

Congress Giveth, Congress Taketh Away, Congress Fixeth Its Mistake?

Assessing the Potential Impact of the Battered Immigrant Women Protection Act of 2000

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I. Introduction

Battered immigrant women fall into a severely marginalized category of American society.¹ Language, culture, and a lack of legal resources often prevent battered immigrants from leaving an abusive relationship.² In addition, these women often have trouble finding shelter and employment due to language barriers, lack of income, and ineligibility for public assistance.³ Finally, the battered immigrant woman is often faced with an unenviable choice. She must decide to suffer in silence with her abusive husband or risk deportation to her country of origin.⁴ This

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1. See NOW Legal Def. & Educ. Fund, *NOW Legal Defense and Education Fund Testifies Before Congress on the Need to Protect Battered Immigrant Women*, Press Releases & Statements, at <http://www.nowdef.org/html/news/pr/archive/immtestimony.shtml> (last visited Mar. 2, 2001).

2. See Virginia P. Coto, *LUCHA, The Struggle for Life: Legal Services for Battered Immigrant Women*, 53 U. MIAMI L. REV. 749, 751 n.4 (July 1999); see also Julie Linares-Fierro, *A Mother Removed—A Child Left Behind: A Battered Immigrant's Need for a Modified Best Interest Standard*, 1 SCHOLAR 253, 287-88 (1999) (explaining that some foreign cultures accept spousal abuse as the norm and dictate that women should accept the abuse as a matter of duty). An immigrant woman may also fear risking her social status. See *id.* It may be imperative in her culture that she not dishonor her husband by reporting the abuse, for if she does so, her culture and her family may reject her. See *id.* Furthermore, many world religions dictate that the woman tolerate the abuse because she is married to the abuser. See *id.*

3. See Linares-Fierro, *supra* note 2, at 285.

4. See Maurice Goldman, *The Violence Against Women Act: Meeting Its Goal in Protecting Battered Immigrant Women?*, 37 FAM. & CONCILIATION CTS. REV. 375,

combination of factors often leads the woman to stay with her batterer rather than face unknown consequences.⁵

The plight of battered immigrant women is further exacerbated by the fact that, until 1994, their abusers had sole responsibility for their immigration status.⁶ Under the Immigration Marriage Fraud Amendments of 1986 (IMFA), a U.S. citizen or legal permanent resident spouse was required to file a permanent residency application on behalf of his immigrant spouse.⁷ This requirement allowed the abusive spouse to trap his wife with promises to file the residency petition and threats of deportation if she did not comply with his demands.⁸ When President Clinton signed the Violence Against Women Act of 1994 (VAWA),⁹ this tyranny ended. Under VAWA, a battered immigrant woman may now self-petition for permanent residency status or suspension of deportation.¹⁰

Despite the 1994 legislation, battered immigrant women still face grave problems when they attempt to leave their abusive spouses. A battered immigrant's evidentiary burden under the self-petition is extremely difficult to carry.¹¹ Other factors that

377 (July 1999). The battered immigrant often does not seek legal assistance because she fears deportation. *See id.* This common fear arises from the fact that many battered immigrants are undocumented aliens residing illegally in the United States. *See id.*

5. *See* Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 591 n.2 (Winter 1997) (recognizing that the fear of deportation coupled with the unfamiliarity with the American legal system influences battered immigrants to stay with their abusive spouses).

6. *See* Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 324-25 n.2 (Summer 1995).

7. *See* Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.).

8. *See* Suzanne Tice, *Battered Immigrants Given New Hope with Violence Against Women Act*, 62 TEX. B.J. 930, 931 n.9 (Oct. 1999); *see also* Coto, *supra* note 2, at 749 (relating victim's story where the lawful permanent resident spouse beat his wife and dragged her to the INS for deportation, changing his mind on a whim before they arrived at the center).

9. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902, 1902-55 (codified as amended in scattered sections of multiple titles of U.S.C.).

10. *See id.* The terminology "suspension of deportation" was changed to "cancellation of removal" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See* Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of multiple titles of U.S.C.).

11. *See* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 672-73 n.2 (1998) (explaining that the woman must show evidence of abuse, a valid marriage, good moral character, and extreme hardship if deported).

hinder battered women's access to the self-petition provisions of VAWA include ineligibility for economic assistance¹² and the lack of legal resources.¹³ For these reasons, many battered immigrant women continue to remain under the control of their abusers.¹⁴

Congress took notice of these inadequacies and introduced several pieces of legislation in both houses of the 106th Congress.¹⁵ The proposed legislation aimed to amend current immigration law to lessen the self-petitioner's burden both substantively and procedurally, primarily through altering the type and amount of evidence necessary to satisfy the rigorous elements of the self-petition.¹⁶ From among the various proposals, Congress enacted a version entitled the Battered Immigrant Women Protection Act of 2000 (BIWPA),¹⁷ which was signed by President Clinton on October 28, 2000.¹⁸ BIWPA amends the 1994 VAWA and current immigration laws to lessen the self-petitioner's burden and better accommodate the unique situation of battered immigrant women.¹⁹ The question that remains is whether BIWPA will effectively remedy the many obstacles battered immigrants face in leaving their abusers, or if more congressional action is necessary.

This Article will attempt to answer that question by looking at the several bills proposed during the 106th Congress and the final product, the Battered Immigrant Women Protection Act of 2000.²⁰ Through comparative analysis, this Article will determine if the new legislation substantially improves the position of battered immigrant women in the American system or if it simply adjusts the barriers without giving the needed relief. Part II will examine the historical context of both domestic violence and

12. See Emily Stubbs, *Welfare and Immigration Reform: Refusing Aid to Immigrants*, 12 BERKELEY WOMEN'S L.J. 151, 155-56 (1997) (explaining that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 creates an exception for otherwise ineligible battered immigrants if their self-petition is approved or pending).

13. See Coto, *supra* note 2, at 751 (citing the lack of legal services as an impediment to battered immigrants).

14. See *id.*

15. See, e.g., S. 51, 106th Cong. (1999); S. 245, 106th Cong. (1999); S. 1069, 106th Cong. (1999); H.R. 357, 106th Cong. (1999); H.R. 1248, 106th Cong. (1999); H.R. 3083, 106th Cong. (1999); S. 2787, 106th Cong. (2000); H.R. 4663, 106th Cong. (2000); H.R. 4966, 106th Cong. (2000).

16. See *supra* note 15.

17. Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37.

18. See H.R. 3244, 106th Cong. (1999), *Bill Summary & Status for the 106th Congress*, at <http://thomas.loc.gov/bss/d106query.html> (last visited Mar. 7, 2001).

19. See *infra* notes 326-406.

20. Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. at 1518-37.

family immigration law in the United States.²¹ Part III will look at immigration legislation enacted between 1986 and 1996,²² including the Immigration Marriage Fraud Amendments of 1986²³ and the 1990 legislation passed to amend those provisions,²⁴ the Violence Against Women Act of 1994,²⁵ the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,²⁶ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.²⁷ Part IV will compare the provisions of House bill H.R. 4966,²⁸ Senate bill S. 2787,²⁹ and the version ultimately enacted³⁰ to the statutory provisions discussed in Part III.³¹ Finally, Part V will determine if Congress has taken adequate steps to alleviate the stress on battered immigrant women who face the dire choice of continued battery or deportation.

II. Historical Context

A. Domestic Violence

Domestic violence is generally thought of as the violence that occurs between couples living together, or who once lived together, in a conjugal relationship.³² Although both males and females may perpetrate domestic violence, the overwhelming majority of

21. See *infra* notes 32-70 and accompanying text.

22. See *infra* notes 71-208 and accompanying text.

23. Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.); see *infra* notes 73-102 and accompanying text.

24. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of multiple titles of U.S.C.); *infra* notes 104-120 and accompanying text.

25. Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of multiple titles of U.S.C.); see *infra* notes 123-178 and accompanying text (looking at the substantial changes made to the status of battered immigrants).

26. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of multiple titles of U.S.C.); see *infra* notes 179-187 and accompanying text (looking at the financial obstacles battered immigrants face when trying to leave their abusers).

27. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of multiple titles of U.S.C.); see *infra* notes 188-208 and accompanying text (discussing the protections IIRIRA adds to and removes from VAWA).

28. H.R. 4966, 106th Cong. (2000).

29. S. 2787, 106th Cong. (2000).

30. Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37.

31. See *supra* notes 23-27 and accompanying text; *infra* notes 209-407 and accompanying text.

32. See RICHARD L. DAVIS, DOMESTIC VIOLENCE: FACTS AND FALLACIES 1 (1998).

victims are female.³³ Statistics show that women are at least six times more likely than men to suffer violence committed by an intimate partner.³⁴ Between two and four million women are subjected to intimate abuse in a single year.³⁵ Furthermore, even these staggering figures likely underestimate the incidence of domestic violence because most victims do not go to the police or otherwise report their abuse.³⁶ All in all, it is estimated that domestic violence is the most commonly unreported crime.³⁷

The phenomenon of underreporting domestic abuse stems directly from its historical context. Through the English common law system on which American law is based, a woman's identity and autonomy were legally subsumed by her husband upon marriage, and men were held liable for acts committed by their wives.³⁸ Thus, men were legally charged with the obligation of controlling their wives, and encouraged to "chastise" them with physical force.³⁹ This legal tradition transferred to the American colonies where laws were passed allowing men to chastise their wives as they saw fit.⁴⁰ The legal entitlement of men to use violence against their wives has long been abrogated, yet the legal systems of the United States continued to treat domestic violence

33. See *id.* at 28.

34. See RONE BACHMAN & LINDA E. SALTZMAN, U.S. DEPT OF JUSTICE, *VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1* (Aug. 1995), reprinted in *1 DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE 11* (Patricia G. Barnes ed., 1998). This study further shows that in twenty-nine percent of all violence against women by a single perpetrator, the perpetrator was an intimate, and that these victims are more often injured than are females victimized by a stranger. See *id.* at 3, reprinted in *1 DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE 13* (Patricia G. Barnes ed., 1998).

35. See Karla M. Digirolamo, *Myths and Misconceptions About Domestic Violence*, 16 PACE L. REV. 41, 42 n.1 (Fall 1995).

36. See U.S. DEPT OF JUSTICE, *VIOLENCE BETWEEN INTIMATES* (Nov. 1994), reprinted in *1 DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE 1* (Patricia G. Barnes ed., 1998) (explaining that domestic violence is difficult to measure because victims are reluctant to come forward based on shame or fear of reprisal).

37. See Del Martin, *The Historical Roots of Domestic Violence*, in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 3, 3* (Daniel Jay Sonkin ed., 1987) (citing 1974 FBI statistics estimating that domestic violence is ten times less likely to be reported than rape).

38. See generally *id.* (examining the various societal and legal influences that permit this construct); R. Emerson Dobash & Russel P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY 426 (1978) (detailing the legal evolution of wife battery from Roman law to the present).

39. See generally Dobash & Dobash, *supra* note 38, at 426-39.

40. See *id.* In general, the right of domestic chastisement was limited only by the "rule of thumb," i.e., that a husband was allowed to whip his wife with a switch no bigger in diameter than his thumb. See Martin, *supra* note 37, at 6.

as a private offense into which the law will not probe.⁴¹ Because the law provided no redress for victims of domestic abuse, and because the abuse itself was attributed to misconduct by the women, victims of domestic violence have suffered in silence. It is from this legal and attitudinal tradition that the current epidemic of domestic abuse stems, a tradition that once fostered violence as the protected mechanism used by husbands to control their wives.⁴² Legal reform has been slow but successful, perhaps best exemplified by the momentous passage of the Violence Against Women Act of 1994.⁴³

Despite the evolution of domestic violence from a legally protected practice to a criminally prohibited act, many abuse victims, especially within immigrant communities, fail to use the legal resources that are now available.⁴⁴ Many battered women remain in violent relationships due to complex emotional ties to their abusive partners, exacerbated by abusers' apologies and promises to get help after an abusive incident.⁴⁵ Victims may internalize the widespread perception that domestic violence is a private matter, and may hide the abuse out of fear, shame, and denial.⁴⁶ Additionally, a battered woman may feel trapped because her partner has systematically destroyed all of her relationships outside the household, leaving her isolated and

41. See Dobash & Dobash, *supra* note 38, at 426-39 (citing case law demonstrating courts' refusal to penetrate the "veil of privacy" constructed around the practice of domestic abuse). The law's reluctance to intervene to protect battered women was evidenced by the widespread policy of police departments to refuse to make an arrest in situations of domestic violence. See Martin, *supra* note 37, at 6-7. Police departments adopted this "hands-off" policy because the general consensus was that arrest would only aggravate the situation and reconciliation was the best avenue for the family relationship. See *id.*

42. See generally Dobash & Dobash, *supra* note 38, at 426-39 (documenting the legal and social construction of domestic violence and noting that it has been only a hundred years since men have been denied the legal right to beat their wives in the United States and Great Britain).

43. See Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902, 1902-55 (codified as amended in scattered sections of multiple titles of U.S.C.). See generally Douglas R. Marvin, *The Dynamics of Domestic Abuse*, FBI Library: Law Enforcement Bulletin (1997) (presenting a basic structure for police to use when responding to a domestic violence call), <http://www.fbi.gov/library/leb/1997/july973.htm> (last visited Mar. 2, 2001).

