and the more sanitized term “removal” was created.²⁰ The concept of due process was also re-envisioned. From as far back as the Chinese Exclusion Act²¹ in the 1880s, the U.S. immigration system acknowledged some level of rights to a non-citizen upon entry.²² This premise was overturned with IIRAIRA,²³ now granting a basic level of rights only upon a legal “admission.”²⁴ The controversial classification “aggravated felony”²⁵ was introduced to bar immigrants with serious criminal convictions for crimes involving moral turpitude,²⁶ which at one point had been interpreted

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18. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. No. 104-208.
 19. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-587-90 (codified as amended at 8 U.S.C. § 1229a(b)(5) (2006)) (stating prior to 1996, deportation was the term used by the U.S. Department of Justice Executive Office for Immigration Review (EOIR) to demand an immigrant leave the United States).
 20. Congress enacted Immigration and Nationality Act (INA) section 101(a)(47) in 1996 in section 440(b) of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1277 (codified as amended at 8 U.S.C. § 1101(a)(47)(A) (2006)). A year later, through the enactment of IIRAIRA, Congress created removal proceedings with resulting removal orders. Pub. L. 104-208, § 240(b)(5), 110 Stat. at 3009-546, 3009-589-90 (codified at 8 U.S.C. § 1229a(b)(5)). IIRAIRA section 309(d)(2) provided that references to orders of removal are deemed to include references to orders of deportation. Accordingly, INA section 101(a)(47) applies to orders of removal.
 21. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).
 22. See 8 U.S.C. § 1101(a)(13) (1994) (entry vs. exclusion), amended by IIRAIRA § 301; 8 U.S.C. §§ 1222-26 (outlining procedures for exclusion), amended by IIRAIRA § 308.
 23. See IIRAIRA, 110 Stat. 3009-546-724 (codified as amended at 8 U.S.C. § 1101).
 24. IIRAIRA § 301(a), 8 U.S.C. § 1101(a)(13) (2006).
 25. *Id.* § 321(a), 8 U.S.C. § 1101(a)(43).
 26. INA § 212(a)(2)(a)(i), 8 U.S.C. § 1182(a)(2)(a)(i), INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2006) (making deportable any legal permanent resident who, within the first 5 years of gaining status, is convicted of even one crime involving moral turpitude (CIMT) for which potential sentence is one year or more).

so widely as to include jumping a New York City turnstile.²⁷ Remaining in the U.S. without permission became codified as “unlawful presence”²⁸ that could bar access to immigration status.²⁹ Detention became mandatory for those arriving without authorization at ports of entry,³⁰ even for political asylum seekers escaping persecution.³¹ These laws were initially deemed retroactive.³²

The first of the harsh bills was AEDPA,³³ ironically justified by a U.S. citizen's bombing of the Oklahoma federal building.³⁴ This bill's most shocking clause was one to suspend for immigrants the writ of habeas corpus, the most fundamental protection of the individual from unjustified governmental infringement of liberty.³⁵ Constitutional challenges to this suspension re-affirmed the import of

27. A class A misdemeanor in New York can be punishable for up to one year. N.Y. PENAL LAW § 165.15 (McKinney 2010). An aggravated felony includes a theft offense or a burglary offense plus a sentence of imprisonment of at least one year. INA §237(a)(2)(A)(iii); 8 U.S.C. 1227(a)(2)(A)(iii). While turnstile jumping has been determined not to be an aggravated felony, it is a deportable offense if committed within 5 years of obtaining legal permanent resident status, as a “crime involving moral turpitude” that carries a potential sentence of at least one year. INA §237(a)(2)(A)(i); 8 U.S.C. 1227(a)(2)(A)(i).
28. See IIRAIRA § 301(b)(1) (1996) (codified as amended at 8 U.S.C. § 1182(a)(9)(B)(ii) (2006)) (applying unlawful presence “if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled”).
29. INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B)(i) (triggering a 3 or 10 year bar for those unlawfully present for more than 180 or 365 days respectively).
30. INA § 241(a)(2), 8 U.S.C. §1231(a)(2) (requiring mandatory detention during the removal period).
31. See *id.* § 235(b)(1)(B)(ii), 302(a) (codified as amended at 8 U.S.C. § 1225(b)(2)(A)) and § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (permitting applicant's release from detention only after passing a credible fear interview).
32. See IIRAIRA § 301(a), 8 U.S.C. § 1101(a); *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1063–64 (B.I.A. 1998).
33. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).
34. See Rabea Chaudhry, *Effective Advocacy in a Time of Terror: Redefining the Legal Representation of a Suspected Terrorist Facing Secret Evidence*, 8 UCLA J. ISLAMIC & NEAR E.L. 101, 114 (2009) (noting that the reaction to create more stringent immigration laws ignored the fact that the violence was executed by a native-born U.S. citizen).
35. See AEDPA § 104(1)–(3) (codified as amended at 28 U.S.C. § 2254(b)(1)–(3)). *But cf.* Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2524–25 (1998) (detailing the tradition of common law courts to exercise a broad scope of review where confinement presented a threat to one's right to liberty).

the writ for citizens and non-citizens alike.³⁶ Equally caustic were the provisions of mandatory detention of legal permanent residents convicted of a wide range of criminal offenses, including shoplifting³⁷ or minor drug offenses.³⁸ The Supreme Court validated the use of mandatory detention,³⁹ but limited the indefinite detention provisions.⁴⁰

Within another six months, Congress passed even more sweeping legislation, IIRAIRA.⁴¹ Whereas a non-citizen without proper immigration documents may have previously been unable to obtain legal working papers and may have been vulnerable to deportation, IIRAIRA first created the concept of “unlawful presence” that could permanently obstruct the legalization process.⁴² This bill erased any sense of security that legal permanent residents had enjoyed by mandating that a return to the U.S. after travel could under certain circumstances be considered as seeking new admission to the country,⁴³ and by enacting retroactive changes to the types of crimes that could cause a legal permanent resident to lose legal status and face removal.⁴⁴ IIRAIRA also built on AEDPA’s expansion of the list of crimes that would trigger mandatory detention.⁴⁵ Further, IIRAIRA substantially limited federal judicial review of immigration cases, stripping the courts of jurisdiction for any discretionary

36. See *INS v. St. Cyr*, 533 U.S. 289, 290 (2001).

37. See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006); INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii) (providing an exception for just one offense); See generally *St. Cyr*, 533 U.S. at 294–98 (describing the erosion, as a result of AEDPA and IIRAIRA, of the rights held by permanent-resident aliens to apply for a discretionary deportation waiver).

38. INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Any conviction or admission of a controlled substance violation (as defined in section 802 of title 21) is a ground for inadmissibility. See also *id.* § 212(h), 8 U.S.C. § 1182(h) (stating the only exception is for possession of thirty grams or less of marijuana).

39. *Demore v. Kim*, 538 U.S. 510, 513 (2003) (ruling that the mandatory detention provision of IIRAIRA was constitutional).

40. In *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001), the Court examined the detention of lawful permanent residents under final deportation orders. It held that “[o]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized.” *Id.* at 699. In *Clark v. Martinez*, 543 U.S. 371, 378 (2005), the Court held that the same analysis must be applied to inadmissible noncitizens as well as to noncitizens who are removable.

41. See IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

42. See IIRAIRA § 301(a), 8 U.S.C. § 1182(a)(9)(B).

43. See *id.* § 301(a)(1), 8 U.S.C. §§ 1101(a)(13), (a)(27)(A).

44. See *id.* § 304, 8 U.S.C. § 1229a.

45. See *id.* § 321, 8 U.S.C. § 1101(a)(43) (amending the definition of aggravated felony).

decisions.⁴⁶ Lastly, IIRAIRA created a climate of fear in immigrant communities through the encouragement of agreements between localities and the federal government to cooperate in immigration enforcement.⁴⁷

In the aftermath of the September 11, 2001 attacks, Congress reacted again to further impede immigration by closing the main legal artery for undocumented immigrants being sponsored by family members or employers to legalize their immigration status.⁴⁸ In eliminating use of a special payment structure previously available to forgive prior immigration violations,⁴⁹ Congress blocked the legalization path for over a million family members of U.S. citizens and legal permanent residents.⁵⁰

By 2003, the entire administrative scheme governing immigration was restructured, breaking up the former Immigration and Naturalization Service (INS) under the Department of Justice into three separate agencies under the new Department of Homeland Security.⁵¹ To the extent that these titles described the national posture toward immigration, the vision of the institution shifted from one of service to newcomers (the Immigration and Naturalization

46. *Id.* § 303(a), 8 U.S.C. § 1226(e).

47. *See id.* § 133, 8 U.S.C. § 1357(g) (resulting in profound disagreement throughout mixed status communities and police localities, which fear the consequences of the loss of trust between local police and vulnerable populations).

48. *See* MARC R. ROSENBLUM, U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM 6–8 (2011).

49. INA, Pub. L. No. 103-317, § 245(i), 108 Stat. 1765-66 (1994), 8 U.S.C. § 1225(i) (2006) was an experimental provision that allowed non-citizens who had fallen out of status or those who never obtained documents to move forward with paths to family or employment-based immigration, paying a super-fee of \$1,000 to have their immigration infractions waived. Without this provision, most undocumented immigrants were unable to obtain status. They could not legalize in the United States and if they were to leave the country voluntarily, even to attend their consular interview, sanctions were imposed for three or ten years. *See* INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2006).

50. Ted Hesson, *New Immigration Process Will Keep Families Together*, ABC NEWS (Jan. 3, 2013, 5:31 PM), <http://abcnews.go.com/m/story?id=18116673> (referring to a temporary fix crafted by the Obama Administration to overcome the effects of the unlawful presence bars).

51. DHS was created by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 on November 25, 2002. It merged the legacy INS into DHS as of March 1, 2003, creating U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). 3A AM. JUR. 2D *Aliens and Citizens* § 33 (2005).

Service), to the defensive management of an inherent potential threat to the county (Department of Homeland Security).⁵²

Next, the Justice Department cut the number of members sitting on the Board of Immigration Appeals (BIA), and encouraged rubber-stamping of Immigration Judges' decisions by permitting "affirmation without decision."⁵³ The federal appellate court backlog grew untenable with immigrants seeking meaningful judicial review that they could no longer find at the BIA.⁵⁴ The huge rise in the number of immigration appeals continues to plague the federal system.⁵⁵ Ongoing constitutional challenges attempt to push back on many of these provisions with mixed results.⁵⁶

B. Criminalization of Immigrants

Immigration violations have always been civil, not criminal, in nature.⁵⁷ Thus, there is no right to counsel in immigration proceedings despite the grave deprivations of liberty such as indefinite detention, loss of one's home, job, and family, or virtual

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52. The primary missions of DHS are preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism, and minimizing the damage from potential attacks and natural disasters. *Our Mission: Homeland Security*, HOMELAND SECURITY, <http://www.dhs.gov/our-mission> (last visited Jan. 11, 2013). In contrast, the former INS was charged with implementation of laws of naturalizing, admitting, rejecting, and processing all immigrants seeking entry to the United States, and policing and expelling those who entered or remained without permission. 1891 Immigration Act, ch. 551, 26 Stat. 1084, 1084–86. Even the language "homeland" raises ethnic nationalist ideals, calling forth images of Nazi Germany.
 53. See generally Martin S. Krezalek, *How to Minimize the Risk of Violating Due Process Rights While Preserving the BIA's Ability to Affirm Without Opinion*, 21 GEO. IMMIGR. L.J. 277, 279, 288, 296, 314 (2007).
 54. See, e.g., OFFICE OF PLANNING AND ANALYSIS, U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2004 STATISTICAL YEARBOOK B5 fig.2 (2005), available at <http://www.justice.gov/eoir/statspub/fy04syb.pdf> (showing immigration cases from fiscal years 2000–2004).
 55. As of July 31, 2012, there are currently 320,331 pending immigration cases on the federal docket. *Immigration Court Backlog Tool*, TRACIMMIGRATION (July 31, 2012), http://trac.syr.edu/phptools/immigration/court_backlog/.
 56. See *Clark v. Martinez*, 543 U.S. 371, 378 (2005); *Demore v. Kim*, 538 U.S. 510, 513 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001); *INS v. St. Cyr*, 533 U.S. 289, 297–98 (2001).
 57. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Ting v. United States*, 149 U.S. 698, 730 (1893).

exile from a long-established life in the United States.⁵⁸ In 2010, the U.S. Supreme Court clarified that given the severity of the consequences to an immigrant of a criminal conviction, a defense attorney has an affirmative duty to advise about the immigration implications of plea bargains.⁵⁹ A breach of this duty can serve as the basis for vacating an agreement.⁶⁰

More and more, public opinion has equated undocumented immigrants with criminals. The construct of “unlawful presence,” while not a crime, gave fuel to anti-immigrant groups insistent on publically categorizing immigrants with no status as “illegals.”⁶¹

Bill Ong Hing describes a calculated campaign to criminalize immigrants as an instrument of control.⁶² The process begins by dehumanizing the immigrant.⁶³ “[T]hen she is demonized and labeled a problem,” and finally, Hing argues, is “further dehumanized until at last her actions or conditions are criminalized.”⁶⁴ In reality, this dehumanization begins with the very labeling of immigrants in the Immigration and Nationality Act (INA) as “aliens,” connoting “other” or “foreign,” and fostering fear.⁶⁵ Popular media aids this

58. See, e.g., Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 700 (2006) (arguing that there should be a civil right to counsel); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1480 (2010). The *Padilla* decision was a breakthrough in acknowledging the severity of the immigration consequences of a criminal conviction, previously dismissed as collateral. See *Padilla*, 130 S. Ct. at 1478, 1480.