44. See generally Loke, *supra* note 5, at 590-93 (discussing the obstacles battered women face that leave them feeling helpless and powerless to escape the abuse).

45. See Linares-Fierro, *supra* note 2, at 270-71. These promises create hope that the abuse will end and the couple will be able to build a loving, non-abusive marriage. See *id.*

46. See Loke, *supra* note 5, at 592.

without any support.⁴⁷ Economic obstacles also play an enormous role in preventing women from leaving violent relationships, as many victims are financially dependent on their abusive partners and cannot afford the expense of relocating and raising their children alone.⁴⁸ Finally, battered women may remain in abusive relationships based on their acute and justified fear of violent retaliation if they leave.⁴⁹ These fears, the challenge of self-reliance, and the known risk of increased retaliatory violence deter women from leaving an abusive relationship.⁵⁰

Battered immigrant women face all of these obstacles and more.⁵¹ Until 1994 their unique situation was generally ignored by both Congress and the American public.⁵² It appears that Congress considered regulating immigrants more important than protecting this marginalized portion of society.⁵³ Nevertheless, recognizing in 1994 that nearly seventy-seven percent of Latina immigrant women suffer domestic abuse in the District of Columbia alone,⁵⁴ Congress undertook to remedy the situation by

47. See Linares-Fierro, *supra* note 2, at 271.

48. See Loke, *supra* note 5, at 593.

49. See generally Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 1-79 (1991) (explaining how separation assault—the acutely violent and potentially lethal assaults intended to prevent victims from leaving, to retaliate for the separation, or to force them to return—constitutes the greatest risk to women who attempt to escape violent relationships).

50. See Linares-Fierro, *supra* note 2, at 271.

51. See *supra* notes 1-31 and accompanying text (identifying many of these challenges).

52. See Linares-Fierro, *supra* note 2, at 283-87 (discussing the scarcity of resources, such as shelters, devoted to battered women); Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902, 1902-55. The 1994 VAWA was the first major congressional step toward recognizing the plight of battered immigrant women. Cf. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of multiple titles of U.S.C.) (altering the conditional status requirements to allow a waiver for battered immigrant women).

53. The Immigration Marriage Fraud Amendments of 1986 established a conditional residency standard for immigrants married to U.S. citizens or legal permanent residents. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.). This conditional status allows an abuser to control his victim because his consent is required for her to become a legal permanent resident. See Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99, 111 (1996) (stating that the conditional residency system empowers abusive partners); see also Linares-Fierro, *supra* note 2, at 283-87 (discussing the scarcity of resources devoted to battered women).

54. See Lee J. Teran, *Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act*, 17 B.U. INT'L L.J. 1, 11-12 n.1 (Spring 1999) (stating that national statistics are generally not available).

enacting the battered immigrant women provisions of VAWA.⁵⁵ Despite VAWA's progress, domestic violence victims in general, and battered immigrants specifically, continue to face dire conditions.⁵⁶ Only through new legislation encouraging fair standards, feasible evidentiary requirements, and better access to legal services will battered immigrant women be able to escape violent relationships without jeopardizing their immigration status.

B. Family-Based Immigration

The immigration status of a married non-citizen woman has long depended on her husband.⁵⁷ An 1855 law stated that a non-citizen woman who married a U.S. citizen automatically became a citizen, while a 1907 law stripped a female citizen of her citizenship if she married a non-citizen man.⁵⁸ Although both laws were repealed in 1922, the impact of a spouse's citizenship on that of his or her partner remains a key factor in U.S. immigration law.⁵⁹

Congress has traditionally given significant weight to reuniting families in its promulgation of immigration law.⁶⁰ Modern family-sponsored immigration law is quite complex, with a variety of preferences⁶¹ and country quota⁶² considerations that

55. *See id.* at 16; *supra* note 52.

56. *See, e.g.,* Linares-Fierro, *supra* note 2 (describing the various obstacles battered immigrants still face).

57. *See generally* 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 (Mar. 2000) (analyzing the doctrine of coverture within the context of immigration law).

58. *See id.* at 566. Congress passed the 1855 law in an effort to prevent non-citizen women married to citizen men from becoming stateless. *See id.* Alternatively, the 1907 law forced the citizen woman to become stateless and depend on her husband's country of origin for new citizenship. *See id.*

59. *See id.* at 567.

60. *See* Thomas H. Bassett, *Family-Sponsored Immigration, in 1998-99 IMMIGRATION & NATIONALITY LAW HANDBOOK, VOLUME I: IMMIGRATION BASICS 339, 339* (R. Patrick Murphy et al. eds., 1998).

61. Preference refers to the classification system that groups immigrants based on their familial relationships with a U.S. citizen or legal permanent resident. *See* LAURENCE A. CANTER & MARTHA S. SIEGEL, *U.S. IMMIGRATION MADE EASY 4/1* (6th ed. 1998). There are four different family preferences: 1) unmarried people with one U.S. citizen parent; 2) spouses and unmarried children of legal permanent residents; 3) married people with one U.S. citizen parent; and 4) siblings of U.S. citizens. *See id.*

62. There are annual limits on the number of green cards issued to preference immigrants who are not immediate relatives of U.S. citizens. *See id.* at 4/3. There are two quota systems in the U.S. immigration system, one based on country of origin and the other on a worldwide limit. *See id.*

must be satisfied before receiving a green card.⁶³ It should be noted, however, that immigration based on marriage to a U.S. citizen does not fall into the preference or quota categories.⁶⁴ These non-citizen spouses are considered immediate relatives and may receive a green card subject to several conditions.⁶⁵

Regardless of the preference classification, the immigrant, in conjunction with the U.S. citizen or legal permanent resident spouse, must complete a two-step process.⁶⁶ The first step is the filing of a petition.⁶⁷ This petition is used by the Immigration and Naturalization Service (INS) to determine that the applicant is an immediate relative or part of a preference category.⁶⁸ The date the petition is filed begins the waiting period for a preference immigrant's green card.⁶⁹ Before the green card is issued, the

63. See Bassett, *supra* note 60, at 339-40; see also CANTER & SIEGEL, *supra* note 61, at 5/1-5/3 (describing the four family preferences that establish the relationship between the new immigrant and the lawful resident). Once the relationship is identified, the immigrant may not receive a green card until the applicable quota is available. See *id.* This amount of time varies considerably depending on both preference and country of origin. See *id.* This Article will focus on immediate relative (marriage to a U.S. citizen) and second preference (spouses and children of legal permanent residents) immigrants.

64. See CANTER & SIEGEL, *supra* note 61, at 5/1 (stating that the preference categories are covered by quota while the immediate relative categories are not). An immediate relative does not have to wait until a quota slot opens to receive her green card.

65. See Bassett, *supra* note 60, at 347. Although there is no official quota, the Immigration and Nationality Act provides that all family-based immigration, preference, and immediate relative immigrants should not exceed 480,000 people. See Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of multiple titles of U.S.C.); Bassett, *supra* note 60, at 345. This cap, however, is fluid and will increase if the number of immediate relatives exceeds 254,000, a number derived by subtracting 226,000 (the floor for the number of preference immigrants) from the total number of 480,000. See *id.*; see also *infra* notes 66-112 and accompanying text (discussing the conditions a non-citizen spouse must meet before becoming a legal permanent resident).

66. See CANTER & SIEGEL, *supra* note 61, at 5/5.

67. See *id.* This petition is filed by the sponsoring spouse or, in the case of a battered woman, by the actual applicant. See *id.* In addition to the petition form, the sponsor must submit biographic information for both parties, an affidavit of financial support, and supporting documents to prove the immigration status of the sponsor and petitioner and the relationship between the two. See Bassett, *supra* note 60, at 345. There are additional requirements for the battered immigrant's self-petition. See *id.*; see also *infra* notes 126-136 and accompanying text (describing the requirements for a self-petition); U.S. Dep't of Justice, Immigration & Naturalization Serv., *Petition for Amerasian, Widow(er), or Special Immigrant*, Form I-360, available at <http://www.ins.usdoj.gov/graphics/formsfee/forms/files/I-360.pdf> (Sept. 11, 2000) [hereinafter INS Form I-360]. This is the form filed by the battered immigrant, which sets forth all the necessary qualifications for a self-petition. See *id.* at 2.

68. See CANTER & SIEGEL, *supra* note 61, at 5/5.

69. See *id.* The petition, however, does not give the immigrant the right to enter, work, or be present in the United States. See *id.* It is only a prerequisite to

immigrant's petition must be approved and a green card application filed.⁷⁰

III. Statutory Structure 1986-2000⁷¹

Between 1986 and 1996, Congress passed five laws that both limited and expanded a battered immigrant woman's opportunity to escape her abusive spouse.⁷²

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

An immigrant who marries a U.S. citizen or a legal permanent resident is eligible for permanent residency.⁷³ Until 1986, there were no conditions placed on this status.⁷⁴ However, in response to evidence that thirty percent of marriages between an immigrant and a citizen were "sham marriages,"⁷⁵ Congress

the second step. *See id.*

70. *See id.* The green card application is the formal request for legal permanent residency. *See id.* In the case of immediate relative immigration, it may be submitted at the same time as a petition. *See id.* In the case of a preference immigrant, the application is usually filed after the petition is approved and before the end of the waiting period. *See id.* It should be noted that the legal permanent resident status granted to a married immigrant is conditioned on several criteria within the marriage including good faith and duration. *See id.* at 5/3-5/4; *see also infra* notes 71-208 and accompanying text (discussing these conditions in depth).

71. The immigration procedures discussed throughout Parts III and IV apply to immigrants married to both citizens and legal permanent residents. Unless there is a substantive difference between the two procedures, the text refers only to the immigrant married to the U.S. citizen.

72. *See* Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.) (limiting the immigrant's freedom to escape her batterer); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of multiple titles of U.S.C.) (removing some of IMFA's restrictions); Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (establishing a self-petition that further alleviates the problems imposed by IMFA); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.) (removing some of VAWA's protections); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of multiple titles of U.S.C.) (restricting immigrant access to public assistance).

73. *See* Sandra D. Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 MD. J. CONTEMP. LEGAL ISSUES 129, 132 (1994-95).

74. *See id.*

75. "Sham marriages" are typically conceived of as marriages entered into solely for the purpose of gaining immigration status. *Cf.* 8 U.S.C. § 1255(e)(3) (Supp. 1995) (defining a bona fide marriage for suspension of deportation proceedings).

passed the Immigration Marriage Fraud Amendments of 1986 (IMFA).⁷⁶ IMFA places conditions on the immigrant spouse's permanent residency status and puts this immigration status solely in the hands of the citizen spouse.⁷⁷

IMFA provides that a noncitizen spouse married less than two years will be considered a conditional permanent resident.⁷⁸ This conditional status will be removed if, ninety days before the second anniversary of receiving conditional status,⁷⁹ the couple submits a petition requesting the removal of condition.⁸⁰ Once the petition is filed and accepted by the INS, an INS officer must interview the couple to determine that the marriage is valid before the condition is removed.⁸¹ A decision on validity is made within ninety days of the interview.⁸² If the decision is favorable the condition is removed; if the decision is adverse the immigrant loses her status altogether.⁸³ If either the joint petition or the interview requirement is not met, the immigrant will lose her permanent residency status.⁸⁴

The 1986 IMFA also provides two waivers that allow the immigrant to remove the conditions without meeting the joint petition and interview requirements.⁸⁵ The first, a good faith waiver, allows an immigrant to remove the condition even if the marriage has ended.⁸⁶ The immigrant must show that the marriage was entered into in good faith, the marriage was terminated on the immigrant's initiative, and the immigrant was

76. See Franco, *supra* note 53, at 105. The law reflected the INS view that marriage to a U.S. citizen is "an inevitable channel through which noncitizens who might not otherwise be eligible to immigrate will seek to circumvent the immigration laws." Beth Stickney, *The Immigration Consequences of Divorce*, 13 J. AM. ACAD. MATRIMONIAL L. 271, 279 (1996).

77. See Immigration Marriage Fraud Amendments, 100 Stat. 3537 (preventing immigration-related marriage fraud).

78. See 8 U.S.C. § 1186a (1986).

79. If the marriage is deemed invalid prior to this ninety-day mark, the immigrant will lose her immigration status, subject to a deportation hearing. See *id.*

80. See *id.* The petition should state that the marriage was entered into in accordance with the law, has not been judicially annulled or terminated, was not entered into in order to establish immigration status and no consideration was given for the filing of the petition. See *id.*

81. See *id.*

82. See *id.*

83. See *id.* The immigrant may request a review of the evidence in an adverse decision. See *id.*

84. See 8 U.S.C. § 1154 (1986). The immigrant is entitled to a deportation hearing to establish compliance with these requirements. See *id.*

85. See *id.*

86. See *id.*

not at fault for failing to file the joint petition.⁸⁷ The second waiver applies when the immigrant fails to meet the petition and interview requirements, but demonstrates that she will suffer extreme hardship if deported.⁸⁸ Neither of these waivers is sufficient to aid a battered immigrant who is trying to escape her husband's control.⁸⁹

IMFA has a disparate impact on women, because the majority of immigrants who obtain status through marriage are women married to citizens or legal permanent residents.⁹⁰ This impact is especially harsh on battered immigrant women for several reasons. First, the citizen spouse is required to file the initial petition in order for the immigrant spouse to receive conditional resident status; the two-year conditional period does not begin until the petition is filed.⁹¹ Therefore, battered immigrant women are deportable unless and until their batterer files the petition granting them conditional status. This vulnerability allows the citizen spouse to subject his wife to further abuse through promises to file the petition and threats to turn the undocumented citizen over to the INS.⁹²

The second primary way the IMFA adversely affects battered immigrant women results from the joint petition and interview requirements.⁹³ Assuming the citizen husband files the initial petition, unless he agrees to participate in the joint petition and interview process, the battered immigrant is legally stranded and will lose her immigration status.⁹⁴ In sum, the IMFA's conditional residency requirements vest absolute control over a battered immigrant woman's status in the hands of her abuser, allowing batterers to use the U.S. immigration system as yet another tool of power and control over their victims.

Although IMFA provided two waivers for conditional immigrants who are unable to meet the petition and interview requirements, battered immigrants did not fit well into either

87. *See id.*

88. *See id.*

89. *See infra* notes 95-100 and accompanying text (setting forth the problems with these waivers).

90. *See* Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER RACE & JUST. 511, 535 (2000).

91. *See* Pressman, *supra* note 73, at 132-33.

92. *See* Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.); *supra* note 8 and accompanying text.

93. *See* Franco, *supra* note 53, at 105-06.

94. *See id.*

category.⁹⁵ Under the good faith waiver as it was originally enacted, the marriage must have been terminated and the immigrant must have been the filing party in the divorce.⁹⁶ This presented a significant barrier for a battered immigrant woman.⁹⁷ First, it required that she file for divorce at what is often a very difficult and dangerous time in a battered woman's life.⁹⁸ The volatility of the situation was complicated by the fact that most battered immigrants are low income and do not have adequate access to legal services, especially if they do not speak English.⁹⁹ Second, the battered immigrant likely could not qualify for the waiver if she lived in a "no-fault" divorce jurisdiction, making this waiver generally useless.¹⁰⁰ The good faith waiver was thus impracticable for most battered immigrant women, forced to legally maneuver through both divorce and immigration laws that they often can not fully access.

The extreme hardship waiver was similarly impracticable for battered immigrant women. Under this waiver, the INS may consider only evidence relating to the conditional status, thereby substantially narrowing the battered immigrant's opportunity to present proof of battery.¹⁰¹ Furthermore, evidence of abuse will probably not be sufficient to satisfy the requirements of this waiver because the legal question is whether the immigrant will suffer extreme hardship *if deported*, not if she remains married.¹⁰² Therefore, given the limited scope of the evidentiary inquiry by the INS, as well as the fact that proof of abuse is relevant primarily to the immigrant's present hardship, it is improbable that battered immigrant women are able to fulfill the requirements of the extreme hardship waiver.¹⁰³

95. *See id.*; *see also* Pressman, *supra* note 73, at 136 (stating that the waivers do not provide relief for battered immigrants).

96. *See* Immigration Marriage Fraud Amendments, 100 Stat. 3537.

97. *See* Pressman, *supra* note 73, at 137; Loke, *supra* note 5, at 595.

98. *See* Pressman, *supra* note 73, at 137. Requiring the immigrant to file first created a race to the courthouse because the waiver was inapplicable if the citizen spouse filed first. *See id.*

99. *See id.*; *see also* Loke, *supra* note 5, at 596 (stating that the lack of bilingual legal services makes it difficult to obtain a dissolution of marriage).

100. *See* Pressman, *supra* note 73, at 137. Although domestic violence is seen as good cause for divorce, there remains a problem of proof in no-fault divorce jurisdictions. *See id.*

101. *See id.* at 136.

102. *See id.*

103. *See* Franco, *supra* note 53, at 106. The statute does not permit the INS to consider conditions existing prior to the filing for conditional status. *See id.* Therefore, country conditions and pre-existing medical conditions are not part of the extreme hardship determination. *See id.* Furthermore, unless the battered

Battered immigrant women's inability to use these waivers effectively led Congress to amend the IMFA in 1990.¹⁰⁴ The Immigration Act of 1990 (Immigration Act) substantially amended the good faith waiver and created a new battered spouse waiver.¹⁰⁵ The good faith waiver no longer requires that the immigrant file for divorce or that there be good cause for the divorce.¹⁰⁶ The battered spouse waiver provides that an immigrant who enters into a marriage in good faith may petition for removal of conditional status if she can prove she is battered or subject to extreme cruelty.¹⁰⁷ The immigrant need not be divorced or living separately from her spouse in order to qualify for this waiver.¹⁰⁸

Despite the progress Congress made in passing the Immigration Act, significant problems still remained for battered immigrant women. Most of these problems stemmed from the INS regulations promulgated to implement the new law.¹⁰⁹ The regulations define an individual who is abused or subject to extreme cruelty inclusively, but require these immigrants to meet stringent credible evidence standard.¹¹⁰ A battered immigrant must submit documentary evidence of abuse including, but not limited to, police reports, medical reports, and social service reports.¹¹¹ In order to prove extreme mental cruelty the immigrant must also submit an evaluation from a mental health professional.¹¹² These strict evidentiary requirements of official records directly contradict the established knowledge that domestic abuse is grossly underreported, particularly by

woman can show that her children will be left with an abusive father, she will probably be unable to prove extreme hardship if deported. *See Pressman, supra note 73, at 136.*

104. *See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of multiple titles of U.S.C.).*

105. *See id.*

106. *See Franco, supra note 53, at 109.* Removal of the requirement that the battered immigrant file first leaves the finalization of the divorce and evidence of a good faith marriage as the main requirements for a good faith waiver. *See id.* The immigrant must also show that she is not at fault for the failure to file a timely joint petition. *See id.*

107. *See Immigration Act, 104 Stat. 4978; Franco, supra note 53, at 108.*

108. *See Stickney, supra note 76, at 287.*

109. *See Loke, supra note 5, at 598 (claiming that the regulations are "unnecessarily burdensome on battered immigrant women").*

110. *See Franco, supra note 53, at 108.*

111. *See Loke, supra note 5, at 598.*

112. *See Pressman, supra note 73, at 142.* When the claim depends solely on extreme mental cruelty this evaluation becomes the determining factor in a decision to grant or deny the waiver. *See id.*

immigrant women who face the added barriers of language, culture, and fear of deportation.¹¹³

It is unreasonable to hold battered immigrant women to these evidentiary standards.¹¹⁴ The INS, however, justified its position as a balance between two needs.¹¹⁵ It must make the evidentiary requirements as fair as possible while preventing immigrants from abusing the system and taking advantage of the new waiver.¹¹⁶ When compared to the alternative good faith waiver, these requirements are not at all fair. It is easier for a woman to leave her husband and get divorced under the good faith waiver than to apply for the battered immigrant waiver.¹¹⁷ This strict evidentiary requirement made the Immigration Act amendments far weaker and less useful than originally intended.¹¹⁸

The major problem with the 1986 IMFA was not addressed in the 1990 Immigration Act. Under the IMFA, the citizen spouse maintained ultimate control over the immigration process.¹¹⁹ Thus, the battered spouse waiver applied to only those immigrants whose citizen spouses filed the original petition for conditional status.¹²⁰ A battered immigrant whose citizen spouse did not file the first petition had little hope of escaping her situation.¹²¹ Undocumented battered immigrant women remained in this precarious situation until enactment of the Violence Against Women Act of 1994.¹²²

113. See Loke, *supra* note 5, at 598 (stating that cultural and language barriers, as well as fear of deportation, prevent a battered immigrant from obtaining any objective documentation of abuse).

114. See *id.*; Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1419 (1993) (stating that the extreme mental cruelty requirement may be inconsistent with congressional intent).

115. See Pressman, *supra* note 73, at 143.

116. See *id.*

117. See Franco, *supra* note 53, at 110. The immigrant need only show a good faith marriage and a valid divorce decree under the good faith waiver. See *id.* at 111. Under the battered spouse waiver, she must present additional documentary evidence of her abuse. See *id.*

118. See *id.*

119. See Anderson, *supra* note 114, at 1416-17.

120. See *id.* at 1417.

121. See *id.* (claiming that battered immigrants whose spouses failed to file the first petition "fall through the cracks"); Pressman, *supra* note 73, at 140 (explaining that the new waiver does not help undocumented aliens).

122. See Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902, 1902-55 (codified as amended in scattered sections of multiple titles of U.S.C.).

B. *The Violence Against Women Act of 1994*

Title IV of the Violent Crime Control and Law Enforcement Act of 1994¹²³ deals specifically with violence against women.¹²⁴ This Title, the Violence Against Women Act (VAWA), includes a section designed to increase a battered immigrant's options in her quest to establish legal immigration status.¹²⁵ In its efforts to alleviate the problems created by IMFA, VAWA made great strides toward equalizing the power differential between battered immigrants and their citizen husbands.

1. The Self-Petition Process

Under VAWA of 1994, abused immigrants no longer have to wait for their citizen spouse to file the initial immigration petition establishing conditional residency.¹²⁶ They may gain legal status on their own by completing a two-step process.¹²⁷ The first step is to file an I-360 Petition with the INS Vermont Service Center.¹²⁸ The petition includes an application and credible evidence supporting the claim.¹²⁹ In order for the INS to grant a petition, the battered immigrant must prove residence in the United States, good faith marriage to a citizen, and battery.¹³⁰ In addition, she

123. Pub. L. No. 103-322, 108 Stat. 1796.

124. See Violence Against Women Act §§ 40001-40703; see also Linares-Fierro, *supra* note 2, at 296 (asserting that this portion of the Act was passed because of states' failure to adequately punish gender-related violence).

125. See Violence Against Women Act §§ 40701-40702.

126. See Ryan Lilienthal, *Old Hurdles Hamper New Options for Battered Immigrant Women*, 62 BROOK. L. REV. 1595, 1598 (1996). According to the legislative history, "[t]he purpose of permitting self-petitioning is to prevent the citizen or resident from using the petition process as a means to control or abuse an alien spouse." *Id.* (quoting 8 U.S.C.A. § 1254(a)(3) (1996)).

127. See Goldman, *supra* note 4, at 381.

128. See INS Form I-360, *supra* note 67; Goldman, *supra* note 4, at 381. Usually immigration petitions are filed with the immigrant's local office; however, only the Vermont Service Center will accept a battered immigrant's self-petition. See Immigration & Naturalization Serv., *How Do I Apply for Immigration Benefits as a Battered Spouse or Child?*, <http://www.ins.gov/graphics/howdoi/battered.htm> (last visited Nov. 5, 2000). Sending the application to another office may result in a delayed decision. See *id.* The Department of Justice chose to consolidate the adjudication of battered spouse self-petitions in one location in order to ensure sensitivity among the adjudicators and expeditious processing for all self-petitioners. See Teran, *supra* note 54, at 42 n.206.

129. See INS Form I-360, *supra* note 67. Petitioners are encouraged to provide evidence of the abuser's immigration status, marriage certificate, proof of good faith marriage, information regarding courtship, documents proving joint residence with the abuser in the United States, evidence of abuse, affidavits of good moral character, and evidence of extreme hardship. See *id.*

130. See Violence Against Women Act of 1994, § 40701, 108 Stat. 1902, 1953 (codified as amended in scattered sections of multiple titles of U.S.C.); INS Form I-

must prove she will suffer extreme hardship if deported and that she is a person of good moral character.¹³¹ Once a self-petition is approved, the second step requires that the battered immigrant file for an adjustment of status to legal permanent resident.¹³²

Despite its benefits, the self-petition process has developed significant problems. The implementing regulations, issued in March of 1996, require the battered immigrant to remain married to her abusive husband until after she has filed a self-petition.¹³³ This prevents a battered immigrant who has severed ties with her abusive spouse from availing herself of the self-petition and acquiring legal status.¹³⁴ Furthermore, the battered immigrant must satisfy the stringent evidentiary requirements of the IMFA's battered spouse waiver.¹³⁵ This creates an undue burden, especially considering that the self-petitioner must also satisfy extreme hardship and good moral character requirements.¹³⁶

2. Suspension of Deportation/Cancellation of Removal¹³⁷

VAWA of 1994 also provides relief for battered immigrants who find themselves in deportation proceedings.¹³⁸ The applicant must establish continuous physical presence in the United States for at least three years.¹³⁹ In addition, the battered immigrant must prove abuse by a citizen spouse, good moral character, and

360, *supra* note 67.

131. *See supra* notes 122-130 and accompanying text. These requirements present the biggest challenge for battered immigrants and will be discussed *infra* notes 144-175 and accompanying text.

132. *See* INS Form I-360, *supra* note 67; Goldman, *supra* note 4, at 381. The woman must file for adjustment at her local INS office, not through the Vermont Service Center. *See* INS Form I-360, *supra* note 67.

133. *See* Loke, *supra* note 5, at 604. Once the petition is filed, divorce does not affect the decision. *See id.*

134. *See id.* This is true for any form of marital dissolution. *See id.* Therefore, death of the abuser will result in a denial. *See id.*

135. *See supra* notes 109-118 and accompanying text; *see also* Franco, *supra* note 53, at 121-22 (asserting that the self-petitioner must satisfy the battered spouse waiver evidentiary standard); *infra* notes 144-175 and accompanying text (discussing the evidentiary problems).