59. *Padilla*, at 1483, 1486 (holding that a criminal defense attorney must advise non-citizen clients about the deportation risks of a guilty plea, advising if a conviction “may” or will have immigration consequences); see also *Chaidez v. United States*, 113 S. Ct. 1103 (2013) (clarifying that *Padilla* does not apply retroactively to cases already final on direct review).

60. *Id.* at 1482–83.

61. See, e.g., Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2044 (2008) (observing that “some advocates start—and end—their arguments by pointing out that some noncitizens are ‘illegal aliens,’” an “unforgiving approach to unlawful immigration find[ing] broad resonance in a post-9/11 climate,” while others consider “unlawful presence . . . [as] merely a formal status that overlooks contributions made to U.S. society and ties acquired . . . [in U.S.] with government acquiescence,” prefer the term “‘undocumented’”).

62. Bill Ong Hing, *Understanding SB1070 from the Lens of Institutionalized Racism and Civil Rights*, THE RACE EQUITY PROJECT, LEGAL SERVS. OF N. CAL., http://equity.lsnr.net/understanding-sb1070-from-the-lens-of-institutionalized-racism-and-civil-rights/#_ftn15 (last visited Jan. 11, 2013).

63. *Id.*

64. *Id.*

65. See INA § 101(a)(3), (15), 8 U.S.C. § 1101(a)(3), (15) (2006) (defining the terms alien and immigrant).

effort, playing on common fears.⁶⁶ While statistically immigrants commit crimes at a rate half of U.S. citizens, media stories abound, sensationalizing incidents in which undocumented men commit violent crimes.⁶⁷ Concurrently, refurbished regulations under the new Department of Homeland Security, the Secret Service, and Federal Emergency Management send a clear message that immigrants represent a threat that must be controlled.⁶⁸

In fact, over the last decade immigration authorities have found ways to criminalize unauthorized immigrants for entering or simply existing in the U.S. Prior to the 1990s, border agents managed cases of those caught crossing the border by processing a voluntary return or a civil violation. This policy changed radically in 2005 with the Bush administration's Operation Streamline that removed discretion and mandated criminal prosecution.⁶⁹ First-time offenders were charged with misdemeanor illegal entry, while those with prior deportations, felony illegal reentry.⁷⁰ Laborers working under false social security numbers were arraigned with federal crimes ranging from false identification to being found in the U.S. after removal.⁷¹ The very act of immigrating and participating in the natural flow of labor following capital, became criminal.⁷² The phenomenon of criminalization, however, is neither new nor unique to the U.S., but represents a global trend.⁷³ Some have concluded it to be both the

66. David L. Altheide, *The Mass Media, Crime and Terrorism*, 4 J. INT'L CRIM. JUST. 982, 982-997 (2006).

67. See Kristin F. Butcher & Anne Morrison Piehl, *Crime, Corrections, and California: What Does Immigration have to do with It?* in 9 California Counts: Population Trends and Profiles at 2, 7-9 (Pub. Policy Ins. of Cal. Ed., 2008), available at http://www.ppic.org/content/pubs/cacounts/CC_208KBCC.pdf (finding that immigrants are about half as likely to become involved in crime).

68. See Noël L. Griswold, Note, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U. L. REV. 207, 208-10, 221-22, 224-25, 227, 229-31 (2005) (arguing that when the Department of Homeland Security was created, immigration began to be treated less as a benefit to the economy and more as a threat to national security).

69. See Joanna Jacobbi Lyndgate, *Assembly-line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 482-84 (2010).

70. *Id.* at 484.

71. See Ira J. Kurzban, *Criminalizing Immigration Law*, in 42ND ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 321, 326-27 (2009).

72. See *id.* at 326-27; DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* 5 (2008).

73. See BACON, *supra* note 72, at 71-73, 75. United States and European systems have never acknowledged legitimacy to social or economic rights. *Id.* at 74-77, 80-81. As our political and economic systems grow increasingly globalized, they create illegality by displacing people and then denying them rights or equality as they adapt to the

“‘productive’ and the ‘intended’ consequence[] of state policies of social control,” endemic to the neoliberal agenda.⁷⁴

II. VITAL EXPANSION OF BENEFITS FOR IMMIGRANT SURVIVORS OF ABUSE SINCE THE 1990s

During the same time period, the Violence Against Women Act (VAWA) of 1994⁷⁵ was passed as a result of a massive, coordinated effort by advocates to secure protection for survivors of domestic abuse, including immigrant survivors.⁷⁶ Law enforcement was enlisted to improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault, and stalking in the United States.⁷⁷ The initial purpose of VAWA was “to deter and punish violent crimes against women” by providing law enforcement with additional tools to combat domestic violence, and by making it easier for victims to come forward.⁷⁸ Importantly, included in the Act was Subtitle G, Protections for Battered Immigrant Women and Children, the first substantial legislation addressing the plight of immigrant women suffering from domestic abuse.⁷⁹ Within a mixed-status marriage, an abusive United States citizen or legal permanent resident had complete control of his immigrant spouse’s immigration status, and thus her ability to work to support herself and her children, to travel, and to access most public benefits.⁸⁰ The abused spouse would commonly fear that seeking help could instead lead to her arrest, deportation, and separation from her children.⁸¹ VAWA

economic fluctuations and follow the labor demand in order to survive. *Id.* at 23, 70, 74–77, 80–81.

74. See KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 11–12 (2008) (proffering that when this trend examined in the historical and cultural context, it cannot be dismissed as unintended consequences).
75. Enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. § 13701 (2006)).
76. Violence Against Women Act, H.R. REP. NO. 103-395, at 25 (1993).
77. VAWA 1994, *supra* note 9, § 40121, 108 Stat. at 1910–11.
78. Violence Against Women Act, H.R. REP. NO. 103-395, at 25.
79. VAWA 1994, *supra* note 9, § 40701, 108 Stat. at 1953 (codified as amended at 8 U.S.C. § 1154(a) (2006)). Note that while passed under the VAWA, the language of the provisions are gender neutral. Given that the vast majority of abuse in domestic relationships is perpetrated by men against women, this article will continue to refer to survivors as women, recognizing that men can also be victimized by the same abuses of power.
80. Violence Against Women Act, H.R. REP. NO. 103-395, at 26.
81. *Id.*

Subtitle G publically recognized that immigration laws had been manipulated as a tool for abuse and control of immigrant women.⁸² The bill introduced the construct of self-petitioning for immigration status: a process that enabled an abused immigrant to manage the legalization process herself, independent from the control of the abusive U.S. citizen or legal permanent resident spouse.⁸³ A similar process was crafted for those in deportation or removal proceedings.⁸⁴ These early VAWA provisions did not create new pathways for battered immigrant women to legalize.⁸⁵ Rather, they modified the existing systems—family petitioning or cancellation of removal—which would normally benefit a non-citizen married to a U.S. citizen or legal permanent resident.⁸⁶ The difference was that the general immigration provisions afforded full dominion to the petitioning citizen or legal resident to initiate or complete the process.⁸⁷ The VAWA provisions removed that power from the abuser and returned a battered immigrant woman to the legal posture she would have held in the immigration process based on her marriage, absent the abuse.⁸⁸

In the debates preceding IIRAIRA, a number of senators voiced their awareness of the adverse consequences to immigrant survivors of immigration enforcement, which could be exploited by an abuser to silence a victim.⁸⁹ Among them, Senator Wellstone asserted that

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82. Congress recognized that “[m]any immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.” *Id.*
83. See VAWA 1994, *supra* note 9, § 40701(a), 108 Stat. at 1953 (codified as amended at INA § 204(a)(1), 8 U.S.C. § 1154(a)(1)(A)–(D) (2006)).
84. See IIRAIRA, Pub. L. No. 104-208, § 304(a), 110 Stat. 3009-546, 3009-594 (codified at 8 U.S.C. § 1229(b)(2)(A)(i) (2006)).
85. See VAWA 1994, *supra* note 9, § 40701(a), 108 Stat. at 1953.
86. See *id.*; IIRAIRA, § 304(a), 110 Stat. 3009-546, 3009-594 (codified at 8 U.S.C. § 1229b(2)(A)(i) (2006)).
87. See 8 U.S.C. § 1154(a)(1) (1988) (current version at 8 U.S.C. § 1154(a)(1)(A)(i)–(iii) (2006)).
88. It did not advance her process, but it would transfer her priority date. See VAWA 1994, *supra* note 9, § 40701(a), 108 Stat. at 1953 (codified as amended at 204(a)(1)(D), 8 U.S.C. § 1154(a)(1)(D)(i)(III) (2006); 8 C.F.R. 204.2(h)(2)). For example, the category of spouses of legal permanent residents has a backlog of over two years. The law did not allow a battered woman to bypass this wait and move to the front of the line. However, if the woman left her abuser in the midst of the process, she would hold her place in the backlog, and would not need to begin her process anew.
89. IIRAIRA, Pub. L. No. 104-208, § 384(a), 110 Stat. 3009-652 (codified as amended at 8 U.S.C. § 1367(a)). This provision prohibited DHS from providing any information about the applicant to the abuser or from denying a case based solely on accusation from the abuser. *Id.*

“it would be unconscionable for our immigration laws to facilitate an abuser’s control over his victim.”⁹⁰ To overcome this defect in the law, a specific amendment was added to shield an applicant from false allegations by her abuser and to safeguard confidentiality.⁹¹ This regulation serves as a primary protection for immigrant survivors to safely utilize the VAWA provisions.⁹²

Over the next five years, advocates lobbied Congress in preparation for the reauthorization of VAWA in 2000, the Victims of Trafficking and Violence Protection Act (VTVPA).⁹³ The issues confronted by battered immigrant women were again specifically addressed.⁹⁴ VTVPA 2000 perfected many of the self-petitioning provisions from the original act, making them more practically useful.⁹⁵ Most notably, VTVPA 2000 created the U visa, a new legislative path for immigrant victims who could not take advantage of the 1994 provisions.⁹⁶ The U visa opened the door to immigrant victims of domestic abuse who were not married to U.S. citizens or legal permanent residents⁹⁷ if they could assist law enforcement in

90. 142 CONG. REC. 56, S4306 (1996) (statement of Sen. Paul Wellstone).

91. IIRAIRA, Pub. L. No. 104-208, § 384(a), 110 Stat. 3009-652 (codified as amended at 8 U.S.C. § 1367(a)).

92. The House version of the 2013 VAWA reauthorization that was voted down challenged this confidentiality provision by proposing to allow input from the abuser to be considered as part of the adjudication process of a self-petitioning battered spouse. *See* H.R. 4970 § 801(a)(D) and (b)(4)(IV)(bb), (112th): Violence Against Women Reauthorization Act of 2012, 112th Cong. (2011–2013).

93. VTVPA, *supra* note 9.

94. *Id.*, § 1502, 114 Stat. at 1518.

95. *Id.* VTVPA removed “extreme hardship” as an element of a self-petition. *See id.* § 1503(b) (codified as amended at INA § 204(a), 8 U.S.C. § 1154(a)(1)(A)), to allow approved self-petitioners to adjust status in the U.S. in spite of having entered without inspection or having overstayed a visa. *See id.* § 1507(a). And it created age-out protections for children of self-petitioners who would turn 21 before being able to complete their legalization process. *See id.* § 1503(d).

96. *See* Memorandum from William R. Yates, Assoc. Dir. of Operations for Vermont Serv. Ctr., U.S. Citizenship and Immigration Servs., on Centralization of Interim Relief for U Nonimmigrant Status Applicants at 1 (Oct. 8, 2003), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803.pdf (explaining that the VTVPA allowed immigrant victims to stay in the U.S. if they could assist law enforcement).

97. *See id.* at 1, 3 (indicating that the list requirements does not include that the victim be married to a U.S. citizen or be a legal permanent resident). Either a victim was not married to the abuser, or if she was married, her spouse did not have legal permanent resident or citizenship status.

“investigation or prosecution” of the abuser.⁹⁸ Its purpose was “to strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking of persons and other criminal activity of which aliens are victims, while offering protection to victims of such offenses.”⁹⁹

The improvements in immigration protections for battered immigrant women continued through the Violence Against Women Act and Department of Justice Reauthorization Act of 2005.¹⁰⁰ Specifically, Title VIII, “Protection of Battered and Trafficked Immigrants,” removed further obstacles for battered immigrant women by carving exceptions for survivors of domestic violence on motions to reopen old deportation or removal orders,¹⁰¹ expanding self-petitioning provisions to older children,¹⁰² to elderly parents,¹⁰³ and to abused spouses dependent on status in other programs,¹⁰⁴ and affording an immigration judge discretion in evaluating the weight of an applicant’s criminal convictions.¹⁰⁵

The latest VAWA reauthorization in 2013 prevailed only after contentious negotiations that delayed the renewal for over a year, allowing the expiration of VAWA in 2011.¹⁰⁶ This time the debates were distinct. With a more partisan congressional environment, advocates and sponsors are not able to focus productively on practical

98. See VTVPA, *supra* note 9, § 1513 (codified as amended at INA 101, 8 U.S.C. § 1101(a)) (noting that the U visa can be used for a list of enumerated crimes, including domestic abuse).

99. Memorandum from William R. Yates, *supra* note 96, at 1.

100. See VAWA 2005, *supra* note 9.

101. See *id.* § 825(a) (codified as amended at INA 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006)).

102. See *id.* § 805(c) (codified as amended at INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) (2006)).

103. See *id.* § 816.

104. VAWA 2005 created similar self-petitioning protections for battered spouses of abusers who were eligible for status under the Nicaraguan Adjustment and Central American Relief Act of 1998 § 815, Cuban Adjustment Act § 823, and Haitian Refugee Immigration Fairness Act of 1998, § 824.

105. See VTVPA, *supra* note 9, § 1505(b) (codified as amended at INA § 237(a), 8 U.S.C. § 1227(a)(2006)). Previously any crime of domestic violence meant mandatory deportability.

106. Laura Bassett and Jennifer Bendery, *House GOP Lets Violence Against Women Act Passed By Senate Die Without a Vote*, THE HUFFINGTON POST (Jan. 2, 2013, 6:38 PM), http://www.huffingtonpost.com/2013/01/02/violence-against-women-act-_n_2398553.html. Cf. New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for T Nonimmigrant Status, 77 Fed. Reg. 61,7743 (Feb. 13, 2012) (negotiations resulting in rule establishing application procedures and responsibilities for DHS).

expansions of protections for battered immigrant women, but instead defended against the elimination of some of the basic existing provisions.¹⁰⁷ The bill was successful in adding anti-discrimination assurances for the LGBT community¹⁰⁸ and it extended protections to victims in tribal regions.¹⁰⁹ For immigrant survivors, it modestly improved protections by eliminating the obstacles of public charge¹¹⁰ and aging out of dependent children,¹¹¹ drafting warnings for fiancés and fiancées of U.S. citizens to better inform them of their rights,¹¹² and implementing regulations of international marriage brokers.¹¹³ Concessions were made to opponents of the bill in the form of accountability provisions for grant recipients¹¹⁴ and a qualification of confidentiality for law enforcement and national security purposes.¹¹⁵

III. MOVEMENT CHOICES TO PARTNER WITH LAW ENFORCEMENT

The story of how advocates for battered immigrant women were able to stem the tides of the burgeoning anti-immigrant currents to secure protections for this otherwise voiceless population is a remarkable one. To begin, this achievement must be applauded as a grassroots organizing victory for battered immigrant women who gained the only advances for immigrants during that period and did so repeatedly.¹¹⁶ At the same time that these developments are

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107. Tara Culp-Ressler, *Violence Against Women Act Debacle: Why Congress Should be More Diverse*, THE ATLANTIC, Jan. 3, 2013, www.theatlantic.com/sexes/archive/2013/01/...act.../266784/. Also see Jennifer Bendery, *Violence Against Women Act: Eric Cantor, Joe Biden in Talks Amid Stalled Tribal Provisions*, THE HUFFINGTON POST (Dec. 6, 2012), http://www.huffingtonpost.com/2012/12/06/violence-against-women-act-eric-cantor-native-americans_n_2251924.html. See also Robert Pear, *House Vote Sets Up Battle on Domestic Violence Bill*, N.Y. TIMES, May 17, 2012, at A19 (noting Representative Zoe Lofgren's assertion that "[t]he House bill rolls back protections for battered spouses and victims of serious crimes such as rape and sexual assault. It does so by weakening or repealing provisions that have had near-unanimous support of Democrats and Republicans in years past").
108. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(b)(4), (2013).
109. *Id.* § 902.
110. *Id.* § 804.
111. *Id.* § 805(a).
112. *Id.* § 807.
113. *Id.* § 808.
114. *Id.* § 1005.
115. *Id.* § 810.
116. See, e.g., LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 36 (2008).

celebrated, a critical analysis of the aftermath of these legislative feats reveals unforeseen costs to the feminist movement, undermining some of its most fundamental principles.¹¹⁷ These outcomes are similar to the experiences of battered women's advocates in the 1960s and 1970s.¹¹⁸

A. *Battered Women's Movement*

The decision to seek out law enforcement as a primary response to domestic violence was not made lightly in the early feminist movement. Battered women's advocates believed criminal enforcement of domestic violence laws to be crucial to the protection of women, and they cautiously examined the tensions inherent in working with the state.¹¹⁹

Movement leaders demanded accountability from the batterer and from the state.¹²⁰ To varying degrees from the 1800s until the 1960s, the criminal and judicial systems gave men a right to beat their wives.¹²¹ Even after the repeal of criminal laws specifically exempting violent husbands from prosecution, the police and prosecutors were generally unwilling to intervene in domestic affairs.¹²² The traditional pairing of sexual violence and domestic life created a culture of tolerance for domestic violence.¹²³ To counter this history, advocates focused on forcing the state to declare domestic violence a crime and to ensure that law enforcement agencies would act accordingly.¹²⁴ These laws successfully relocated domestic abuse from the private domain into the public sector.¹²⁵ In

117. *See id.*

118. *See* ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING I* (2000).

119. *See id.* at 196; GOODMAN & EPSTEIN, *supra* note 116, at 36; Miccio, *supra* note 1, at 272-73.

120. GOODMAN & EPSTEIN, *supra* note 116, at 36 (stating that activists felt the state needed to take responsibility for a problem of such massive proportions).

121. *See* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 597-98 (1991); Miccio, *supra* note 1, at 252-53.

122. Miccio, *supra* note 1, at 266, 269.

123. Judith Resnik, *The Law: Citizenship and Violence*, AM. PROSPECT, Mar. 27-Apr. 10, 2000, at 62 (explaining that when violence is understood as being about sex, it "softens the brutality" and provides abusers with lust as the justification).

124. *See* Miccio, *supra* note 1, at 264-65 (describing how advocates successfully implemented mandatory arrest as a means of holding law enforcement accountable for responding to domestic violence).

125. *See* LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 16 (2012).

essence, they removed state power as a coercive force in support of the dominance of men, redirecting it on behalf of women.¹²⁶

Not all advocates were in agreement with the adoption of enforcement as a key strategy. Many felt uneasy with employing the state to protect women, recognizing that police practices typically enforced cultural stereotypes that were gendered, raced, and classed.¹²⁷ Further concern centered on the misuse of police power against women, particularly in communities of color.¹²⁸ Advocates confronted the question posed by Angela Davis at the historic Color of Violence Conference: "Can a state that is thoroughly infused with racism, male dominance, class-bias, and homophobia and that constructs itself in and through violence, act to minimize violence in the lives of women?"¹²⁹

In the end, advocates conceded the partnership as a necessary strategy.¹³⁰ They acknowledged that any state institution would be plagued with varying degrees of misogynistic policies and procedures, and at the same time, altering women's position required a relationship with the state and with state actors.¹³¹ While being mindful of "the roles of the state, other institutions, law, and culture in encouraging, legitimizing, and perpetuating violence," a middle ground had to be found.¹³²

B. *Battered Immigrant Women's Movement*

In the battered immigrant women's movement, advocates first rallied together for battered immigrant women in reaction to the passage of the 1986 Marriage Fraud Act,¹³³ which mandated an

126. *Id.*

127. See Miccio, *supra* note 1, at 269.

128. Cecelia M. Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 185–86 (1999) (noting that abused women of color are disadvantaged in police exercise of discretion for which they rely on erroneous and stereotypical attitudes and perceptions).

129. Angela Davis, *The Color of Violence Against Women*, 3 COLORLINES, Fall 2000, at 4, 6.

130. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1887–88 (1996) (supporting the notion that, although it is not ideal, the benefits of aggressive prosecution of domestic violence perpetrators outweigh the costs).

131. See Miccio, *supra* note 1, at 271.

132. See SCHNEIDER, *supra* note 118, at 196.

133. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2, 100 Stat. 3537, 3537–38 (codified as amended at INA § 216, 8 U.S.C. § 1186a (2006)). The Marriage Fraud Act imposed a new status of "conditional resident" for an immigrant

additional petition for immigrant spouses to obtain full legal status.¹³⁴ The Act passed to offset allegations of widespread immigration fraud, now widely accepted to have been based on purely speculative data.¹³⁵ The uproar that followed galvanized the advocate community in demanding a fix, an effort that led to the successful passage of the Battered Spouse Waiver in 1990.¹³⁶ Once this network had been formed, it used its newly established strength and congressional contacts to continue to push for protections for domestic violence victims.¹³⁷

The strategy advocates employed to move the legislation forward was rational and effective: they would locate their issues inside the battered women's movement rather than the immigrants' rights movement.¹³⁸ Advocating separately for protections for immigrant women would not have been fruitful in the tense, anti-immigrant climate of the 1990s. Because national sentiment against domestic violence was strong, battered women's advocates rightfully assessed that their agenda would be better received in the context of the need for protection from domestic abuse, rather than the need for reform to

having status approved based on a marriage of less than two years. INA § 216(a)–(b). That status would be removed two years later when the couple submits further evidence of the bonafides of the marriage. *Id.* § 216(c)(3)(B).

134. INA § 216(c)(1)(A).

135. See Michelle J. Anderson, Note, Recent Development, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L. J. 1401, 1419 (1993) (noting that one of the bill's original sponsors, Representative Bruce Morrison, was disappointed with the Marriage Fraud Act, reiterating that Congress had "directed the INS to write protection regulations, not fraud regulations").

136. Immigration Act of 1990, Pub. L. No. 101-649, § 701(a)(4)(C), 104 Stat. 4978, 5085 (codified as amended at INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C) (2006)). The Battered Spouse Waiver was created as an exception to the requirement of the joint filing at the end of the conditional period, where the immigrant suffered spousal abuse.

137. Representative Slaughter was approached as a sponsor due to her strong record against domestic violence. See *Women's Issues*, CONGRESSWOMAN LOUISE M. SLAUGHTER, http://www.louise.house.gov/index.php?option=com_content&view=category&layout=blog&id=83&Itemid=134 (last visited Jan. 11, 2013).

138. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1246–47 (1991) (reporting tragic consequences resulting from immigrant women being forced to choose "between protection from their batterers and protection against deportation . . . put pressure on Congress to include in the Immigration Act of 1990 a provision amending the marriage fraud rules to allow for an explicit waiver for hardship caused by domestic violence").

the immigration system.¹³⁹ Even the bill's sponsors had to overcome the fact that "illegal" immigrants would benefit.¹⁴⁰ The bill was framed as the need for protection under the law without regard to immigration status.¹⁴¹ Congressional concerns about helping the undocumented were allayed by the understanding that "but for" an abuser's misuse of control of the immigration process through his refusal to exercise his power, the victim would have legal immigration status.¹⁴²

In moving forward with VAWA, battered immigrant women's advocates had to confront the historically problematic relationship between law enforcement and battered women mentioned above, particularly for women of color.¹⁴³ These concerns were even more pronounced in the anti-immigrant environment since the 1990s, and after the changes in immigration policy (outlined above) made contact with law enforcement more dangerous.¹⁴⁴

Following the harsh legislative changes to immigration law in 1996 and 2001, women disproportionately shouldered the brunt of the militaristic enforcement measures.¹⁴⁵ They not only faced the risk of deportation for themselves or family members, but the related "risks

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139. See Leslye E. Orloff & Janice v. 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, 143, (2002) (discussing the realization that immigration law provided an imperfect and often ineffective solution for many immigrant victims of domestic violence.) See also Sujata B. Barai, *Negotiating the Intersection: How and Why Provisions for Battered Immigrant Women Have Become a Part of U.S. Immigration Policy* 68 (Apr. 2, 1998) (unpublished B.A. thesis, Princeton University) (on file with author).
140. *Id.* at 72 (quoting from an interview with legislative aide Sandra Sobrieraj, February 17, 1998).
141. See 146 CONG. REC. 22066-67 (2000).
142. See *id.* at 22070 (noting Sen. Orrin Hatch raised that the law was being used to blackmail the abused spouse through threats about immigration sponsorship).
143. GOODMAN & EPSTEIN, *supra* note 116, at 77-78.
144. See Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 137, 143 (2002).
145. *Id.* at 148-49; Michael T. McCarthy, *Recent Development, USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435, 448-49 (2002); Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in COLOR OF VIOLENCE, THE INCITE! ANTHOLOGY 138, 139 (2006) (noting that women of color experience the same types of law enforcement violence as men of color, including "law and order agendas," "war on terror," "zero tolerance" policies, as well as gender-related harassment and sexual abuse).

of economic deprivation, separation from children, and [the possibility of] even greater violence in their home country.”¹⁴⁶

The threats of immigration raids and the post-9/11 societal perception of immigrants as potential lawbreakers or terrorists further intimidated women.¹⁴⁷ Just as the war on drugs justified the “law and order” policies of the last two decades, the more recent war on terrorism has led to military and law enforcement policing under “quality of life” initiatives in immigrant communities.¹⁴⁸ For immigrant women, the threat of deportation from the most minor police encounter became a reality as the newer laws encouraged linkages between the Department of Homeland Security and local municipalities, in essence deputizing police officers with federal powers.¹⁴⁹ Renee Saucedo, Community Empowerment Coordinator at La Raza Centro Legal, charged that immigration raids are used as a tool to subjugate women into submission.¹⁵⁰ Immigrant women experienced harassment by law enforcement directly to themselves or indirectly through having to tolerate abuses to others for fear of being caught by the police.¹⁵¹ The ongoing potential threat of criminal or immigration law enforcement effectively silences women from

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146. See Donna Coker, *Race, Poverty, and the Crime-Centered Response to Domestic Violence: A Comment on Linda Mills's Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 10 VIOLENCE AGAINST WOMEN 1331, 1334 (2004) (exposing several of the laws' vulnerabilities for immigrant women: “Conviction for domestic violence is a deportable offense (8 U.S.C. § 1227), and although the attorney general may waive deportation for those acting in self-defense, some battered women's violence is unlikely to fit the definition of self-defense”); see also Espenozza, *supra* note 128, at 185–86; Linda Kelly, *Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665 *passim* (1998); Leslye E. Orloff, et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313 *passim* (1995); Julia L. Perilla, *Domestic Violence as a Human Rights Issue: The Case of Immigrant Latinos*, 21 HISP. J. BEHAV. SCI. 107, 118, 122 (1999).
147. See Ritchie, *supra* note 145, at 139, 154–55.
148. *Id.* at 155.
149. See INA § 287(g), 8 U.S.C. § 1357(g) (2006).
150. Renee Saucedo, *INS Raids and How Immigrant Women are Fighting Back*, in COLOR OF VIOLENCE, THE INCITE! ANTHOLOGY, *supra* note 145, at 135–37; cf. Julia Sudbury, *Rethinking Antiviolence Strategies: Lessons from the Black Women's Movement in Britain*, in COLOR OF VIOLENCE, THE INCITE! ANTHOLOGY, *supra* note 145, at 13, 19 (noting that the anti-violence movements in the United States, Britain, and Canada have all been complicit in the law enforcement agenda simultaneous to the globalization of the last two decades); Renee Saucedo *Community Empowerment Coordinator*, LA RAZA CENTRO LEGAL, http://lrcl.electricmembers.net/article.php/article.php?story=rsaucedo_bio (last visited Jan. 11, 2013).
151. Saucedo, *supra* note 150, at 135–37.

complaining about sexual harassment or asserting basic rights, thus making immigrant women easy prey for unscrupulous employers, landlords, or others with power.¹⁵²

In spite of the dangers, many advocates for battered immigrant women agreed that working through the law enforcement framework was the only realistic way to access immigration relief.¹⁵³

IV. THE UNINTENDED CONSEQUENCES OF LAW ENFORCEMENT SUCCESSES

As the subsequent phases of the battered women's movement gained the targeted benefits from partnering with law enforcement agencies, each also experienced a significant erosion of basic feminist principles.¹⁵⁴ This section will chronicle some of the losses for the battered women's movement generally and then focus on those of the battered immigrant women's movement more specifically.

A. *Battered Women's Movement*

1. Questioning Survivor Autonomy

The demands of early battered women's advocates that domestic abuse be treated as a serious crime successfully led to policies of mandatory arrest and no-drop prosecution, among others.¹⁵⁵ While these policies accomplished the goal of ensuring that law enforcement would take decisive action toward protecting battered women, they also challenged the notion of survivor agency or independence.¹⁵⁶ Instead of fostering a return of choice to a survivor, the state usurped control of the decision-making process. Once the police were called, mandatory policies removed from the victim all control of the process or the outcome.¹⁵⁷ The prosecution moved forward regardless of the threat of retaliation against the victim, the economic support provided to the family by the abuser, or her wish to

152. *Id.*

153. See Emi Koyama, *Disloyal to Feminism: Abuse of Survivors within the Domestic Violence Shelter System*, in COLOR OF VIOLENCE, THE INCITE! ANTHOLOGY, *supra* note 145, at 208, 220.

154. GOODMAN & EPSTEIN, *supra* note 116, at 36 (asserting that expanded available resources "also diminished the movement's original feminist orientation").

155. GOODMARK, *supra* note 125, at 106–07.

156. *Id.*; see also Miccio, *supra* note 1, at 240–42.

157. GOODMARK, *supra* note 125, at 107.

forgive or reconcile with her partner.¹⁵⁸ Her agency ended when she first accessed the protection of the state.

Some early proponents of mandatory state action justified this shift in agency with the thesis that a victim of domestic abuse had an impaired ability to make autonomous decisions in her own self-interest.¹⁵⁹ Such hypotheses failed to recognize the multitude of ways survivors of domestic violence exercise decision-making within the abusive relationship.¹⁶⁰ Regardless of these critiques, policies were accepted as necessary to protect women.

In retrospect, advocates predominantly conclude that the battered women's movement unnecessarily ceded control over the responses to domestic violence, enabling the state to take primary responsibility for addressing, defining and analyzing domestic violence and for determining the objectives of the response.¹⁶¹ Many critics view this phenomenon as the state successfully quashing the women's movement's anti-violence campaign.¹⁶² Advocates of the 1960s and 1970s envisioned criminalization only as an initial undertaking in a broader coordinated strategy to gain safety, autonomy, and accountability for victims of domestic violence.¹⁶³ It was never intended to be the sole strategy of the movement, but a first step.¹⁶⁴

2. Government Control of the Nature of Services

Once law enforcement was elevated as the central strategy against domestic violence, the government backed its commitment with

158. Ana Clarissa Rojas Durazo, "we were never meant to survive" in *THE REVOLUTION WILL NOT BE FUNDED, BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, 119 (2007). GOODMAN & EPSTEIN, *supra* note 116, at 75.

159. GOODMARK, *supra* note 1265, at 121–22; *see also* MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 151 (2003) (suggesting that the state should act to protect women even if it is against their wishes).

160. GOODMARK, *supra* note 1265, at 122–23; *see also* Miccio, *supra* note 1, at 320–21 (equating the ability of battered women to that of Holocaust survivors to exercise resistance in an oppressive environment).

161. *See* Rojas Durazo *supra* note 158, at 117–118 (asserting that in limiting the definition of domestic violence to individual crimes, government excluded state violence and effectively broke up the movement's radical, social justice agenda). GOODMARK, *supra* note 1265, at 6.

162. *Id.* at 117 ("Through funding and non-profitization, the movement was called in to sleep with the enemy, the US state, the central organizer of violence against women in the world.").

163. Miccio, *supra* note 1, at 265–67; SCHECHTER, *supra* note 10, at 159–61.

164. Miccio, *supra* note 1, at 265.

strong funding directives.¹⁶⁵ VAWA made available approximately \$550 million per fiscal year.¹⁶⁶ By relying upon the criminal justice system as the principal response to domestic violence, state domestic response resources were funneled almost exclusively into law enforcement projects.¹⁶⁷ As a result, few other approaches to impact the economic, social, or political realities of battered women were developed.¹⁶⁸

Non-profit funding had the same effect of funding programs that did not fundamentally challenge the status quo. Some assert that the non-profit industrial complex is a tool for capitalist interests to monitor and control social justice movements, manage dissent, and redirect mass organizing efforts away from transformation.¹⁶⁹ Regardless of the intentions of private donors, the funding stream reinforced that social change efforts would be financed and therefore controlled by benefactors rather than by community constituents.¹⁷⁰

The results of the influx of funding had a surprisingly significant impact on the movement. Programs that served victims of domestic violence were expanded by over fifty percent in less than a decade.¹⁷¹ Domestic violence advocates did not foresee that over time this receipt of desperately needed resources into their programs would co-opt the feminist underpinnings of the movement.¹⁷² Along with the flow of government funds came demands for professionalism and accountability to the state. State and private funding streams favored “shelters founded by established charities over those begun by

165. GARRINE P. LANEY, CONG. RESEARCH SERV., RL30871, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING 1–2 (2010), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1716&context=key_workplace.

166. See *id.* at 3–9.

167. See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 804–05 (2001).

168. *Id.*; see also GOODMARK, *supra* note 125, at 6.

169. Andrea Smith, *Introduction, The Revolution Will Not Be Funded, THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, 3 (2007)

170. *Id.* at 9.

171. See GOODMAN & EPSTEIN, *supra* note 116, at 38 (funding increased rapidly from 1986 to 1994); GOODMARK, *supra* note 125, at 25–26.

172. See GOODMARK, *supra* note 125, at 27; see also SCHECHTER, *supra* note 10, at 6 (forewarned as early as 1982 that “shelters need to view themselves simultaneously as services and as movement organizations. Only by maintaining this tension will the spirit of progressive social change continue to inspire women and help mobilize them for the fight ahead to keep shelter doors open”).

feminists.”¹⁷³ “Because these organizations were not feminist . . . both programmatic and organizational focus changed.”¹⁷⁴

When state funds were directed to feminist-run agencies, strict conditions were imposed that began to change the very nature of the shelters that were previously at the center of the battered women’s movement.¹⁷⁵ Before partnering with law enforcement, shelters were often managed in a non-hierarchical fashion and staffed by survivors of domestic violence.¹⁷⁶ Women needing shelter were welcomed as sisters.¹⁷⁷ Shelters were a site for “consciousness-raising” and profound examination of the position of women in a patriarchal society.¹⁷⁸

In contrast, state funding altered the way in which shelters operated. The government demanded academically credentialed staff and traditional governance, marginalizing survivors without professional academic degrees and destroying the egalitarian operational structures.¹⁷⁹ Battered women became “clients” and shelters were forced to track information reflecting clinical perspectives.¹⁸⁰ Private foundations similarly preferred funding organizations focused on policy and legal reform, or campaigns with measurable results and specific programmatic goals. Such directives further encouraged a professionalization of the movement, straying further from grassroots driven organizing.¹⁸¹ Eventually the battered women’s movement was depoliticized and de-contextualized from its feminist roots. No longer was the eradication of domestic violence understood to depend on ending women’s subordination and

173. GOODMARK, *supra* note 125, at 25 (citing ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 194 (1987)) (discussing the historical analysis of social policy shaping funding for family violence).

174. Miccio, *supra* note 1, at 291.

175. *Id.* at 257, 292–93.

176. See GOODMARK, *supra* note 125, at 25; see also Miccio, *supra* note 1, at 292–93.

177. SCHECHTER, *supra* note 10, at 4; see also Judith L. Herman, *Foreword* to GOODMAN & EPSTEIN, *supra* note 116, at xii (commenting about the early days of the women’s movement).

178. See Miccio, *supra* note 1, at 313–14 (“[Consciousness-raising] groups were utilized in the early battered women’s movement as a vehicle to deconstruct subjective knowledge about male intimate violence and to approximate common ground.”).

179. Patricia Gaddis, *In the Beginning: A Creation Story of Battered Women’s Shelters*, OFF OUR BACKS: THE FEMINIST NEWSJOURNAL, Oct. 2001, at 14, 15; see also Miccio, *supra* note 1, at 292–93. Also see Rojas Durazo, *supra* note 158, at 116–17.