136. *See supra* notes 109-118 and accompanying text; *see also supra* note 129 (providing the various forms of evidence that can be submitted with the application).

137. *See supra* note 10.

138. *See* Goldman, *supra* note 4, at 381. "Deportable" in this context generally means a person without legal immigration status. *See* Loke, *supra* note 5, at 602.

139. This requirement is far less stringent than the ten years of continuous residence requirement imposed on other deportable immigrants. *See* Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents Under the Immigration and Nationality Act: The Impact of 1996 Reform Legislation*, 48 DRAKE L. REV. 79, 131 (1999).

that she will suffer extreme hardship¹⁴⁰ if deported.¹⁴¹ Relief via suspension/cancellation is granted at the discretion of the immigration judge.¹⁴² If the immigration judge decides to grant a suspension, the applicant's status is changed to legal permanent resident and she receives her green card.¹⁴³ Like the self-petition process, the battered immigrant must satisfy stringent evidentiary requirements.

3. Evidentiary Barriers to Relief

The primary requirements of a self-petition are a good faith marriage to a citizen and evidence of abuse.¹⁴⁴ The INS regulations implementing VAWA's battered immigrant provisions prefer the self-petitioner to produce public records corroborating these requirements.¹⁴⁵ However, due to the dynamics of domestic violence, much of this evidence is nonexistent or unavailable to the battered immigrant woman.¹⁴⁶ Nevertheless, the INS does not address whether the battered immigrant's own testimony is acceptable as evidence of good faith marriage and abuse.¹⁴⁷ These evidentiary requirements often appear insurmountable and lead the battered immigrant to reject VAWA relief and remain with her abuser.¹⁴⁸

a. Extreme Hardship if Deported

Of the two remaining evidentiary requirements, extreme hardship may be the hardest to satisfy. The regulations require consideration of "all credible evidence of extreme hardship . . . including evidence of hardship arising from circumstances

140. This is in contrast to the exceptional and extremely unusual hardship requirement imposed on other deportable immigrants by the IIRIRA in 1996. *See id.* at 132.

141. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40703, 108 Stat. 1902, 1955.

142. *See* Goldman, *supra* note 4, at 381.

143. *See id.*

144. *See* Violence Against Women Act § 40701.

145. *See* Kelly, *supra* note 11, at 683.

146. *See id.* at 684 (declaring that it is common for a battered woman's name to be absent from mortgages, bank accounts, and other public records). The INS Commissioner has stated that "[g]enerally, more weight will be given to primary evidence [of abuse] and evidence provided in court documents, medical reports, policy reports, and other official documents." *Id.* at 675 (quoting Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, 13,068 (1996)).

147. *See id.* at 683.

148. *See id.* at 684.

surrounding the abuse."¹⁴⁹ The ultimate decision, however, is discretionary and must be determined on a case-by-case basis.¹⁵⁰ This leaves battered immigrants at the mercy of the adjudicator with no guarantee that their evidence of hardship will be sufficient to meet an adjudicator's personal standards.¹⁵¹ Adjudicators may rely on traditional notions of extreme hardship,¹⁵² on six specific factors suggested by the INS, or on a combination of the two.¹⁵³ These six INS factors include:

- (1) the nature and extent of the physical and psychological consequences of the battering or extreme cruelty;
- (2) the impact of the loss of access to the U.S. courts and criminal justice system (including but not limited to the ability to obtain and enforce: orders for protection; criminal investigations and prosecutions; and family law proceedings or court orders regarding child support, maintenance, child custody and visitation);
- (3) the self-petitioner's . . . need for social, medical, mental health, or other supportive services which would not be available or reasonably accessible in the [native] country;
- (4) the existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the self-petitioner . . . for having been the victim of abuse, for leaving the abusive situation, or for actions taken to stop the abuse;
- (5) the abuser's ability to travel to the [native] country and the ability and willingness of foreign authorities to protect the self-petitioner . . . from future abuse; and
- (6) the likelihood that the abuser's family, friends, or others acting on behalf of the abuser in the [native] country would physically or psychologically harm the self petitioner . . .¹⁵⁴

It seems only logical that these standards would provide an objective basis for determining a battered woman's extreme hardship; however, these factors are not included in the INS rules, and adjudicators need only consider them at their discretion.¹⁵⁵ In

149. Gail Pendleton, *Immigration Relief for Noncitizens Suffering Domestic Violence 1998 Update*, in 1998-99 IMMIGRATION & NATIONALITY HANDBOOK, VOLUME II: ADVANCED PRACTICE 136, 152 (R. Patrick Murphy et al. eds., 1998) (quoting 8 C.F.R. § 204.2(c)(1)(viii), (e)(1)(viii)).

150. *See id.* at 154; Teran, *supra* note 54, at 28.

151. *See Teran, supra* note 54, at 28.

152. These include family ties in the United States, length of residence in the United States, health of the applicant, economic and political conditions in the native country, possibility of status adjustment through other means, position in the community, evidence of community service, and prior immigration history. *See id.* at 27-28.

153. *See id.* at 43-44.

154. *Id.*

155. *See id.* at 44.

making these considerations optional the INS fails battered immigrant women.¹⁵⁶ Instead of recognizing the prisoner-of-war-like conditions of domestic abuse,¹⁵⁷ the INS focuses on congressional enforcement goals to limit immigration benefits.¹⁵⁸ This focus creates significant barriers for battered immigrant women and undermines VAWA's purpose: "to provide meaningful relief to battered spouses who are eligible to immigrate and are already in the United States."¹⁵⁹

b. *Good Moral Character*

VAWA is the only family-related immigration procedure that requires proof of good moral character to sustain a petition.¹⁶⁰ Considering the historical context of domestic violence, it appears this element is directly related to the societal tendency to blame the abuse on the battered woman rather than the responsible spouse.¹⁶¹ Regardless of its impetus, requiring battered immigrant women, but not other family-based petitioners, to affirmatively establish their morality is misplaced.¹⁶² Proving good moral character through absence of arrest or other questionable activity will not prevent fraud on the INS.¹⁶³ Rather, the element merely corroborates an unfounded stereotype, allowing society to rest assured that the victim of domestic violence is "helpless, virginal, and completely without fault."¹⁶⁴

A determination of good moral character is discretionary and determined on a case-by-case basis.¹⁶⁵ Adjudicators may consider criminal history, including petty offenses, felony convictions, prostitution, and drug use; habitual drunkenness; smuggling aliens; and INS fraud in determining good moral character.¹⁶⁶

156. See e.g., Lilienthal, *supra* note 126, at 1615 (citing *In re Rivera-Gomez*, Oral Decision of the Immigration Judge, File No. A 70 922 256 (June 5, 1995)) (denying the battered immigrant suspension of deportation because she could apply her employment skills elsewhere and was not threatened by the political situation in her native country).

157. See *id.* at 1618.

158. See Teran, *supra* note 53, at 24.

159. *Id.*

160. See Kelly, *supra* note 57, at 581.

161. See *supra* notes 32-56 and accompanying text.

162. See Kelly, *supra* note 57, at 581 (asserting that it may be a legitimate policy in other immigration contexts).

163. See *id.* ("An alien able to successfully file a VAWA claim which fraudulently asserts a good faith, but abusive marriage will not be discovered simply by requiring proof of good moral character.").

164. *Id.* at 580.

165. See Goldman, *supra* note 4, at 383.

166. See *id.*

Some adjudicators will even consider the use of public assistance as a negative factor.¹⁶⁷ Originally, establishing good moral character required the petitioner to submit police reports from every place the immigrant resided for more than six months during the three years before filing the self-petition.¹⁶⁸ This proved unnecessarily burdensome and the INS changed the requirement by allowing the self-petitioner to submit her fingerprints so that the INS can run a criminal background check.¹⁶⁹

In summary, there are two major problems stemming from the good moral character requirement. First, the battered immigrant is once again subject to standards that her non-abused counterpart does not have to meet in order to gain legal permanent residency.¹⁷⁰ The disparate burden of this element is especially unfair considering the unique burdens battered immigrants face.¹⁷¹ Second, a battered immigrant may fail the good moral character test as a result of the domestic abuse itself.¹⁷² For example, many jurisdictions have mandatory arrest policies regarding domestic assault, which commonly result in mutual arrest of both the batterer and the victim.¹⁷³ The victim may also be arrested if the batterer files countercharges out of vengeance.¹⁷⁴ Additionally, many battered women are forced by their abusers to commit crimes under threat of violence, and thus offenses such as prostitution and petty theft are often the direct consequence of the abuse. The good moral character element not only imposes a higher standard of conduct on the victim than on the abuser, but also requires that battered immigrant women overcome an evidentiary burden they likely cannot surmount as a direct consequence of the abuse. In effect, the good moral character requirement once again thwarts VAWA's underlying

167. *See id.* But see Pendleton, *supra* note 149, at 151 (stating that "[u]se of public benefits is irrelevant unless fraud is evident," an assertion based on a discussion between the author and Vermont Service Center adjudicators).

168. *See id.* This included foreign countries. *See id.*

169. *See id.* at 152.

170. *See Kelly, supra* note 11, at 687. The non-abused immigrant spouse also need not prove extreme hardship. *See id.* at 686.

171. *See supra* notes 32-56 and accompanying text.

172. *See Lilienthal, supra* note 126, at 1622 (citing a telephone interview between the author and Gail Pendleton, Coordinator of the National Lawyers Guild (Apr. 28, 1997)).

173. *See id.*; *see also Goldman, supra* note 4, at 383 (noting that abused partners are often automatically arrested, even when acting in self-defense).

174. *See Pendleton, supra* note 149, at 151.

purpose and prevents meaningful remedy to immigrant women trying to escape violent relationships.¹⁷⁵

4. The Benefits and Burdens of VAWA

There is no question that satisfying VAWA requirements is "onerous and make[s] cases time consuming."¹⁷⁶ Nevertheless, VAWA's benefits are seen clearly in the number of petitions submitted between 1995 and the present. Since the implementation of regulations in 1996, the INS has adjudicated more than five thousand self-petitions.¹⁷⁷ In short, VAWA does work, but only for the limited number of battered immigrants who have obtained the required evidentiary materials and who have access to legal services.¹⁷⁸

C. *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*

In 1996 Congress overhauled the welfare system through passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act).¹⁷⁹ The Welfare Reform Act severely impacted the entire U.S. immigrant population.¹⁸⁰ Unless an immigrant falls into one of four

175. See Lilienthal, *supra* note 126, at 1626 (describing VAWA's purpose as "helping battered women leave abusive relationships").

176. Tice, *supra* note 8, at 932.

177. See Teran, *supra* note 54, at 41. Most of these petitions were approved. See *id.*

178. In addition to the 1996 legislation discussed *infra* notes 180-208 and accompanying text, Congress has enacted two other laws restricting access to VAWA. The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1259 (codified as amended in scattered sections of 8 U.S.C.), essentially eliminated cancellation of removal for undocumented immigrants. See Loke, *supra* note 5, at 612. As most battered immigrants are undocumented, this law removed the cancellation of removal option provided under VAWA. See *id.* Access to VAWA was further limited when Congress prohibited recipients of funding from the Legal Services Corporation (LSC) from using any of their funds to aid undocumented immigrants. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-53 to 1321-54. Under this provision most battered immigrants may not seek legal advice or representation from their local Legal Aid office if that agency receives LSC funding. See *id.* Without access to legal assistance it is nearly impossible for a battered immigrant to self-petition successfully. See Loke, *supra* note 5, at 612-13.

179. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C.).

180. See Stubbs, *supra* note 12, at 151-52 (noting that up to 500,000 legal immigrants could lose federal benefits under this Act).

exceptions,¹⁸¹ there is a complete bar to all federal benefits including Supplemental Security Income (SSI) and food stamps.¹⁸² This prohibition adversely affects as many as 500,000 legal immigrants¹⁸³ and has serious ramifications for battered immigrant women seeking to leave their abusive husbands.

Many abused immigrants need public benefits in order to leave their spouses.¹⁸⁴ Battered women are often economically dependent on their husbands and lack the resources necessary to leave and start over on their own.¹⁸⁵ By eliminating what often is a battered immigrant woman's only alternative source of income, the Welfare Reform Act forced a battered immigrant to choose between starvation on the street or remaining in an abusive environment.¹⁸⁶ Fortunately, Congress soon recognized its error and instituted a battered immigrant exception under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.¹⁸⁷

D. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

In addition to the radical restrictions imposed by the Welfare Reform Act, Congress also overhauled the immigration system in 1996.¹⁸⁸ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹⁸⁹ expanded the grounds for

181. These exceptions include refugees/asylees, those granted a withholding of deportation, military personnel, and working non-citizens. See 8 U.S.C. § 1612 (1994 & Supp. II 1996) (codifying provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 402, 110 Stat. 2105, 2113-15).

182. See *id.* The Act also restricts state policies toward immigrants. See Stubbs, *supra* note 12, at 152-53. While states were previously prohibited from discriminating between legal and illegal immigrants for the purpose of allocating aid, they may now establish eligibility based on legality or deny benefits altogether. See *id.*

183. See Stubbs, *supra* note 12, at 151-52. Illegal immigrants were never eligible for public assistance. See *id.*

184. See Loke, *supra* note 5, at 610 (noting that "the period immediately after leaving an abusive relationship is when many battered immigrant women face an unavoidable need for public assistance").

185. See *id.* at 611.

186. See *id.* (stating that women will be forced to stay with their batterers); Stubbs, *supra* note 12 (stating that the Welfare Reform Act substantially harms immigrant women and children and may result in an increase in the homeless population).

187. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 501, 110 Stat. 3009-546, 3009-670 to 3009-671 (codified as amended in scattered sections of 8 U.S.C.).

188. See Kelly, *supra* note 57, at 583.

189. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8

which an immigrant can be deported and isolated INS actions from judicial review.¹⁹⁰ Despite its negative impact on the majority of immigrants, IIRIRA recognized the exceptional situation of battered immigrants and provided special provisions and exemptions for them.¹⁹¹ The primary change was that battered immigrants are no longer subject to the prohibitions of the Welfare Reform Act.¹⁹² In addition, Congress maintained the 1994 VAWA provisions for suspension of deportation while increasing the barriers for all other immigrants.¹⁹³ Despite its advances, IIRIRA still managed to create problems for battered immigrant women by requiring the deportation of domestic violence offenders.¹⁹⁴

1. The Domestic Violence Exception in the Welfare Reform Act

Congress recognized the error of its over-inclusive ban on public assistance for all immigrants and enacted an exception for battered women in the IIRIRA.¹⁹⁵ Now a battered immigrant woman who has self-petitioned successfully or has a petition pending is eligible for federal public assistance.¹⁹⁶ However, this exception does not apply while the battered immigrant lives with her batterer.¹⁹⁷ In addition, the immigrant must show a substantial connection between the abuse and the need for public

U.S.C.).

190. *See id.*

191. *See* Loke, *supra* note 5, at 614 (discussing the available exceptions and exemptions).

192. *See id.* In addition, the suspension of deportation problem discussed *supra* note 178 was remedied by IIRIRA. *See id.* at 612. Undocumented battered immigrants are no longer excludable, but they must prove that entry without inspection was substantially connected to the abuse. *See id.* at 615. The LSC funding ban was also amended in 1996 to allow LSC-funded agencies to use non-LSC funds to serve undocumented battered immigrants with legal matters directly related to their abuse. *See* Legal Serv. Corp., *LSC Statutes: Part 1626-Restrictions on Legal Assistance to Aliens*, <http://www.lsc.gov/pressr/regulati/1626.htm> (last visited Feb. 23, 2001) (discussing this amendment in the preamble to the regulations); *infra* notes 203-208 and accompanying text (explaining how deportation of abusers may preclude relief for victims of abuse).

193. *See* Griffith, *supra* note 139, at 130-31.

194. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 350.

195. *See id.* § 501.

196. *See id.*; Marry Ann Dutton, et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POLY 245, 297 (2000) (noting the expanded access to public benefits available to battered women under this Act).

197. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 501.

assistance.¹⁹⁸ These changes constitute significant progress and allow battered immigrants to better achieve independence under VAWA.

Nevertheless, there are still substantial barriers to receiving financial assistance. All of the provisions of the Welfare Reform Act still apply; battered immigrants are simply a fifth exception to the general rules.¹⁹⁹ This means that only certain federal programs are available, and state aid is totally dependent on whether a particular state has decided to extend public assistance to legal immigrants.²⁰⁰ Furthermore, it is unclear what type and amount of proof will constitute a substantial connection between the abuse and the need for aid.²⁰¹ Presumably, simply being in the relationship and not working is a substantial connection.²⁰² It is uncertain, however, if the INS will see it this way.

2. The Immigration Status of the Batterer

IIRIRA mandates the deportation of legal permanent resident domestic violence offenders.²⁰³ Once the legal permanent resident is convicted of a crime and placed in deportation proceedings, a loss of immigration status is imminent.²⁰⁴ This loss of status in turn negatively affects the VAWA self-petitioner.²⁰⁵

The regulations implementing VAWA provide that the self-petitioner's husband, if he is a legal permanent resident, must maintain his immigration status until her petition is approved.²⁰⁶ A battered immigrant is once again left to choose between two undesirables. She may remain with her abusive spouse until he applies for and becomes a citizen, or she may file a self-petition, thereby turning him over to the authorities, and risk the

198. *See id.*

199. *See* Goldman, *supra* note 4, at 384; *supra* note 181 and accompanying text (setting forth original four exceptions).

200. *See id.*

201. *See* Loke, *supra* note 5, at 614 (noting this uncertainty and discussing the need for INS clarifying regulations).

202. *See* Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 326 (1997) (stating that a higher evidentiary standard would discourage battered immigrants from leaving their spouses).

203. *See* Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 305, 110 Stat. 3009-546, 3009-597 to 3009-607 (codified as amended in scattered sections of 8 U.S.C.).

204. *See* Cecilia M. Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 211-12 (1999).

205. *See id.*

206. *See* 8 C.F.R. § 204.2(c)(1)(iii) (2000) ("The abusive spouse must be a citizen of the United States or a lawful permanent resident of the United States when the petition is filed and when it is approved.").

possibility that her petition will not be adjudicated before her abuser is convicted and deported.²⁰⁷ Not only does this undermine the purpose of VAWA,²⁰⁸ but it also creates an unnecessary distinction between battered immigrants married to U.S. citizens and those married to legal permanent residents. This can be remedied only by repealing the INS regulations requiring the husband to maintain his immigration status throughout his wife's self-petition process.

IV. Battered Immigrant Women Protection Act of 2000: Does It Provide the Necessary Remedy?

Congressional policy has not followed a straight course in the area of battered immigrant women.²⁰⁹ There is constant debate over restricting the flow of immigrants versus protecting women in general, and battered immigrants in particular, from domestic abuse.²¹⁰ In order to protect battered immigrants, Congress must leave its misgivings about immigration fraud behind and focus on the needs of this marginalized group. As a result, Congress must take substantial steps to remedy the apparent downfalls of past legislation.

Scholars and legal practitioners propose several changes to make VAWA immigration relief more accessible.²¹¹ The only way to truly correct the problems that began in 1986 is to abolish the conditional residency requirement.²¹² Total abolition, however, is a radical change not likely to happen anytime soon. Therefore, progressive, incremental change is the most feasible political option.²¹³ Perhaps the most important incremental change that may be made is the abolition of the extreme hardship and good moral character requirements of the self-petition. Intended to prevent fraud, the requirements in fact do little more than prevent battered immigrants from accessing VAWA relief.²¹⁴ They create an insurmountable evidentiary burden and should be done away

207. See Espenozo, *supra* note 204, at 211-12.

208. See *id.* at 212; *supra* note 159 and accompanying text.

209. See *supra* notes 72-208 and accompanying text.

210. See *supra* notes 72-208 and accompanying text.

211. See *infra* notes 212-228 and accompanying text.

212. See Franco, *supra* note 53, at 123-24. If there were no conditional residency requirement, there would be no need for waivers and self-petitions for a battered immigrant. See *id.* Rather, the abused woman would simply gain her status when she is married and does not have to worry about her husband controlling the process. See *id.*

213. See *id.*

214. See Kelly, *supra* note 11, at 704 (asserting that these requirements only impede battered women's ability to obtain relief).

with in order to promote VAWA's purpose of helping battered women break free from domestic violence.²¹⁵

Another necessary change requires broadening the credible evidence standard to allow abuse to be proven despite a victim's lack of official reports and documentation.²¹⁶ The present standard is too narrow and restrictive for battered women to satisfy.²¹⁷ INS officials must recognize that battered immigrants often do not turn to the police or community organizations for help.²¹⁸ The immigrant may not know that protection is available or she may fear further abuse and deportation if she reports her abusive spouse.²¹⁹ For these reasons, primary evidence, including police and medical reports, is far too often not available.²²⁰ Therefore, the INS should accept alternative evidence.²²¹

There are several other changes that Congress could make in order to increase VAWA's effectiveness. These include lifting the barrier on all public benefits²²² and providing domestic abuse education and training for INS officials.²²³ Unfortunately, in light of the inherently controversial nature of immigration law, such changes could not be made until the political climate was right. The proper political climate finally presented itself during the 106th Congress. With the 1994 VAWA set to expire on September 30, 2000,²²⁴ more than nine reauthorization bills with substantive provisions addressing battered immigrants were introduced in

215. See Franco, *supra* note 53, at 139 (declaring that extreme hardship places a double evidentiary burden on the self-petitioner); Espenosa, *supra* note 204, at 215 (stating that the good moral character requirement in a self-petition is "unreasonable and needlessly sets a barrier to relief").

216. See *supra* notes 110-112.

217. See Franco, *supra* note 53, at 127-28 (proposing that the INS accept evidence in addition to that derived from official sources).

218. See Goldman, *supra* note 4, at 385.

219. See *id.*

220. See *id.*

221. See Franco, *supra* note 53, at 127-28. The primary piece of alternative evidence should be the battered immigrant's own testimony. See Kelly, *supra* note 11, at 696. Battered women should be treated in the same manner as a refugee, who is also required to produce credible evidence corroborating her story. See *id.* at 697. Refugees who provide "believable, consistent, and sufficiently detailed" testimony meet the credible evidence standard. *Id.* (citation omitted).

222. See Loke, *supra* note 5, at 620. This will allow the battered immigrant to leave her husband without fearing loss of subsistence. See *id.*

223. See Goldman, *supra* note 4, at 385. Sensitivity training may prevent many of the problems inherent in the discretionary nature of self-petition adjudication. See *id.*

224. See NOW Legal Def. & Educ. Fund, *NOW Legal Defense and Education Fund Congratulates Congress for Reauthorizing the Violence Against Women Act*, Press Releases & Statements, at <http://www.nowldef.org/html/news/pr/senpassvawa.shtml> (last visited Nov. 10, 2000).

both Houses.²²⁵ Two of these bills culminated in the Violence Against Women Act of 2000,²²⁶ which incorporates the Battered Immigrant Women Protection Act of 2000,²²⁷ passed on October 28, 2000.²²⁸

A. H.R. 4966

The Restoration of Fairness in Immigration Law Act of 2000 (H.R. 4966),²²⁹ proposed by Representative John Conyers on July 26, 2000, contains an entire Title calling for the fair treatment of battered immigrants.²³⁰ The Title recognizes that "several groups of battered immigrant women . . . do not have access to the immigration protection of the Violence Against Women Act of 1994 . . ."²³¹ Among the purposes established in the Title, Representative Conyers sought "to correct erosions of the [VAWA] immigration protections . . ."²³² In doing so, the Title promises to restore the protections that existed prior to the 1996 IIRIRA.²³³ Despite these noble statements, it is uncertain if the proposed bill is sufficient to remedy the situation.

1. Provisions

The procedural provisions of H.R. 4966 provide for the removal of certain barriers to VAWA immigration relief.²³⁴ The bill eliminates obstacles from the adjustment of status²³⁵ process

225. See *supra* note 15.

226. See Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

227. See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1501, 114 Stat. 1464, 1518.

228. See H.R. 3224, 106th Cong. (1999), *Bill Summary & Status for the 106th Congress*, at <http://thomas.loc.gov/bss/d106query.html> (last visited Jan. 14, 2001).

229. H.R. 4966, 106th Cong. § 601 (2000).

230. See *id.*

231. *Id.* § 601(a)(3). This is one of three findings Representative Conyers gave in support of the new immigration provisions. See *id.* The bill reaffirmed the original VAWA goal to remove the immigration laws as a barrier that kept battered immigrants locked in abusive relationships. See *id.* § 601(a)(1). It also recognized the need to protect battered immigrants against deportation, which allows them to cooperate with law enforcement and criminal prosecution of abusers. See *id.* § 601(a)(2).

232. *Id.* § 601(b)(3). Representative Conyers included two additional purposes. See *id.* § 601(b)(1)-(2). The first is to promote criminal prosecution of the abuser. See *id.* § 601(b)(1). The second offers protection against domestic abuse. See *id.* § 601(b)(2).

233. See *id.* § 601(b)(3).

234. See H.R. 4966, 106th Cong. (2000).

235. Adjustment of status occurs after the initial self-petition is granted. See *supra* notes 127-132 and accompanying text.

and exempts battered immigrants from the annual cap on cancellation of removal grants.²³⁶ It also eliminates time limitations for motions to reopen removal proceedings,²³⁷ thus allowing a battered immigrant to appeal a removal order at her convenience.²³⁸ This exemption also applies to battered immigrants who are in deportation proceedings and are eligible for relief as a result of VAWA or H.R. 4966.²³⁹ Accordingly, battered immigrants who were in removal or deportation proceedings prior to 1994 may now seek VAWA relief.