180. See GOODMAN & EPSTEIN, *supra* note 116, at 43–44.

181. See Smith, *supra* note 169, at 7.

increasing their economic and social empowerment.¹⁸² The vision of broad social change had been replaced by service deliverables.¹⁸³

B. *Battered Immigrant Women's Movement*

Consonant to the experience of the broader battered women's movement discussed above, the advances gained by the battered immigrant women brought forth serious challenges to germane feminist principles. VAWA legislation merged the interests of the state with those of the movement to end domestic violence but in a way that pulled the movement in new directions.¹⁸⁴ The criminalization of domestic violence created a dual advantage for the state: the perpetrator became the sole party responsible for violence against women and the state allied itself with battered women against the perpetrator.¹⁸⁵ Activists ultimately relinquished to law enforcement the power to frame and legislate the issues.¹⁸⁶ In time, the language and requirements of the expanded laws served to undermine survivors by rewarding victimhood and by demanding dependence.¹⁸⁷

1. Framing of the Issues

Since the passage of VAWA 1994, the initial, unified stand against domestic violence by feminists and bipartisan congressional sponsors has slipped from legislative consciousness and has been sacrificed to other objectives.¹⁸⁸ The purpose statements of the original VAWA and the subsequent reauthorizations provide insight into the changes in the framing of the issues. Each of the bills reference law enforcement aims, however, the preliminary statements of the bills' subsections introducing protection for battered immigrant women

182. *Id.* at 117 (as organizations became dependent on private foundations, they lose political autonomy and their sense of accountability shifts from their constituents to their funders). See also GOODMAN & EPSTEIN, *supra* note 116, at 47; see also Koyama, *supra* note 153, at 213–14.

183. See Durazo, *supra* note 158, at 118, 123–24 (“The social servicization of the anti-violence movement undermined social change.”).

184. *Id.* at 119.

185. *Id.* at 118.

186. See GOODMARK, *supra* note 125, at 128.

187. See Espenosa, *supra* note 128, at 220.

188. Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 155 (2004).

expose the shift in thinking of the congressional sponsors and the relative power of the advocates from the women's movement.¹⁸⁹

The preamble of VAWA 1994, enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Authorization, provides a clear message that a loophole in the law facilitating domestic abuse was unacceptable and must be corrected.¹⁹⁰ It recognizes that "some abusive citizens or lawful permanent residents... misuse their control over the petitioning process. Instead of helping close family members to legally immigrate, they use this discretionary power to perpetuate domestic violence against their spouses and minor children who have been living with them in the United States."¹⁹¹

By the VTVPA Reauthorization Act 2000, a dual purpose was adopted, replacing the singular message of the original VAWA.¹⁹² It set forth the purposes of the amendments: "(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 occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes."¹⁹³

Section 1513 of the VTVPA 2000 conceived the U visa with the purpose "to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the INA committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States."¹⁹⁴ Here the language is explicit that law enforcement is the priority, with protection of the victim considered a supportive, secondary goal.¹⁹⁵

189. See VAWA 1994, *supra* note 9, § 40701, 108 Stat. at 1953-54; VTVPA, *supra* note 9, § 1502(b), 114 Stat. at 1518.

190. See VAWA 1994, *supra* note 9, § 40701, 108 Stat. at 1953-54; 61 Fed. Reg. 59,13061, 59,13062 (Mar. 26, 1996).

191. 61 Fed. Reg. 59,13061, 59,13062 (Mar. 26, 1996) (codified at 8 C.F.R. § 204.2 (1997)).

192. VTVPA, *supra* note 9, § 1502, 114 Stat. at 1518; see VAWA 1994, *supra* note 9, § 40701, 108 Stat. at 1953.

193. VTVPA, *supra* note 9, § 1502, 114 Stat. at 1518.

194. *Id.* § 1513(a)(2)(A), 114 Stat. at 1533.

195. *Id.*

The subsequent reauthorizations in section Title VIII—Protection of Battered and Trafficked Immigrants from 2005¹⁹⁶ and that of 2013—have no statement of findings or purpose. Those bills launched directly into the legislative changes, which were far more moderate than those from the original VAWA. Perhaps by the later reauthorizations, the history of VAWA was redundant. This silence, however, is conspicuous in light of the vigorous opposition preceding the bills and the harsher tones of the law that followed.

Whereas the three prior bills all received strong bipartisan support, negotiations on VAWA 2013 failed last year precisely along party lines. Much of the controversy surrounded the expanded protections to victims from the LGBT community, tribal populations and undocumented immigrants. The statements by elected officials during the hostile debates about the 2013 reauthorization illustrate the disparate frameworks. Senator Grassley, a prime opponent of the Senate bill, explained his objection by stating “The substitute creates so many new programs for underserved populations that it risks losing focus on helping victims, period.” Further, regarding immigrant survivors, Grassley posed the legislative aims as follows: “VAWA is meant to protect victims of violence. It shouldn't be an avenue to expand immigration law or give additional benefits to people here unlawfully.”¹⁹⁷

In contrast, Senate Judiciary Committee Chairman Pat Leahy urged the House to consider the broader version of VAWA, emphasizing that Congress couldn't “pick and choose” which victims to protect under the legislation.¹⁹⁸ He maintained that the purpose of VAWA was to protect all victims of sexual assault or domestic violence, declaring “a victim is a victim is a victim and violence is violence is violence.”¹⁹⁹

2. Narrowing Relief to Innocent, Deserving Victims

196. See VAWA 2005, *supra* note 9, § 801, 119 Stat. at 3053.

197. Amanda Turkel, *Violence Against Women Act Becomes Partisan Issue*, HUFFINGTON POST (Feb. 16, 2012, 5:33 PM), http://www.huffingtonpost.com/2012/02/14/violence-against-women-act_n_1273097.html.

198. Mercedes White, *Why Some Oppose Extension To Violence Against Women Act*, DESERET NEWS (Feb. 14, 2013, 12:12 PM), <http://www.deseretnews.com/article/865573170/Why-some-oppose-extension-to-Violence-Against-Women-Act.html>.

199. Sunlen Miller, *Senate Passes Violence Against Women Act*, ABC NEWS (Feb. 12, 2013, 5:26 PM), <http://abcnews.go.com/blogs/politics/2013/02/senate-passes-violence-against-womens-act/>.

The original VAWA legislation was written in a straight-forward manner, reflecting a focused goal to provide battered women with exceptions in the law enabling them to legalize their status independent from the control of their abusers.²⁰⁰ If an applicant met the criteria for self-petitioning, she was eligible for the relief.²⁰¹ As long as the applicant could show she had been a victim of physical battering or extreme cruelty, the law would excuse immigration violations from her past that would have otherwise prevented her from legalizing her status.²⁰² The justification was simple; no woman should be trapped in an abusive relationship.²⁰³ That clarity of message was lost in the later developments of the law.

i. All Qualifying Victims

In the initial legislation, an immigrant married to a U.S. citizen or legal permanent resident could “self-petition” for her own residency if she could meet the following elements: show a legal and good faith marriage, joint residence, spousal abuse, good moral character and extreme hardship.²⁰⁴ There was no examination of why the immigrant did not already have status, whether she arrived without documentation, overstayed a temporary visa, or violated other immigration provisions.²⁰⁵ It was enough that Congress recognized the terrible predicament created when the abuser had control of his victim’s immigration status. The focus of the law was prospective towards a remedy, independent of past-based fault or merit.

To facilitate appropriate adjudication of the self-petition, exceptions to corresponding sections of immigration law were devised.²⁰⁶ To begin, the evidentiary standard for proving abuse was established as “any credible evidence.”²⁰⁷ This standard reflected an acknowledgement that domestic abuse commonly happened behind closed doors and that not every survivor sought help from police or medical providers.²⁰⁸ A 1996 INS memorandum clarified that a

200. VAWA 1994, *supra* note 9, § 40701, 108 Stat. at 1953.

201. *Id.*

202. *See id.*

203. VTTPA, *supra* note 9, § 1502(a)(1), 114 Stat. at 1518 (codified as amended 8 U.S.C. § 1101 (2006)).

204. VAWA 1994, *supra* note 9, § 40701(a)(1)(C), 108 Stat. at 1954 (codified as amended at INA § 204(a)(1), 8 U.S.C. § 1154(a)(1)).

205. *See id.*

206. *See id.* § 40701(a)(2)–(3).

207. *Id.* § 40701(a)(3).

208. *Cf. Habrzyk v. Habrzyk*, 775 F. Supp. 2d 1054, 1069 (N.D. Ill. 2011) (discussing the difficulty in meeting the clear and convincing standard for battered parents using the

woman's affidavit by itself, if sufficiently detailed and credible, could successfully support a self-petition application.²⁰⁹ A flexible standard was consistent with the overarching goal of facilitating survivors in leaving abusive homes.

VTVPA 2000 and VAWA 2013 provide examples of practical amendments to VAWA that made the self-petitioning requirements more accessible to *all* qualified applicants; first, by removing one of the initial requirements, second, by granting the ability to adjust status to legal permanent resident status in the United States, and third by eliminating the barrier of public charge.²¹⁰

Example 1: Extreme Hardship

The 1994 VAWA self-petition required proof that the applicant or her children would suffer "extreme hardship" if she were deported back to her home country.²¹¹ There was no specific definition provided for extreme hardship; however, it had to encompass "more than the mere economic deprivation . . . [or] readjustment to life in the native country after having spent a number of years in the United States"²¹² The types of acceptable evidence could include "the nature and extent of the physical and psychological consequences of the battering or extreme cruelty[,] . . . the impact of the loss of access to the U.S. courts and criminal justice system . . . [, or the] abuser's ability to travel to the foreign country" to cause further harm.²¹³ In the VTVPA reauthorization in 2000, the extreme hardship element was entirely removed from the requirements,²¹⁴ recognizing that it presented a devastating obstacle for survivors and unnecessarily focused on the immigrant's life in the home country, a prerequisite

grave risk of harm defense); Petitions for Relatives, Widows and Widowers, and Abused Spouses and Children, 8 C.F.R. § 204.2(c)(2)(iv) (2007) (discussing the various avenues in which battered women seek treatment or support).

209. Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 59,13061, 59,13066 (Mar. 26, 1996) (codified at 8 C.F.R. § 204.2 (1997)) ("The Service is not precluded from deciding . . . that the self-petitioner's unsupported affidavit is credible and that it provides relevant evidence of sufficient weight to meet the self-petitioner's burden of proof.").

210. VTVPA, *supra* note 9, §§ 1501, 1504(a), 114 Stat. at 1505, 1522–23, 1525–27.

211. VAWA 1994, *supra* note 9, § 40701(a)(1)(C), 108 Stat. at 1953–54.

212. Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. at 59,13067.

213. *Id.*

214. See VTVPA, *supra* note 9, § 1503(b)(1), 114 Stat. at 1518–19 (codified as amended in INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) (2006)).

that did not parallel the family petitioning process.²¹⁵ With this change, the process was made more consistent with the congressional intent for all applicants.

Example 2: Adjustment of Status

Next, the VTVPA 2000 addressed impediments created by changes in IIRAIRA that made battered spouses with approved self-petitions, no longer able to complete the legalization process of obtaining legal permanent residents if they were out of status.²¹⁶ According to the provisions of IIRAIRA, an immigrant who had entered the country without a visa or who had overstayed her visa was prevented from adjusting her status unless she was married to a U.S. citizen.²¹⁷ In response, Congress included in VTVPA 2000 a direct amendment to INA § 245(a), the statute governing eligibility to adjust status in the United States, to include *all* VAWA self-petitioners regardless of the manner of entry into the country or the length of time since the expiration of any prior legal status.²¹⁸ There was no need for an applicant to explain the reason she had fallen out of status, nor any requirement to tie that infraction to the abusive spouse. It was enough that the applicant had already satisfactorily proved the elements of the self-petition.²¹⁹

Example 3: Public Charge

In spite of the intense debates on some of the provisions in VAWA 2013, the removal of the public charge ground of inadmissibility received little attention. Ordinarily, a person seeking adjustment of status to a legal permanent resident via the family based process must make available her financial history and that of the sponsor. These records are scrutinized to determine the likelihood that the applicant

215. See *supra* note 139, at 145.

216. See VTVPA, *supra* note 9, § 1506(a), 114 Stat. at 1527 (codified as amended in INA § 245, 8 U.S.C. § 1255)).

217. IIRAIRA § 301(b)(1), 110 Stat. 3009-546 (codified at INA § 212(a), 8 U.S.C. § 1182(a)(9)(B) (2006)). The combination of being prevented from using adjustment of status within the limitations of INA § 245(a), 8 U.S.C. § 1255(a) and the three and ten year bars that were passed under IIRAIRA means that many immigrants married to US citizens or legal permanent residents are unable to legalize their status, even after years of residing in the US. See INA, Pub. L. No. 84-414, § 245(a), 66 Stat. 163, 217, 8 U.S.C. § 1255(a) (2006); IIRAIRA § 301(b)(1), 110 Stat. at 3009-575-3009-576, 8 U.S.C. § 1182(a)(9)(B)(i).