Section 603 of H.R. 4966 changes the INS regulation requiring that the legal permanent resident spouse maintain his immigration status until the self-petition is approved.²⁴⁰ Under the new provision, "denaturalization, loss or renunciation of citizenship, death of the abuser, or changes to the abuser's citizenship status after filing of the petition shall not adversely affect the approval of the petition . . ." ²⁴¹ This section further alters a battered immigrant's burden by allowing her to proceed under the IMFA conditional residence requirements regardless of the abuser's actions.²⁴² By presenting credible evidence of battery or extreme cruelty, the INS may adjudicate the IMFA petition without regard to its withdrawal by the abuser or the failure of the abuser to attend the interview.²⁴³ Although it is unclear what will constitute credible evidence, this provision expands relief by allowing battered immigrants to proceed under IMFA instead of scrapping everything for a self-petition. Finally, section 603 provides that a battered immigrant may remarry without fear of losing her status under an approved self-petition.²⁴⁴

236. See H.R. 4966 § 602(a)-(b)(1).

237. Removal proceedings are roughly equivalent to suspension of deportation proceedings. See *supra* note 10.

238. See H.R. 4966 § 602(c)(1). A copy of the self-petition should be filed with the application for cancellation of removal. See *id.* This exemption also applies to reopening a deportation proceeding. See *id.* § 602(c)(2).

239. See *id.* § 602(c)(2)(B).

240. See *id.* § 603; see also *supra* notes 203-208 and accompanying text (describing the problems caused for battered immigrants married to legal permanent residents under this regulation and IIRIRA).

241. H.R. 4966 § 603(a)(1). The battered immigrant must file the petition before her spouse loses status. See *id.* If she does not, the original INS regulation still applies and her petition will be denied. See *id.*

242. See *id.* § 603(c).

243. See *id.*

244. See *id.* § 603(e). It is not clear in the bill, but it is likely that the battered immigrant cannot remarry her abusive spouse and still maintain her self-petition status.

In addition to these procedural changes, H.R. 4966 alters several substantive requirements of the self-petition and suspension of deportation procedures. Under the bill, a self-petitioner must prove a good faith marriage and battery or extreme mental cruelty by her U.S. citizen spouse.²⁴⁵ Also, she must still show that she is a person of good moral character.²⁴⁶ However, the extreme hardship if deported requirement is eliminated for self-petitioners.²⁴⁷ The immigrant spouse of a U.S. citizen must also show that she has resided with that spouse.²⁴⁸ The immigrant spouse of a legal permanent resident, on the other hand, must show that she has resided with her spouse in the United States.²⁴⁹

A cancellation of removal applicant must meet most of the same requirements that the self-petitioner must satisfy.²⁵⁰ She must show a good faith marriage to a U.S. citizen and battery or extreme cruelty by that spouse.²⁵¹ In addition, she must establish good moral character.²⁵² The major differences include a three-year continuous residence requirement and the extreme hardship if deported requirement, which was not eliminated for the cancellation of removal applicant.²⁵³

Although the good moral character requirement is still present in both the self-petition and cancellation of removal processes, its requirements are more lenient under H.R. 4966.²⁵⁴ The INS is no longer limited by the battered immigrant's criminal record and can make exceptions for otherwise qualified self-petitioners and suspension of deportation applicants.²⁵⁵ These exceptions must be based on an arrest, conviction, or guilty plea to:

245. *See id.* § 606(c)(1)(A), (d)(1).

246. *See id.* § 606(c)(1)(B), (d)(2).

247. *See id.* § 606(c), (d) (proposing to amend the Immigration and Nationality Act, 8 U.S.C § 1154 (2000), to exclude an extreme hardship if deported requirement for a self-petition).

248. *See id.* § 606(c)(1)(B). Under this provision it is no longer required that the battered immigrant and citizen spouse reside in the United States, which opens VAWA relief to all immigrants married to citizens living outside U.S. borders. *See id.*

249. *See id.* § 606(d)(2). The likely reason for the difference between this requirement and that of section 606(c)(1)(B) is that legal permanent residents are not usually found living abroad.

250. *Compare* H.R. 4966 § 606, *with* H.R. 4966 § 607.

251. *See id.* § 607(a).

252. *See id.*

253. *See id.*

254. *See id.* § 608.

255. *See id.* § 608(a)-(c).

- (I) violating a court order issued to protect the alien;
- (II) prostitution if the alien was forced into prostitution by an abuser;
- (III) a domestic violence-related crime, if the [INS] determines that the alien acted in self defense; or
- (IV) a crime where there was a connection between the commission of the crime and having been battered or subjected to extreme cruelty.²⁵⁶

The final changes that H.R. 4966 makes to the existing statutory framework include provisions for economic security,²⁵⁷ improved access to legal representation and services,²⁵⁸ and required sensitivity training for INS officials and immigration judges.²⁵⁹ Section 609 provides an exception to the Welfare Reform Act that allows battered immigrants to collect Supplemental Security Income (SSI) and food stamps.²⁶⁰ It also restricts organizations receiving federal funds from discriminating in providing shelter and services to battered immigrants.²⁶¹ Section 610 permits non-profit legal agencies that receive funding from the federal Legal Services Corporation to use those funds to assist undocumented battered immigrants with legal problems resulting from the abusive relationship.²⁶² Finally, section 611 mandates training for the INS and immigration judges to provide information of the immigration provisions of VAWA and their impact on domestic violence victims.²⁶³

2. Benefits and Burdens of H.R. 4966

H.R. 4966 makes substantial progress toward relieving the negative impact of IMFA, IIRIRA, and the Welfare Reform Act on battered immigrant women, as well as removing some of the barriers arising from the 1994 VAWA. The primary procedural benefit is section 603(a), which provides that the self-petition will not be denied if the legal permanent resident spouse loses his immigration status,²⁶⁴ thereby allowing battered immigrants

256. *Id.* § 608(a)-(d).

257. *See id.* § 609.

258. *See id.* § 610.

259. *See id.* § 611.

260. *See id.* § 609(d).

261. *See id.* § 609(f).

262. *See id.* § 610(a); *see also supra* note 178 (discussing the provision requiring low-income legal agencies that receive LSC funds to turn away undocumented immigrants); *supra* note 192 (discussing the amendment that allows LSC-funded agencies to use non-LSC funds to aid undocumented battered immigrants).

263. *See* H.R. 4966 § 611(a)(2).

264. *See id.* § 603(a) (proposing to amend the Immigration and Nationality Act, 8

married to legal permanent residents the opportunity to self-petition.²⁶⁵ This provision equalizes the status of all battered immigrants and reduces the negative impact of seeking help from the criminal justice system.²⁶⁶ In short, by broadening the range of eligible battered immigrant women, this provision takes a large step toward ensuring that VAWA's purpose is fulfilled.²⁶⁷

Nevertheless, section 603(a) does not go far enough. Because the battered immigrant is still required to submit her petition before her husband loses status, an entire class of women may be precluded from relief.²⁶⁸ If the legal permanent resident spouse is arrested and put into deportation proceedings before the battered immigrant has the opportunity to prepare and file her petition, she will lose out on any potential relief under this provision.²⁶⁹ Although it may be reasonable to require that the battered immigrant be married to a citizen or a legal permanent resident to be eligible for VAWA,²⁷⁰ it does not follow that the legal permanent resident must maintain this status until the battered immigrant files her self-petition. The INS keeps records of immigration status and can simply refer to those records in order to determine that the spouse who has lost status was once a legal permanent resident.²⁷¹ Making battered immigrants' eligibility for immigration relief contingent on the status of the batterer impedes the effectiveness of protections designed to assist battered women in escaping abuse and hinders the purposes of both the 1994 VAWA and H.R. 4966.²⁷²

The other key benefits of H.R. 4966 include the elimination of the extreme hardship if deported requirement for self-petitioners²⁷³ and the alteration of the good moral character

U.S.C. § 1154(a)(1)(A)-(B) (2000)).

265. See Espenozza, *supra* note 204, at 211 (declaring that the regulation eliminates VAWA's provisions for an entire class of battered immigrants).

266. See *id.* at 210 (stating that the victim occasionally must choose between immigration relief for herself and criminal prosecution of her legal permanent resident spouse).

267. See *supra* note 159 and accompanying text (discussing VAWA's purpose).

268. See Espenozza, *supra* note 204, at 211 (discussing the problems battered immigrants face in this situation).

269. See H.R. 4966 § 603(a)(1); *supra* note 241.

270. The purpose of family-based immigration is to reunite families; thus, the new immigrant must be related to a person with legal status in the United States. See *supra* note 57 and accompanying text.

271. See generally Kelly, *supra* note 11, at 683 (stating that the INS is already authorized to look to its own records in determining a spouse's immigration status).

272. See *supra* note 159 and accompanying text; H.R. 4966 § 601; *supra* note 232 and accompanying text.

273. See generally H.R. 4966 § 606(c)-(d) (proposing to amend the Immigration

standard.²⁷⁴ Eliminating the extreme hardship standard removes the double evidentiary burden VAWA imposed on battered immigrant women.²⁷⁵ By taking away this element of discretion, Congress will reassure battered immigrants that the key purpose of VAWA is to provide immigration relief, not to eliminate immigration fraud.²⁷⁶ Unfortunately, the drafters of the bill did not deem it necessary to match the elimination of extreme hardship with the elimination of good moral character.

Good moral character remains a necessary element under H.R. 4966.²⁷⁷ Although it is altered to account for problems unique to battered immigrant women,²⁷⁸ the requirement still works to prevent a grant of relief.²⁷⁹ The exceptions remain somewhat discretionary and leave a battered immigrant in a similar position as the original VAWA requirements.²⁸⁰ Furthermore, a positive determination of good moral character does not curb immigration fraud.²⁸¹ It does, however, keep the woman in a subordinate position by working to blame the abusive situation on her.²⁸² Contrary to the purpose of VAWA to help battered women leave abusive relationships, the good moral character element mandates that battered immigrants affirmatively prove their morality and worthiness of immigration relief, implying that their abuse is related to their character.²⁸³ The fact that no other family-based

and Nationality Act, 8 U.S.C. § 1154, to exclude the extreme hardship standard); *see also supra* note 247 and accompanying text.

274. *See* H.R. 4966 § 608(a)-(c); *see also supra* notes 254-256 and accompanying text.

275. *See* Franco, *supra* note 53, at 139. However, the bill eliminates the extreme hardship if deported element for only self-petitioners, not for battered immigrants applying for cancellation of removal. *See supra* notes 245 & 253 and accompanying text.

276. *See generally supra* notes 149-159 and accompanying text (discussing the original VAWA provisions concerning extreme hardship if deported).

277. *See* H.R. 4966 § 608; *see also supra* note 254 and accompanying text (explaining that good moral character remains a requirement for H.R. 4966).

278. *See* H.R. 4966 § 608 (a)-(c). *See generally supra* notes 170-175 and accompanying text (stating that battered immigrant women face mandatory arrest policies and vengeful charges by their abuser which prevent an affirmative determination of good moral character).

279. *See* Espenosa, *supra* note 204, at 215. Imposing this requirement on battered immigrants is unreasonable and is not required for any other family-based immigration petition. *See id.*

280. *See* H.R. 4966 § 608; *see also supra* note 165 and accompanying text (stating that good moral character is determined on a case-by-case basis); *supra* note 151 and accompanying text (stating that discretionary standards leave the battered immigrant at the mercy of her adjudicator).

281. *See supra* note 214 and accompanying text.

282. *See supra* notes 160-164 and accompanying text.

283. *See* Linares-Fierro, *supra* note 2, at 270-71 (discussing how the widespread

immigrant must meet the good moral character requirement directly reveals the bias against battered women and the tenacious stereotypes ingrained in the law.

Although these are clearly not the only benefits and burdens present in H.R. 4966, they are by far the most profound. H.R. 4966 does not eliminate the conditional residency program,²⁸⁴ nor does it fix all of VAWA's problems.²⁸⁵ It does, however, constitute progress toward ensuring fair treatment of battered immigrant women. Enactment of this legislation would provide battered immigrants with better access to the VAWA self-petitioning process and more assurance of meeting the petition requirements. It would also provide a base for more incremental changes that may ultimately lead to elimination of the good moral character requirement altogether and the establishment of statutory guidelines toward defining the credible evidence standard.²⁸⁶

B. S. 2787²⁸⁷

Senator Joseph Biden also introduced a battered immigrant bill on July 26, 2000.²⁸⁸ The bill, entitled the Violence Against Women Act of 2000, provides both a renewal of the 1994 Act and additional provisions for the protection of battered immigrant women.²⁸⁹ The bill's provisions are somewhat less comprehensive than those of H.R. 4966 but still take a substantial step forward for battered immigrant women.²⁹⁰ The Senate bill presents three findings and two purposes, including an acknowledgement that many battered immigrant women do not have access to the immigration provisions provided in VAWA and a proposal to

practice of victim-blaming is internalized by battered women, resulting in their low self-esteem and inability to imagine themselves surviving without their abusive husbands).

284. See H.R. 4966 (failing to eliminate the conditional residency program in its proposed amendments to the Immigration and Nationality Act, 8 U.S.C. §§ 1154, 1186 (2000)); see also *supra* note 212 and accompanying text (stating that the only way to fix the problem is to eliminate conditional residence altogether).

285. Specifically, it does not redress the problems inherent in the credible evidence and good moral character requirements. See H.R. 4966 §§ 603, 608; *supra* notes 243 & 277 and accompanying text (stating, respectively, that the requirements of credible evidence and good moral character remain in the proposed amendments of H.R. 4966).

286. H.R. 4966 does not address credible evidence standards beyond requiring the Attorney General to consider all credible evidence relevant to the petition. See H.R. 4966 § 607(a).

287. 106th Cong. (2000).