218. VTVPA, *supra* note 9, §§ 1502-03, 114 Stat. at 1518-19 (codified as amended in INA § 204(a), 8 U.S.C. § 1154(a)).

219. See *id.* § 1503.

would become a public charge, or financially depend on the state. If minimum financial stability is not shown, the applicant can be denied her legal permanent residency. Under VTVPA 2000, self-petitioners were exempt from having to provide the typical affidavit of support demonstrating the financial health of the sponsor, since there was no sponsor. However the applicant still needed to establish her ability to support herself. VAWA 2013 made all applicants for adjustment of status based on the battered spouse protections, exempt from the examination of public charge. As in the above sections, the fact that the applicant was a victim of domestic violence was adequate justification. There was no need to provide a nexus between the domestic abuse and her immediate financial state, nor that she was without fault for causing her weak economic health. The waiver was for all self-petitioners.

Consistent with the purpose of the VAWA, the congressional intent was clear that all battered women should have access to self-petitioning and should be permitted to take advantage of a path to legal permanent status.²²⁰ Both the removal of the extreme hardship language and the exceptions to the adjustment of status process were fashioned for all applicants without imposing any individual scrutiny.²²¹

ii. The Innocent Victim

Changes in the nascent objective of VAWA began to occur in the 2000 Act as advocates pushed for expanded assistance to battered immigrant women.²²² In contrast to the blanket exceptions for self-petitioners outlined above, a very different paradigm was crafted for those with other immigration infractions.

Now, in order to become a legal permanent resident, an approved self-petitioner with an immigration violation needed to show she was not responsible for having caused the infraction, but that her abuser had forced it upon her.²²³ It could be argued that the good immigrants were innocent of wrongdoing and were assumed worthy, while those

220. Mayte Santacruz Benavidez, Comment, *Learning from the Recent Interpretation of INA Section 245(a): Factors to Consider When Interpreting Immigration Law*, 96 CAL. L. REV. 1603, 1609–10 (2008).

221. *See id.*

222. *See* Orloff & Kaguyutan, *supra* note 139, at 145–56.

223. *See* Violence Against Women Act of 2000 § 1505(b)(1), 8 U.S.C. § 1227(a)(7)(A) (2006).

who were themselves responsible for their immigration infractions (bad immigrants) had to prove they deserved relief.²²⁴ The later amendments providing exceptions to the bars for unlawful presence, the failure to depart under voluntary departure, and the bigamy exception illustrate the added level of individual scrutiny.

Example 1: Unlawful Presence

As noted earlier, the concept of “unlawful presence,” classified the time an immigrant is present in the United States without authorization.²²⁵ The unlawful presence becomes problematic only when an immigrant leaves the country after collecting six months or one year in this category, causing her to be ineligible for receiving legal permanent residence for three or ten years, respectively.²²⁶ The 2005 reauthorization aimed to overcome this barrier for approved self-petitioners by creating a waiver for some applicants.²²⁷ Eligibility for the waiver was made contingent on proof of a “substantial connection” between the reason for her leaving the country and the abuse she endured.²²⁸ If no such connection existed or could be proved, an approved self-petitioner would be unable to access this waiver and would be prevented from becoming a permanent resident of the U.S.²²⁹

Example 2: Failure to depart after voluntary departure

A similarly narrow exception was passed for violators of another immigration provision, voluntary departure.²³⁰ After an immigrant in

224. *Cf. id.*

225. IIRAIRA, Pub. L. No. 104-208, § 301(b)(1), 110 Stat. 3009-546, 3009-576 (1996) (codified as amended in INA § 212(a), 8 U.S.C. § 1182(a)(9)(B)(ii) (2006)).

226. *Id.*, 8 U.S.C. § 1182(a)(9)(B)(i)(II). After collecting more than 180 days but less than 365 days of unlawful presence, the immigrant will be inadmissible for three years. *Id.*, 8 U.S.C. § 1182(a)(9)(B)(i)(I). If more than 365 days of unlawful presence is acquired, the bar will be ten years. *Id.*, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

227. *Id.* § 301(c), 8 U.S.C. § 1182(a)(6)(A)(ii).

228. *Id.*, 8 U.S.C. § 1182(a)(6)(A)(ii)(III).

229. *See id.* § 301(b)(1), 8 U.S.C. § 1182(a)(9)(B)(i). Practically speaking, many VAWA petitioners would not be subjected to these bars since the amendments to § 245(a) mentioned above mean that self-petitioners could adjust their status in the U.S. without having to leave the country and trigger the bars. *See supra* notes 218–219 and accompanying text. Some self-petitioners, however, make themselves inadmissible under this ground prior to the self-petition, or leave the U.S. for other reasons, such as family emergencies.

230. IIRAIRA, § 304(a), 8 U.S.C. § 1229c(b)(1) (2006).

removal proceedings loses her case in immigration court, the immigration judge can grant voluntary departure in lieu of a removal order.²³¹ If the immigrant agrees to leave the country voluntarily at her own expense and within a specific time allotment, the immigration judge can allow her to use this path to avoid the negative consequences of a removal order.²³² Failure to actually depart in accordance with a grant of voluntary departure will bar the immigrant from becoming a legal permanent resident for a ten-year period and could subject her to civil penalties as well.²³³ Congress, again exempted some approved self-petitioners from this bar, but only those who could demonstrate that the "extreme cruelty or battery was at least one central reason for . . . overstaying the grant of voluntary departure."²³⁴ For those who could not meet this standard, the waiver would be denied.²³⁵

Example 3: Bigamy Exception

After the initial VAWA, advocates saw that in addition to other guile, abusers frequently deceived their spouses about the validity of the marriage itself. Many women attempted to self-petition as abused spouses of U.S. citizens or legal permanent residents, only to find that the marriage was invalid. VTVPA 2000 was responsive to this discovery by designing an exception for these circumstances, but only if the applicant could show that she had been misled and was not complicit in the bigamy.²³⁶ VAWA 2013 extends this exception to conditional residents using the battered spouse waiver to receive her permanent residence.²³⁷ Identical qualifying language from VTVPA limited the waiver to those innocent of wrongdoing.²³⁸

231. *Id.*

232. *Id.*, 8 U.S.C. § 1229c(b)(1)(A)–(B).

233. VAWA 2005, *supra* note 9, § 81 (codified as amended 8 U.S.C. § 1229c(d)(1)(A)–(B) (amending INA § 240B)).

234. VAWA 2005, *supra* note 9, § 81 (codified as amended at 8 U.S.C. § 1229c(d)(2)).

235. *Id.*

236. INA §§ 204(a)(1)(A)(ii)(II)(aa)(BB) and 204(a)(1)(B)(ii)(II)(aa)(BB).

237. *See supra* note 135.

238. Violence Against Women Reauthorization Act of 2013 (Enrolled Bill [Final as Passed Both House and Senate] sec. 2 Title VIII, sec. 806).

In each of these examples the applicants had already proved the abuse and had their petitions granted. This fact alone was no longer sufficient to open a pathway to the freedom of legal permanent residency. Unless the approved self-petitioner could also show her innocence in the immigration infraction by tying it to the abuse, her former violation would not be forgiven.²³⁹ If a survivor had met her abuser after she had already violated the terms of unlawful presence or voluntary departure, or she was aware of her abuser's bigamy, she would not qualify for the exemption from those bars, even if her abuser specifically used her lack of status as part of his abuse.²⁴⁰

iii. The Deserving Victim

The last grouping of exceptions was constructed for battered immigrant women who are not innocent of past infractions and are therefore required to show themselves deserving of exception. Special VAWA motions to reopen and requirements for the U visa will serve as examples.

Example 1: VAWA Motions to Reopen

Some approved self-petitioners had previously been apprehended and ordered deported or removed by immigration authorities, often in absentia and even without their knowledge.²⁴¹ Before an immigrant with a prior removal order can seek permanent immigration status, she must first re-open the old removal order in immigration court.²⁴² For immigrants generally, the regulations allow only ninety days after the issuance of the order to reopen.²⁴³

In this regard, VTPVA 2000 promulgated an exception for approved self-petitioners who needed to reopen cases beyond one year after a final order of deportation or removal.²⁴⁴ To utilize this

239. See VTPVA, *supra* note 9, § 1504(a), 114 Stat. at 1522–23 (2000) (codified as amended at INA § 240A, 8 U.S.C. § 1229b(b)(2)(A)).

240. *Cf. id.*

241. See IIRAIRA § 304(a), 8 U.S.C. § 1229a(b)(5)(A)–(C). The common scenario is an immigrant who is bonded out of detention and leaves officials with an address for future communication but does not remain at that address and thus never receives notice of a hearing. See *id.*, 8 U.S.C. § 1229(a)(1). Actual service is irrelevant, as the onus is on the immigrant to provide the government with address updates. *Id.*, 8 U.S.C. § 1229(a)(1)(F)(i)–(ii).

242. See *id.*, 8 U.S.C. § 1229a(b)(5)(C).

243. *Id.*, 8 U.S.C. § 1229a(c)(7)(C)(i).

244. VTPVA, *supra* note 9, § 1506(c)(1)(A) (codified as amended at 8 U.S.C. § 1229a(c)(7)(iv)).

exception, a woman must not only show her eligibility for the underlying battered spouse protection, but must additionally prove “extraordinary circumstances or extreme hardship to . . . [her] child” (not to herself).²⁴⁵ Although the applicant’s self-petition may already have been evaluated and approved, if she cannot meet these additional requirements to reopen her court case, she will never be able to obtain the security intended by the VAWA provisions.²⁴⁶ Embedded in this requirement is the assumption that the deserving victim would have acted timely, before the lapse of one year. Legislators can then justify a heightened standard beyond the one year mark for survivors, many of whom will not be able to overcome this impediment and will be unable to achieve permanent immigration status.²⁴⁷

Example 2: The U Visa

The U visa is procedurally positioned differently, as it is outside the previously discussed amendments for survivors of domestic violence who would have had relief based on their marriage to a United States citizen or legal permanent resident.²⁴⁸ The U visa marked expanded relief to reach a battered woman who was not married to her abusive partner or whose abusive spouse did not have legal status.²⁴⁹ The U visa remains a useful example of the concept of a “deserving victim” because it requires for relief further proof of merit, beyond the baseline proof of being a crime victim.²⁵⁰ In order to qualify for U visa relief the applicant must also show that she had suffered “substantial” harm and that she has offered assistance to law enforcement.²⁵¹ On top of proving the domestic abuse, an applicant must demonstrate her worthiness of relief by the degree to which she was harmed and by her usefulness to law enforcement in prosecuting the case.²⁵²

245. *Id.*; see also Orloff & Kaguyutan, *supra* note 215, at 158.

246. See VAWA 1994, *supra* note 9, § 40701(a)(1)(C) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)).

247. See VTVPA, *supra* note 9, § 1506(c)(1)(A) (codified as amended 8 U.S.C. § 1229a(c)(7)(iv)) (leaving sole discretion to the Attorney General for decisions on whether or not to waive the one-year time limitation for filing motions to reopen).

248. Compare *id.* §§ 1502–06, with *id.* § 1513.

249. See *id.* § 1513(a)(2), 114 Stat. at 1533–34.

250. *Id.* § 1513(b)(3) (codified as amended 8 U.S.C. § 1101(a)(15)(U)(i)–(ii)) (providing a broad list of twenty-six qualifying crimes, including domestic abuse).

251. *Id.* § 1503(b)(3), 8 U.S.C. § 1101(a)(15)(U)(i)(I)–(III).

252. See *id.*

While the immigration violations of applicants in this grouping are no more serious than those discussed in the first section, the tenor of Congress had changed as the reauthorization bills were passed. The exceptions ceased to be forward-looking toward the survivor accessing safety and independence, but were now past-based, scrutinizing innocence and requiring an earned deservedness for relief.²⁵³

Many of the 2012 proposed amendments put forth in the substitute bill from the House of Representatives contained the demand for earning the relief sought. HR4970 proposed fraud investigations against self-petitioners requiring an in-person interview, raising the standard of proof to clear and convincing evidence, and making relief contingent upon the abuser's conviction of any domestic violence crimes.²⁵⁴ That amendment further restricted U visas availability to only those who report crimes within 60 days and while still within the statute of limitations for the crime, when the investigation or prosecution was active, and where the identify of the perpetrator could be known.²⁵⁵ The bill's sponsor Representative Chuck Grassley explained that with these changes, U visas will become a "true law enforcement tool" and that these provisions would ensure that help is "real" and "significantly advances an actual investigation or prosecution."²⁵⁶ All of these amendments were defeated in Congress.

3. Creating Dependence

The third way in which the immigration provisions for battered women diverged from the essential principles of the feminist movement was in moving away from a model intent on returning agency to the survivor, toward more recent provisions that created further dependence for a domestic violence victim on law enforcement officials.

253. Cf. Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 580 (2000) (raising concerns about characterizing women as only deserving protection if they are good victims).

254. H.R. 4970 §801, Violence Against Women Reauthorization Act of 2012.

255. H.R. 4970 §802(2)(B) Violence Against Women Reauthorization Act of 2012.

256. Senator Chuck Grassley, *Judiciary Committee Executive Business Meeting Violence Against Women Act, Nominations* (Feb. 2, 2012), http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=3882.

The public perception of a woman who experienced domestic abuse transitioned over the years from early accusations of masochistic tendencies,²⁵⁷ theories of learned helplessness and the “battered women’s syndrome,”²⁵⁸ and finally to the more modern construct of a “survivor.”²⁵⁹ Portraying women who had experienced domestic violence as survivors acknowledged that battered women are found in a society providing them with limited options and that, within this context, they actively take measures to protect themselves and their children from abuse.²⁶⁰ Shelters that were a part of the feminist movement empowered women through programs that expanded their options and by validating their individual choices as legitimate.²⁶¹ The language of early VAWA protections for immigrant women recognized the importance of ensuring that survivors had control of these processes; however, the later provisions involving law enforcement do not.²⁶²

a. Early Control of Process By Immigrant Survivor

The 1994 VAWA provisions corrected the imbalance that the U.S. citizen or legal permanent resident spouse had complete control over the petitioning process, a fact that was thoroughly exploited by abusers. VAWA allowed a battered immigrant spouse to take charge of the legalization process for herself and her children.²⁶³ Under VAWA, it was the applicant who would self-select as a battered spouse and choose to begin her own immigration petition.²⁶⁴ With the “any credible evidence” standard referenced earlier,²⁶⁵ she could prove her case through whatever means available given her unique situation.²⁶⁶ The law did not mandate production of specific pieces of

257. GOODMARK, *supra* note 125, at 55–56 (citing John E. Snell et al., *The Wifebeater's Wife: A Study of Family Interaction*, 11 No. 2 ARCHIVES OF GEN. PSYCHIATRY (1964)); see also GOODMAN & EPSTEIN, *supra* note 116, at 52; Natalie Shainess *Vulnerability to Violence: Masochism as Process*, 33 AM. J. PSYCHOTHERAPY 174, 178 (1979).

258. See GOODMARK, *supra* note 125, at 58–59; LENORE E. WALKER, *THE BATTERED WOMAN passim* (1979).

259. See EDWARD W. GONDOLF WITH ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS passim* (1988).

260. GOODMAN & EPSTEIN, *supra* note 116, at 54; see also GOODMARK, *supra* note 125, at 62.

261. See SCHECHTER, *supra* note 10, at 108–09.

262. See Kelly, *supra* note 253, at 575, 583, 585–86.

263. See *id.* at 575.

264. See *id.*

265. See *supra* text accompanying note 207.

266. See *Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and*

evidence, understanding that survivors might have limited or no access to the family home or official documents.²⁶⁷ Regulations authorized use of secondary evidence that could be used as proof.²⁶⁸

This standard of proof was not always the rule, but was adopted only after an arduous advocacy campaign.²⁶⁹ The battered spouse waiver predated VAWA and provided the first protection for battered spouses.²⁷⁰ According to its terms, an applicant whose abuse had been in the form of extreme mental cruelty (and not physical abuse) was obligated to provide proof “supported by the evaluation of a [mental health] professional recognized by the [Immigration] Service as an expert in the field.”²⁷¹ The advocacy community strongly rejected this standard, criticizing that it was unfair to determine eligibility for the waiver based on how damaged the survivor was as a result of the mistreatment.²⁷² The only factor that should be relevant is whether or not the *perpetrator’s actions* constituted abuse.²⁷³ Focusing instead on the victim’s mental health validated a flawed premise. If a woman could withstand horrific emotional or psychological abuse without lasting damage, should the abuse no longer serve as a basis for relief?²⁷⁴ The terms of VTVPA 2000 corrected this flaw by ensuring that “any credible evidence” could be used to objectively prove that the abuse actually occurred.²⁷⁵

Similarly, the self-petitioner was granted full autonomy to narrate her story in her own distinct voice. She could use the affidavit as one of the most central proofs in her application to convey her history in a way that most accurately depicted what happened.²⁷⁶ To satisfy the “battery or extreme cruelty” element of the self-petition, the applicant

Children, 61 Fed. Reg. 59,13061, 59,13066 (Mar. 26, 1996) (codified at 8 C.F.R. § 204.2 (1997)).

267. *Id.* at 59,13066; see VAWA 1994, *supra* note 9, § 40701(a)(3), 108 Stat. at 1953–54.

268. See Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 59,13066.

269. Cf. James A. Jones, Comment, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. U. L. REV. 679, 689–90 (1997).

270. See *supra* note 136 and accompanying text.

271. 8 C.F.R. § 216.5(e)(3)(iv) (1993).

272. Jones, *supra* note 269, at 690.

273. See *id.*

274. Martha F. Davis & Janet M. Calvo, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES 665, 668 (1991).

275. See VTVPA, *supra* note 9, § 1505(b), 114 Stat. at 1525 (codified as amended at INA § 237(a), 8 U.S.C. § 1227(a)(7)(B) (2006)).

276. See 8 C.F.R. § 204.2(c) (2012).

need only establish that she endured abusive behavior.²⁷⁷ This standard does not demand that she paint a picture of victimization. There was no need for classic recitations of traditional courtships, loving relationships turning abusive, cycles of violence, hopelessness, and finally, separation. Few survivors see themselves entirely as victims, devoid of choice or completely helpless in a marriage. Use of the affidavit allows a woman to explain her choices and to describe the history of the relationship in thoughtful, nuanced terms.²⁷⁸ The survivor's narrative may include mixed emotions of love and anger, self-defense, fighting back, ambivalence regarding the course of the relationship, confusion as to her role, family or cultural pressures, and fear about extricating herself from the relationship.²⁷⁹

Remarkably, VAWA officers are well-prepared for this complex challenge. All VAWA self-petitions are adjudicated by the staff of the USCIS Vermont Service Center, where a VAWA unit receives specialized training in the dynamics of domestic violence.²⁸⁰ The VAWA unit has been acknowledged for the quality of its application review.²⁸¹ With few exceptions, if an adjudicator has doubt about the facts or if there are apparent inconsistencies, she will send the applicant a "request for evidence" giving her an opportunity to clarify or elaborate on the point in question.²⁸² While the self-petition process cannot escape the confines of the family petitioning schema, which generally disadvantages women,²⁸³ it does give broad

277. *Id.* § 204.2(c)(E)–(H).

278. Ann Shallek, *Theory And Experience In Constructing The Relationship Between Lawyer And Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1025–26 (1997). *Cf.* Espenosa, *supra* note 128, at 167; Kelly, *supra* note 146, at 696–99.

279. Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 113–114 (2008).

280. USCIS, REPORT ON THE OPERATIONS OF THE VIOLENCE AGAINST WOMEN ACT UNIT AT THE USCIS VERMONT SERVICE CENTER: REPORT TO CONGRESS II (Oct. 22, 2010) ("Members of the VAWA Unit undergo rigorous initial training . . . significantly more thorough and of greater duration than [other USCIS lines,] . . . followed by a lengthy period of mentorship of newer officers by more senior adjudicators.").

281. *Id.* at 16.

282. See USCIS, ADJUDICATOR'S FIELD MANUAL – REDACTED PUBLIC VERSION ch. 10.5 (2012), *online version available at* <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm>.

283. Calvo, *supra* note 121, at 613–14 (concluding that while "[a]lien spouses of both sexes are theoretically subject to the law's spousal domination," women bear the greatest adverse impact because "the immigrants gaining status as spouses have been predominantly female," "[w]ives have legally and socially been the historical target of

flexibility for the applicant to portray herself more fully than the stereotypical, helpless victim, without jeopardizing her case.²⁸⁴

These protections were seriously challenged by the proposed House amendments to VAWA 2013, demanding the repeal of the any credible evidence standard, inclusion of the abuser's input and evidence, as well as a required professional assessment validating the physical or emotional harm.²⁸⁵

b. Ceding Control of the Process to Law Enforcement

The regulations for the U visa represent a far departure from the independence granted to self-petitioners.²⁸⁶ The U visa provisions codify dependence of an immigrant survivor of domestic violence on law enforcement. Because the U visa grant is contingent upon of a victim's assistance to law enforcement agencies, police and prosecutors have full control of the legalization process at two critical junctures: first, in determining who is a victim in a domestic violence scenario, and second, in exercising discretion to issue the certificate and the follow up verification of helpfulness.²⁸⁷ Then, in spite of overcoming those obstacles, the regulations also require the victim to show that she was substantially harmed as a separate element.²⁸⁸

1. Determining Who Is a Victim

When called to a domestic dispute, police are responsible for two competing functions: enforcement of the law, which often includes discovery of undocumented immigrants, and protection of victims, regardless of immigration status. When the police approach the

subordination in marriage," and the majority of victims of spouse abuse are women); see *supra* notes 263–264 and accompanying text.

284. Cf. Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 628 (2011) (discussing the use of boilerplate documents blurring the uniqueness of the individual).

285. See *supra* note 254.

286. INA § 101(a)(15)(U)(i)(I)–(IV), 8 U.S.C. § 1101(a)(15)(U)(i)(I)–(IV) (2006); see also Jamie Rene Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 MODERN AM. 26, 27 (2008) (discussing petitioner eligibility requirements for a U visa which inherently require the petitioner to rely on certifications from other entities outside of the petitioner's control).

287. INA § 101(a)(15)(U)(i)(I), (III), 8 U.S.C. § 1101(a)(15)(U)(i)(I), (III); see also Abrams, *supra* note 286, at 32–33; Leslye E. Orloff et al, *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 78–79 (2003).

288. INA § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I); see also Abrams, *supra* note 286, at 27, 33.

scene of a domestic incident, they must distinguish who is the victim and who is the perpetrator. Even at best, law enforcement's response to an immigrant victim is informed by societal notions of race and gender, which dictate determinations of who is a legitimate victim.²⁸⁹ Many law enforcement officers recognize as victims only those who are innocent, passive, and under total control of her abuser.²⁹⁰ Such a narrow understanding of domestic abuse can result in no action being taken, or possibly the arrest of the wrong person, or of both people. How the police interpret victimization when the victim is undocumented and the abuser has status varies greatly from one district to the next.

Too often the police are met at the door by a savvy abuser who speaks English and with whom the police identify more readily than the immigrant partner.²⁹¹ When the abuser's explanation seems plausible to the responding officers, many victims have reported that the police leave without interviewing the victim and without making a police report.²⁹²

At worst, outright xenophobia has led certain police precincts to simply neglect to protect immigrant crime victims or to refuse to make the new federal tools available.²⁹³ Some survivors attempt to file a police report and are turned away because the police did not witness the attack or because there is no interpreter available.²⁹⁴ In many instances when a report is issued, it does not reflect the events as told by the survivor, but downplays the seriousness of the violence of the incident, making it unusable in proving the violence.²⁹⁵

289. See Ritchie, *supra* note 145, at 151.

290. See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 195 (2007).

291. See MARGARET ABRAHAM, SPEAKING THE UNSPEAKABLE: MARITAL VIOLENCE AMONG SOUTH ASIAN IMMIGRANTS IN THE UNITED STATES 122 (2000).

292. See Leslye E. Orloff et al., *Battered Immigrant Women's Willingness To Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 55 (2005).

293. Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 377 (2010).

294. Leslye Orloff & Olivia Garcia, *Dynamics of Domestic Violence Experienced by Immigrant Victims*, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 1, 3, 15 (2004).

295. In one case managed by the author, the abuser attempted to stop the victim and their two toddlers from leaving in a car by smashing his car into them. The police report that followed spoke of verbal harassment. On file with author.

2. Issuance of the Helpfulness Certificate

The VAWA statute makes the issuance of the law enforcement certificates completely discretionary, but requires it as the key piece of evidence in a case.²⁹⁶ Without the certificate, an applicant cannot apply for the U visa.²⁹⁷ As with any policing issues, districts vary greatly in how difficult it is for them to issue the certificates.²⁹⁸ Some districts outright refuse to even consider the issuance of the U certification.²⁹⁹

Ineffective Autonomy Language

Ironically, advocates lobbied heavily during the drafting of the U visa to distinguish it by having it controlled by the victim, not by law enforcement.³⁰⁰ Authors carefully worded the provision to give victims maximum independence by making the certificate available at any stage of the process, even before prosecution, thus allowing the victim to freely come forward to participate.³⁰¹ Law enforcement agencies are charged with certifying that the victim “‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of criminal activity.”³⁰² The future-looking option was meant to give full agency to the victim by assuring her that she could come forward to speak out against her abuser without having to worry about her immigration status.³⁰³ If the victim chose to assist in

296. INA § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2006); *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 226–27 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 389 (2010).

297. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1) (2006).

298. *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2011) (discussing the general nature of why discretion is afforded to government agents when dealing with the policing of immigration); 8 C.F.R. § 214.14(a)(2), (b)(3) (2012).

299. *See Abrams*, *supra* note 293, at 387.