288. See S. 2787, 106th Cong. (2000).

289. See *id.* §§ 501-512.

290. See *infra* notes 294-310 and accompanying text.

remove barriers to criminal prosecution of the abuser.²⁹¹ However, the noble purpose stated in H.R. 4966, to remedy the IIRIRA provisions that undermine VAWA relief,²⁹² is not present in S. 2787.²⁹³

1. Provisions

The proposed self-petition elements of S. 2787 require the battered immigrant to prove good faith marriage and battery or extreme cruelty.²⁹⁴ She must also show that she is a person of good moral character.²⁹⁵ S. 2787 does not provide a separate section for determining good moral character.²⁹⁶ Instead it states that any act or conviction connected to the battery shall not bar the INS from determining that the battered immigrant is of good moral character.²⁹⁷ Finally, the battered immigrant is required to show she has resided with the citizen spouse.²⁹⁸ The self-petitioner is not required to show extreme hardship if deported.²⁹⁹

Similarly, cancellation of removal requires the battered immigrant to present credible evidence of battery or extreme cruelty.³⁰⁰ She must also demonstrate good moral character, three years of continuous physical presence in the United States, and extreme hardship if deported.³⁰¹ This section of S. 2787 provides

291. See S. 2787 § 502(a)-(b). The other findings state that the goal of VAWA 1994 was to remove immigration barriers for battered immigrants and to provide them with protection against deportation in order to promote cooperation with law enforcement and prosecutors. See *id.* § 502(a)(1)-(a)(2). The other stated purpose is to offer protection against domestic violence in family and intimate relationships. See *id.* § 502(b)(1)-(b)(2).

292. See H.R. 4966, 106th Cong. § 601 (2000).

293. See S. 2787 § 502.

294. See *id.* § 503(b)(1)(A), (c)(1) (proposing to amend the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)-(B) (2000), to include the requirements of good faith marriage and battery or extreme cruelty).

295. See *id.* § 503(b)(1)(A), (c)(1).

296. Compare S. 2787, 106th Cong. (2000) (providing no section on good moral character determinations), with H.R. 4966, 106th Cong. (2000) (providing a separate section on good moral character). See also *supra* notes 254-256 and accompanying text (discussing the provision in H.R. 4966 on determining good moral character).

297. See S. 2787 § 503(d)(2).

298. See *id.* § 503(b)(1)(A), (c)(1). The Senate bill does not distinguish between a woman that is married to a U.S. citizen and a woman married to a legal permanent resident; both must simply satisfy the requirement that they live with a spouse, not that they live in the United States with a spouse. See *id.* § 503(b)(1)(A), (c)(1).

299. See generally *id.* § 503(b)(1), (c)(1) (proposing to amend the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)-(B), to not require a showing of extreme hardship if deported).

300. See *id.* § 504(a).

301. See *id.*

that a battered immigrant will not fail the continuous presence test if her absence from the United States is connected to the abuse.³⁰² It also provides the same waiveability of arrests and convictions for abuse-related offenses in determining good moral character.³⁰³ The bill does not set out objective standards to measure extreme hardship if deported.³⁰⁴

S. 2787 provides several procedural changes that increase access to VAWA relief.³⁰⁵ It removes barriers from adjustment of status and exempts battered immigrants from the annual cap on grants of cancellation of removal.³⁰⁶ Section 506 also eliminates the time limit on reopening a cancellation case when the battered immigrant is eligible for relief under VAWA or S. 2787.³⁰⁷ The other major procedural provision allows the self-petitioner to maintain her petition even if her spouse loses his immigration status.³⁰⁸ Nevertheless, the Senate bill requires that the abusive spouse be in legal status at the time the self-petition is filed.³⁰⁹ The final procedural change allows battered immigrants to remarry without fear of losing their self-petition status.³¹⁰

2. The Benefits and Burdens of S. 2787

Many of the same benefits and burdens discussed under H.R. 4966 are applicable to S. 2787.³¹¹ The procedural changes in the bills are essentially the same and will produce the same problems for battered immigrants who are unable to file their petitions before their husbands lose their immigration status.³¹² Furthermore, both bills eliminate the extreme hardship

302. *See id.*

303. *See id.*

304. *See id.* (listing extreme hardship if deported as a requirement without providing objective standards).

305. *See id.* §§ 506-507 (proposing to amend scattered sections of the Immigration and Nationality Act, 8 U.S.C. (2000)).

306. *See id.* § 506(a)-(b).

307. *See id.* § 506(c).

308. *See id.* § 507(a).

309. *See id.*; *cf.* H.R. 4966, 106th Cong. § 603 (2000) (containing a similar provision).

310. *See* S. 2787 § 507(b).

311. *See supra* notes 264-286 and accompanying text (laying out the benefits of H.R. 4966).

312. *See* H.R. 4966, 106th Cong. § 603(a) (2000); S. 2787, 106th Cong. § 507(a) (2000) (proposing to amend the Immigration and Nationality Act, 8 U.S.C. § 1154 (2000), so that the petitioner must file her petition before her spouse loses his immigration status); *see also supra* notes 268-272 and accompanying text (providing the possible problems with requiring the spouse to have legal immigration status when the self-petition is filed and recommending changes).

requirement for self-petitioners; thus, both confer the same substantial benefit for battered immigrant women.³¹³ Despite these major similarities between H.R. 4966 and S. 2787, there are a few differences that could make the Senate bill less effective than its counterpart in the House.

The good moral character element is present in both bills.³¹⁴ The standards, however, are far more subjective in the Senate bill. S. 2787 establishes merely that any arrest or conviction arising out of the battery may be discarded in determining good moral character.³¹⁵ Unlike H.R. 4966, S. 2787 does not provide any examples of what may constitute an arrest or conviction arising out of the battery.³¹⁶ This leaves the battered immigrant in great peril as the decision of good moral character is once again left to the discretion of the INS adjudicator.³¹⁷ The potential for arbitrary decisions stemming from this broad discretionary power is both unacceptable and unnecessary. Requiring good moral character circumvents the purposes of VAWA by preventing battered immigrants from accessing relief. Moreover, allowing this determination to be made wholly at the discretion of the adjudicator without any statutory guidance leaves battered immigrant applicants without any predictability as to their fate.³¹⁸ Therefore, the requirement should, at the very least, contain exceptions such as those in H.R. 4966; more preferably, it should be omitted entirely from any new legislation that purports to protect battered immigrant women.

S. 2787 also fails to address changes to the Welfare Reform Act.³¹⁹ It simply maintains the status quo with battered

313. See H.R. 4966 § 606(c), (d); S. 2787 § 503(b)(1), (c)(1) (proposing to amend 8 U.S.C. § 1154 to exclude the requirement of extreme hardship); see also *supra* notes 273-276 and accompanying text (noting that the elimination of this standard eliminates a double evidentiary burden and promotes VAWA's purpose).

314. See H.R. 4966 § 608; S. 2787 § 503(d)(2).

315. See S. 2787 § 503(d)(2).

316. Compare H.R. 4966 § 608(a)-(c) (providing examples of what may constitute an arrest or conviction arising out of the battery), with S. 2787 § 503(d)(2) (providing no examples of what may constitute an arrest or conviction arising out of the battery).

317. See *supra* notes 166-176 and accompanying text (addressing the process of a good moral character determination and its inherent problems arising out of the INS adjudicator's discretion).

318. See Kelly, *supra* note 11, at 704.

319. See S. 2787 § 508 (making only a technical correction to the IIRIRA definition of qualified battered immigrant, as codified in the Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. § 1641(c)(1)(B)(iii) (1996)); see also *supra* notes 199-202 (discussing the inadequacy of IIRIRA's amendments to the Welfare Reform Act).

immigrants qualifying for limited benefits.³²⁰ Although the status quo is better than the original conditions imposed by the Welfare Reform Act,³²¹ S. 2787 does not provide the added relief available in the House bill.³²² Moreover, S. 2787 fails to provide a section regarding Legal Services Corporation (LSC) funding or sensitivity training for INS officials and immigration judges.³²³ Failing to recognize that the insensitivity of adjudicators and the lack of access to public benefits and legal services are major barriers to successful VAWA implementation is a failure to realize that many battered immigrants are unable to use VAWA because of these problems.³²⁴

Neither piece of proposed legislation remedies all of the problems that battered immigrant women face under the statutory structure developed between 1986 and 1996.³²⁵ However, they both make significant strides toward achieving meaningful relief for battered immigrant women. In light of the differences between the two bills, the most effective congressional action would have been to enact H.R. 4966. Regrettably, the 106th Congress did not choose this route. Rather, it passed S. 2787 as part of the larger Violence Against Women Act of 2000 (VAWA 2000).³²⁶

C. *The Battered Immigrant Women Protection Act of 2000*³²⁷

Unfortunately, H.R. 4966 never made it out of the Subcommittee on Immigration and Claims.³²⁸ Instead the House passed H.R. 1248.³²⁹ As originally proposed, H.R. 1248 contained no substantive protections for battered immigrant women.³³⁰ This changed in the final draft to incorporate many of S. 2787's

320. *See id.*

321. *See supra* text accompanying notes 179-187.

322. *See* H.R. 4966, 106th Cong. § 610 (2000).

323. *Compare* H.R. 4966 § 610, *with* S. 2787; *see also supra* notes 262-263 and accompanying text (setting out these provisions in H.R. 4966).

324. *See generally supra* notes 72-208 and accompanying text (describing previous legislation and its negative and positive impacts on battered immigrant women).

325. *See supra* notes 284-286 and accompanying text (presenting the positive ramifications and need for improvement under H.R. 4966).

326. Pub. L. No. 106-386, §§ 1001-1603, 114 Stat. 1464, 1492-1539 (2000).

327. Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37 (2000) [hereinafter BIWPA].

328. *See* H.R. 4966, 106th Cong. (2000), *Bill Summary & Status for the 106th Congress*, at <http://thomas.loc.gov/bss/d106query.html> (last visited Mar. 8, 2001).

329. *See* H.R. 1248, 106th Cong. (1999).

330. *See id.*

battered immigrant protections.³³¹ Both VAWA 2000³³² and the Battered Immigrant Women Protection Act (BIWPA)³³³ were incorporated into the Victims of Trafficking and Violence Protection Act of 2000,³³⁴ which was signed by President Clinton on October 28, 2000.³³⁵ BIWPA does not offer all-encompassing relief from the conditional residency process or the VAWA provisions, but it does provide enough change to make a substantial difference for battered immigrant women.

1. The BIWPA Provisions

BIWPA was enacted to provide better access to VAWA's provisions for all battered immigrants.³³⁶ Congress created this Act to remove barriers to criminal prosecution of the abuser³³⁷ and to offer protection against domestic violence that occurs in familial relationships.³³⁸ Whether implementation of BIWPA will meet these lofty goals or simply create more barriers remains to be seen.

BIWPA re-establishes many of the same self-petition requirements that were present in the original VAWA of 1994.³³⁹ A battered immigrant must show that she has a good faith marriage to a citizen³⁴⁰ and that she is battered or subject to

331. See Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37 (2000).

332. Pub. L. No. 106-386, §§ 1001-1603, 114 Stat. 1464, 1492-1539 (2000).

333. Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37 (2000).

334. Pub. L. No. 106-386, 114 Stat. 1464 (2000).

335. See H.R. 3244, 106th Cong. (1999), *Bill Summary & Status for the 106th Congress*, at <http://thomas.loc.gov/bss/d106query.html> (last visited Mar. 7, 2001).

336. See Battered Immigrant Women Protection Act § 1502(a)(3) (stating that "there are several groups of battered immigrant women . . . who do not have access to the immigration protections of the Violence Against Women Act of 1994 . . ."). BIWPA also provides two other findings. First, it restates the 1994 VAWA's original goal of "remov[ing] immigration laws as a barrier that kept battered immigrant women locked in abusive relationships." *Id.* § 1502(a)(1). Second, it states that granting battered immigrant women protection against deportation "frees them to cooperate with law enforcement and prosecutors in criminal cases . . . without fearing that the abuser will retaliate by withdrawing . . . access to an immigration benefit." *Id.* § 1502(a)(2).

337. See *id.* § 1502(b)(1).

338. See *id.* § 1502(b)(2).

339. See *id.* § 1503(b)-(c); *supra* notes 126-136 and accompanying text (describing the VAWA self-petition process). Generally, section 1503 of BIWPA improves access to immigration protections of the original VAWA. See *id.* § 1503 (amending scattered sections of the Immigration and Nationality Act codified in scattered sections of 8 U.S.C.).