300. Memorandum from National Network on Behalf of Battered Immigrant Women, Implementing the U Visa (2001), *available at* <http://www.legalmomentum.org/assets/pdfs/wwwimplementing.pdf> (noting their interpretation of the negotiated language to mean that “[a]lthough the new visa may bear some superficial similarities to S visas, one significant distinction is that the victim, not a prosecutor, is the applicant controlling the process”). The S visa requires that a potential applicant comply completely with requests for assistance to law enforcement agencies in drug cases as a prerequisite to law enforcement’s application for the relief. *See* INA § 1101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S).

301. *See* 72 Fed. Reg. 53,014, 53,019 (Sept. 17, 2007).

302. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1) (2006) (referencing INA 101(a)(15)(U)(iii), 8 U.S.C.A. (a)(15)(U)(iii)).

303. *See* VTPA, *supra* note 9, 114 Stat. at 1513(a)(1) (codified as amended at 8 U.S.C. § 1101 (2006)); Micaela Schuneman, Note, *Seven Years of Bad Luck: How the*

the prosecution of her abuser, she could qualify for the U visa.³⁰⁴ Unfortunately, this did not turn out to be the case. In practice, law enforcement agencies have unchecked discretion if and when to sign the certificate, which directly determines whether or not an applicant can apply for relief.³⁰⁵ Commonly prosecutors deny consideration of the certificates until the close of a trial, fearing the defense counsel will accuse the victim of ulterior motives in testifying to obtain immigration status.³⁰⁶ This policy often prolongs the issuance of the certificate, and the applicant's ability to file and secure any stability for months or even years.

Similarly, the language of the statute "investigation or prosecution" was meant to sever the determination of helpfulness from a district attorney's decision to prosecute and from the ultimate success of the case.³⁰⁷ An applicant should be issued a certificate if she provided helpful information to investigate a crime of domestic violence, even if the prosecution decided to charge the perpetrator with a different crime, declined to prosecute at all, or went to trial and lost the case. However, in making the waiver completely discretionary, the provisions leave "helpfulness" to be arbitrarily interpreted in different districts.³⁰⁸ In verifying "helpfulness," a law enforcement agency confirms that a victim is deserving of the certification.³⁰⁹ If they do not deem the victim worthy, they can simply decline to issue the certificate.³¹⁰ The applicant has little recourse.³¹¹

The competing provisions in the early versions of VAWA 2013 regarding the issuance of the law enforcement certificates highlighted

Government's Delay in Issuing U-Visa Regulations Further Victimized Immigrant Crime Victims, 12 J. GENDER RACE & JUST. 465, 481 (2009).

304. INA §§ 1101(a)(15)(U)(iii), 214(p)(1), 8 U.S.C. §§ 1101(a)(15)(U)(iii), 1184(p)(1) (2006).
305. *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 226–27 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 389 (2010).
306. *Promoting U Visas With Local Officials*, NAT'L IMMIGRANT FAMILY VIOLENCE INST., <http://www.nifvi.org/Promoting%20U%20Visas%20with%20Local%20Officials.pdf> (last visited Jan. 11, 2013).
307. *See* 72 Fed. Reg. at 53,020 ("This rule does not require that the prosecution actually occur, since the statute only requires an alien victim to be helpful in the investigation or the prosecution of the criminal activity."); INA §§ 101(a)(15)(U)(i)(III), 214(p)(1), 8 U.S.C. § 1101(a)(15)(u)(i)(III), 8 U.S.C. § 1184(p)(1).
308. *See Ordonez Orosco v. Napolitano*, 598 F.3d 222, 226 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 389 (2010).
309. *See* 72 Fed. Reg. at 53,020.
310. *See id.*; *see also* Abrams, *supra* note 293, at 395 (outlining multiple ways in which departments have overstepped their authority).
311. *See* 8 C.F.R. § 214.14(b)(3) (2012).

the struggle for dependence/independence of the U visa applicant. The initial Senate version of VAWA, S1925, included the consideration of secondary evidence of helpfulness in lieu of the law enforcement certificate.³¹² The House amendment, H.R. 4970 diametrically countered this clause by expressly prohibiting issuance of the U visa absent the law enforcement certification.³¹³ Neither amendment survived the final passage of the bill.

Prolonged Dependence

Worse still, the issuance of the certificate does not end law enforcement's control of the process. Even if the victim is successful in obtaining the U visa, her dependence continues.³¹⁴ Three years after the U visa is approved the immigrant becomes eligible to apply for permanent status, and she must re-certify that in those three years she has not refused any further reasonable requests for assistance.³¹⁵ If she cannot do so, she can lose the U status and the opportunity afforded her through VAWA.³¹⁶

What is seen as a "reasonable" request to the victim may not be considered as such by law enforcement. In addition to the fear and distress any crime victim might face in choosing to assist in the prosecution of her attacker, immigrant survivors face added obstacles.³¹⁷ Most survivors of domestic violence will express that

312. S1925 §805(a), Violence Against Women Reauthorization Act of 2012.

313. H.R. 4970 §802, Violence Against Women Reauthorization Act of 2012 (amending INA § 214(p)(1) (8 U.S.C. 1184(p)(1)) to read: "No application for a visa under section 101(a)(15)(U) may be granted unless accompanied by the certification as described in this paragraph").

314. See INA § 245(m)(1), 8 U.S.C. § 1255(m)(1) (2006 & Supp. 2007–2011); DEPT. HOMELAND SECURITY, U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 4, http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf (last visited Jan. 11, 2013).

315. See INA § 245(m), 8 U.S.C. § 1255(m).

316. See *id.*; DEPT. HOMELAND SECURITY, *supra* note 314, at 4 (directing law enforcement agencies contact and inform USCIS of the victim's unreasonable refusal to provide assistance in the investigation or prosecution should this occur after the issuance of the initial certification).

317. See PATRICIA TJADEN & NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE & CENTERS FOR DISEASE CONTROL AND PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 49–54 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>; Orloff & Kaguyutan, *supra* note 215, at 97–99, 133–35.

calling the police is a measure of last resort.³¹⁸ If they do so, it is to stop the violence, but it is not necessarily to have the abuser punished.³¹⁹ For the immigrant community, an arrest means more than a tainted record or time served for the abuser—it may also mean deportation or removal.³²⁰ If the abuser is the father of her children or the family breadwinner, a deportation would be a devastating loss for the victim and her family. Mothers are faced with an excruciating decision. Helping law enforcement to prosecute her partner may mean sacrificing him in order to obtain immigration status for herself and her children.

In addition, many applicants face further fears of retaliation from their abusers.³²¹ In some instances the abuser has legal immigration status and thus the power to unite the victim with her children living in her home country.³²² Or to the contrary, some abusers know that their own deportation is imminent and therefore make threats to harm the woman's family members in the home country.³²³ Some women are aware or resentful of law enforcement's racially disparate treatment of minority communities, and may refuse to participate on that basis.³²⁴ None of these motivations may appear reasonable to the authorities.

Expanding forms of acceptable evidence is an essential step in returning to the applicant some of the independence written into the original U visa, and it will make the protections more available to immigrant communities. As mentioned above, attempts to do so in VAWA 2013 were unsuccessful.³²⁵

318. See TJADEN & THOENNES, *supra* note 317, at 49–51.

319. See Richard B. Felson et al., *Reasons for Reporting and Not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY 617, 631 (2002).

320. See INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (2006) (codifying domestic violence as an aggravated felony, which can be used to remove a legal permanent resident with a criminal conviction).

321. See Karyl Alice Davis, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, 568–72 (2004).

322. See Orloff & Kaguyutan, *supra* note 215, at 97–99, 133, 134–35; *For Immigrant Women*, CENTER FOR RELATIONSHIP ABUSE AWARENESS (2010), <http://stoprelationshipabuse.org/for-immigrant-women/>.

323. See Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIG. L.J. 303, 320–21 (1997); CENTER FOR RELATIONSHIP ABUSE AWARENESS, *supra* note 322.

324. See Ritchie, *supra* note 145, at 140 (charging that until the experiences of women of color who are survivors of law enforcement violence are addressed in the dominant paradigms of police brutality and violence against women, their voices will remain largely unheard and their rights unvindicated).

325. See *supra* notes 215 and 216.

c. *Returning to Harm-Based Victimhood*

The terms of the U visa that condition relief to a victim based on a showing of substantial harm return us to the inequities of the past.³²⁶ In applying for the U visa, the applicant must demonstrate that she has suffered “substantial physical or mental abuse” as a result of being a victim of an enumerated crime or substantially similar criminal activity.³²⁷ The harm is defined as “injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim.”³²⁸ Proving the harm is the applicant’s burden.³²⁹ In determining whether the abuse is substantial, USCIS will consider a variety of factors.³³⁰

This definition of harm harkens back to the problematic terms of the 1990 battered spouse waiver previously rejected. That standard initially required a mental health professional to document that a woman had suffered extreme cruelty.³³¹ It incorrectly focused eligibility for relief on the harm sustained by the victim rather than the criminal behavior of the abuser.³³² Under the current construction of the U visa, objective proof of the abusive actions to which a victim had been subjected is not considered sufficient, and additional proof of subjective harm is required.³³³ For the same reasons that standard was rejected under the battered spouse waiver, maintaining this flawed measure in the U visa will lead to nonsensical conclusions whereby the weaker victim is favored for relief over the stronger survivor based on the same type of criminal activity.³³⁴ As with the

326. See INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2006); *infra* notes 331–335 and accompanying text (discussing the problematic terms of the battered spouse waiver which conditioned relief based on the victim’s showing of harm).

327. See INA § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I); 8 C.F.R. § 214.14(c)(2)(i) (2012).

328. 8 C.F.R. § 214.14(a)(8); see also INA § 1101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I).

329. See 8 C.F.R. § 214.14(c)(4). Note that it is the applicant’s burden to show substantial harm; however, at times law enforcement has overstepped its bounds, making the decision to issue the certification contingent on their affirmative finding of substantial harm. *Id.*; see also *supra* notes 305–306 and accompanying text.

330. 8 C.F.R. § 214.14(b)(1) (listing factors such as: “nature of the injury . . . the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the harm; and . . . permanent or serious harm to the appearance, health, or physical or mental soundness”).

331. See *supra* notes 270–274 and accompanying text.

332. See *supra* notes 270–274 and accompanying text.

333. See 8 C.F.R. § 214.14(b)(1).

334. See *supra* notes 270–278 and accompanying text.

battered spouse waiver, the qualifying abuse should stand on its own without the need for the survivor to have to emphasize on her victimization in order to qualify for relief.³³⁵

Once again, the best efforts of advocates successfully attained expanded protections for battered immigrant women. However, many of the statutory requirements and actual practices of the law enforcement partners directly conflict with the feminist principles at the heart of the women's movement.³³⁶

V. CONCLUSION

This article is intended to contribute to an ongoing dialogue of reflective practitioners and advocates. As we work to utilize and strengthen protections for battered women, we must recognize that these laws do not reach the root causes of domestic violence and are thus incapable of eradicating domestic abuse.³³⁷ Criminal justice approaches are simply interim and limited responses to an ongoing crisis. Inattention to the interwoven, systemic causes for domestic violence prevents a productive understanding of the inequities in cultural, economic, and political institutions that combine to support violence against women, ethnic minority women, and immigrant women.³³⁸ Effective "public policy should reflect an integrated response that identifies and locates both the source of violence and support for such violence."³³⁹ Of course legal work and enforcement should be included in the panoply of approaches, but those approaches will be ineffective and even damaging as the exclusive tactics.³⁴⁰ In addition, we must strive to ensure that as we play our distinct roles in the struggle to end domestic violence, we are being faithful to the feminist principles of "autonomy, individual and

335. See *supra* notes 270–278 and accompanying text.

336. See *infra* Parts III–IV.A.

337. See Coker, *supra* note 167, at 848–49.

338. See ABRAHAM, *supra* note 2921, at 2.

339. Miccio, *supra* note 1, at 323.

340. Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers*, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römken & Marianne Wesson, 10 J.L. & POLY 313, 359–60 (2002) ("Criminalization as a solution in itself is a big problem . . . [if the domestic violence it seeks to deter is] not linked to the larger issues of women's economic situation, gender socialization, sex segregation, reproduction, and women's subjugation within the family.").

systemic accountability, and safety.”³⁴¹ As Gandhi reminded us, “We always have control over the means, but not over the end.”³⁴²

341. Miccio, *supra* note 1, at 322 (asserting that “all policies that affect women survivors of male intimate violence should be passed through the prism of autonomy, individual and systemic accountability, and safety”).

342. GANDHI’S EXPERIMENTS WITH TRUTH: ESSENTIAL WRITINGS BY AND ABOUT MAHATMA GANDHI 118 (Richard L. Johnson ed., 2006) (quoting Gandhi in *Young India*, 724).