340. See Battered Immigrant Women Protection Act § 1503(b)(1)(A), (c)(1). Proving that the spouse is a citizen or legal permanent resident may show this relationship. See *id.* § 1503(b)(1)(A), (c)(1). This relationship can also be established if the immigrant believed the union to be legitimate. See *id.* § 1503(b)(1)(A), (c)(1). In addition, the battered immigrant can still establish this relationship if she is a bona fide spouse of a citizen or legal permanent resident but

extreme cruelty by that spouse.³⁴¹ She must also prove that she is of good moral character,³⁴² as determined at the discretion of the INS. However, any arrest or conviction connected to the abuse shall not bar an affirmative finding.³⁴³ Finally, the battered immigrant must show that she resides with her citizen spouse.³⁴⁴

The process for suspension of deportation/cancellation of removal is nearly identical to that provided in the original VAWA.³⁴⁵ The immigration judge may grant a suspension or cancellation to an immigrant who shows that she is married to a U.S. citizen and that she is subject to battery or extreme cruelty by that spouse.³⁴⁶ The battered immigrant must be present in the United States for three consecutive years prior to her application.³⁴⁷ However, the INS cannot deny relief to a battered immigrant who was absent from the country if there is a connection between the absence and the abuse.³⁴⁸ Finally, the battered immigrant must show she is of good moral character³⁴⁹ and will suffer extreme hardship if deported.³⁵⁰ The determination of good moral character is much like that for a self-petitioner.³⁵¹ The statute contains no specific criteria for establishing extreme hardship.³⁵²

BIWPA also provides six waivers that offer equal access to VAWA protections regardless of how the battered immigrant

falls within one of the three following categories. First, the spouse has died within two years. *See id.* § 1503(b)(1)(A). Second, the spouse lost his citizenship in an incident related to the domestic violence. *See id.* § 1503(b)(1)(A), (c)(1). Third, there is a connection between the abuse and the end of the marriage. *See id.* § 1503(b)(1)(A), (c)(1).

341. *See id.* § 1503(b)(1)(A), (c)(1).

342. *See id.* § 1503(b)(1)(A), (c)(1).

343. *See id.* § 1503(d)(2).

344. *See id.* § 1503(b)(1)(A), (c)(1). By not requiring couples to live in the United States, VAWA relief is extended to battered immigrants living abroad with their citizen spouses; thus, a battered immigrant married to a citizen who is an employee of the U.S. government or a member of the armed services to file a self-petition. *See id.* § 1503(b)(3), (c)(3).

345. *See id.* § 1504; *supra* notes 138-143 and accompanying text (describing the original VAWA procedures). Generally, section 1504 of BIWPA improves access to VAWA in immigration proceedings. *See id.* § 1504 (amending scattered sections of the Immigration and Nationality Act codified in scattered sections of 8 U.S.C.).

346. *See id.* § 1504(a).

347. *See id.*

348. *See id.*

349. *See id.* § 1504(a).

350. *See id.*

351. *See id.* A prior arrest or conviction for an abuse-related incident shall not bar the INS from finding that the applicant demonstrates good moral character. *See id.*

352. *See id.*

entered the country.³⁵³ Under the first waiver, the INS may waive inadmissibility when there is a connection between the abuse and the immigrant's removal, departure, reentry, or attempted reentry to the United States.³⁵⁴ The second waiver permits the INS to consider evidence other than a criminal record when the immigrant is abused.³⁵⁵ This waiver applies when the INS determines that the immigrant is not the primary perpetrator of the abuse and (1) was acting in self-defense; (2) violated a protection order meant to protect her; or (3) was arrested, convicted, or pled guilty to a crime in connection with the battery that did not cause serious bodily injury to any party.³⁵⁶ The third set of waivers deals with inadmissibility and deportability.³⁵⁷ Their essential premise is that the immigrant's misrepresentation, if linked to the abuse, will not automatically render her inadmissible or deportable. The fourth and fifth waivers provide that immigration relief will not be barred for many VAWA-eligible battered immigrants.³⁵⁸ The final waiver provides that receipt of public benefits under the battered immigrant waiver to the Welfare Reform Act shall not result in a determination of public charge and subsequent inadmissibility.³⁵⁹

BIWPA provides several procedural changes for battered immigrants. Section 1506 restores immigration protections under the original VAWA by removing barriers to adjustment of status.³⁶⁰ It also eliminates obstacles to the suspension of

353. *See id.* § 1505(a)-(e). Generally, section 1505 of BIWPA provides for equal access to VAWA immigration protections for all qualified battered immigrant women self-petitioners. *See id.* § 1505 (amending scattered sections of the Immigration and Nationality Act codified in scattered sections of 8 U.S.C.).

354. *See id.* § 1505(a).

355. *See id.* § 1505(b).

356. *See id.*

357. *See id.* § 1505(c). Inadmissibility standards are used when the alien is outside the United States or entered the country through improper channels. *See* DAVID WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 246 (1998). Deportability standards are used when the immigrant was legally admitted to the United States. *See id.* at 247.

358. *See* Battered Immigrant Women Protection Act § 1505(d)-(e). The fourth waiver allows the INS to waive certain health-related bars. *See id.* § 1505(d) (amending section 212(g)(1) of the Immigration and Nationality Act codified at 8 U.S.C. § 1182(g)(1)). The fifth waiver allows the INS to waive certain narrow categories of drug possession offenses. *See id.* § 1505(e) (amending section 212(h)(1) of the Immigration and Nationality Act codified at 8 U.S.C. § 1182(h)(1)).

359. *See id.* § 1505(f).

360. *See id.* § 1506(a). Generally, section 1506 of BIWPA restores immigration protections under VAWA. *See id.* § 1506 (amending scattered sections of the Immigration and Nationality Act codified in scattered sections of 8 U.S.C.).

deportation process,³⁶¹ including elimination of time limits on motions to reopen suspension proceedings, as long as the motion occurs within one year of a final removal order.³⁶² This elimination applies when the battered immigrant is eligible for relief under the original VAWA provisions or the new BIWPA.³⁶³ In addition to these access revisions, BIWPA alters the effect of a change in the batterer's status on the immigrant's self-petition.³⁶⁴ Any change to the abuser's status, including death or divorce, shall not affect the self-petition as long as it is filed before such event occurs.³⁶⁵ The same qualification applies to a self-petition that is filed before the legal permanent resident loses his immigration status; the self-petition will not be denied due to the loss of status.³⁶⁶ The final change allows battered immigrants to remarry without losing their immigration status under the self-petition.³⁶⁷

BIWPA also increases access to basic services and legal representation³⁶⁸ through a series of four grant programs. The first program consists of grants for law enforcement and prosecution, which allow assistance to domestic violence victims with immigration problems.³⁶⁹ The second grant, intended to encourage arrests, includes a provision for strengthening assistance to immigrant victims of domestic violence.³⁷⁰ The third grant, for rural domestic violence and child abuse enforcement, is partially allocated to provide "treatment, counseling, and assistance" to domestic abuse victims dealing with, among other things, immigration problems.³⁷¹ The final grant provides assistance with immigration matters to victims on college

361. *See id.* § 1506(b).

362. *See id.* § 1506(c)(1)(A). This one-year limitation is waivable in the case of extraordinary circumstances or extreme hardship. *See id.*

363. *See id.* § 1506(c).

364. *See id.* § 1507(a). Generally, section 1507 of BIWPA addresses the implementation problems of VAWA associated with changes in the batterer's status. *See id.* § 1507 (amending scattered sections of the Immigration and Nationality Act codified in scattered sections of 8 U.S.C.).

365. *See id.* § 1507(a)(1).

366. *See id.* § 1507(a)(2).

367. *See id.* § 1507(b).

368. *See id.* § 1512 (amending scattered sections of the Omnibus Crime Control and Safe Streets Act of 1994, the Violent Crime Control and Law Enforcement Act of 1994, and the Higher Education Amendments of 1998, codified in multiple titles of U.S.C.).

369. *See id.* § 1512(a).

370. *See id.* § 1512(b).

371. *See id.* § 1512(c).

campuses.³⁷² BIWPA does not include any provisions increasing access to public benefits under the Welfare Reform Act,³⁷³ nor does it address LSC funding.³⁷⁴

2. BIWPA's Potential Impact on Battered Immigrants

BIWPA does not offer the most comprehensive remedy possible for victims of the conditional residency requirements. It neither eliminates the conditional residency requirement³⁷⁵ nor provides relief allowing a battered immigrant to continue the IMFA process regardless of her spouse's actions.³⁷⁶ In fact, BIWPA does not address any of the problems created by the IMFA, but rather focuses on changing the impact of IIRIRA on the 1994 VAWA and fine-tuning the self-petition requirements.³⁷⁷ While these changes are important, they are merely band-aid remedies. Congress needs to examine the rationale behind IMFA, and give meaningful consideration to the total elimination of conditional residency guided by the citizen spouse. For a meaningful congressional remedy to occur, major consideration must be given to the total elimination of conditional residency guided by the citizen spouse.

Primary criticisms aside, BIWPA makes several beneficial changes to the self-petition process. The elimination of the extreme hardship element is very important for a battered immigrant woman.³⁷⁸ No longer will she be subject to the

372. *See id.* § 1512(d).

373. *See id.* §§ 1501-1513 (failing to mention increased access to public assistance).

374. *See id.* (failing to address LSC funding and legal access for battered undocumented immigrants); *see also supra* note 178 and accompanying text (noting the congressional limitations on LSC funding).

375. *See id.* §§ 1501-1513; *supra* notes 73-122 and accompanying text (describing the IMFA process and the problems it creates for battered immigrant women). Reworking the entire conditional residence system to eliminate spousal control is seen as the best way to remove battered immigrants from the negative implications of the IMFA and VAWA processes. *See Franco, supra* note 53, at 102-03, 138-39.

376. *Compare* Battered Immigrant Women Protection Act §§ 1501-1513, *with* H.R. 4966, 106th Cong. § 603(c) (2000). In contrast to BIWPA, the proposed Restoration of Fairness in Immigration Law Act of 2000 would allow the INS to adjudicate the battered immigrant's IMFA petition for conditional residency even if her spouse has already filed but withdrawn it. *See* H.R. 4966 § 603(c). She must present credible evidence of the battery in order for the INS to go forward in this manner. *See id.*

377. *See* Battered Immigrant Women Protection Act §§ 1501-1513; *supra* Part III.A (discussing IIRIRA); *supra* Part III.B (discussing VAWA).

378. *Compare* Battered Immigrant Women Protection Act § 1503, *with* Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1902, 1953-55 (codified as amended in scattered sections of multiple titles of U.S.C.) (omitting from its requirements the adjudicator discretion found in VAWA).

discretionary will of the INS adjudicator.³⁷⁹ As a result, she can meet the other, more objective, standards without fear that it is all for naught.³⁸⁰ Eliminating extreme hardship will also eliminate the double evidentiary burden³⁸¹ and allow unrepresented women better access to VAWA relief.³⁸² Furthermore, a battered immigrant is now one step closer to being treated as an equivalent to a non-abused immigrant who petitions under the original conditional residency requirements.³⁸³

The elimination of the good moral character standard would advance toward this equality. Congress, however, did not see fit to abolish the requirement at this time.³⁸⁴ Nevertheless, some improvement was made: Congress recognized the special circumstances of an abusive relationship and allowed the INS to waive any abuse-related blemish on the applicant's record in making its determination.³⁸⁵ Unfortunately, this waiver does not go far enough because it still leaves too much to the discretion of the INS adjudicator.³⁸⁶ The alternative proposal made in H.R. 4966, giving four substantive criteria for judging whether a criminal offense was related to the abuse, would require all adjudicators to use the same standard of determination.³⁸⁷ This proposal would have eliminated the chance of arbitrary decisions among INS adjudicators. BIWPA instead leaves battered immigrants and their advocates waiting until the INS promulgates new regulations to determine if a standard of this

379. See Violence Against Women Act of 1994 § 40701.

380. This will promote VAWA's intended purpose to "provide meaningful relief to battered spouses who are eligible to immigrate and are already in the United States." Teran, *supra* note 54, at 25.

381. See Franco, *supra* note 53, at 139.

382. See Nat'l Task Force to End Sexual & Domestic Violence Against Women, NOW Legal Def. & Educ. Fund, *Violence Against Women Act of 2000: As Passed by Congress*, at <http://www.nowldef.org/html/issues/vio/vawapassed.shtml> (last visited Mar. 3, 2001) [hereinafter Nat'l Task Force].

383. See *supra* notes 73-88 and accompanying text (describing the "normal" petition process for the conditional immigrant with a helpful spouse).

384. See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1503(b)(1)(A), (c)(1) 114 Stat. 1464, 1519-20 (failing to eliminate the good moral character requirement).

385. See *id.* § 1503(d); see also *supra* notes 170-175 and accompanying text (describing the unique problems a battered immigrant faces in a determination of good moral character).

386. No guidelines are given, which leads to the conclusion that the adjudicator must determine what is or is not abuse-related. See Battered Immigrant Women Protection Act § 1503(d) (failing to provide the adjudicator with substantive guidelines).

387. See H.R. 4966, 106th Cong. § 608(a)-(c) (2000) (providing the four criteria used to judge waivability of prior arrest, conviction, or guilty plea).

sort will apply or if the determination will remain wholly subjective.

Nevertheless, BIWPA provides many other benefits. The section providing equal access to VAWA redresses several of the harsh immigration measures passed in IIRIRA.³⁸⁸ This section ensures that a battered immigrant need not fear ineligibility because of the manner in which she entered the country.³⁸⁹ Procedural changes also allow for greater access to VAWA relief. Prior to BIWPA, many immigrants were required to leave the United States before acquiring legal immigration status.³⁹⁰ Amending the adjustment of status provisions removes this requirement for battered immigrant women.³⁹¹ Perhaps the most important procedural changes, however, are the reclassification and loss of status provisions.³⁹² Under these, a battered immigrant need not relinquish her relief by reporting her batterer to the police.³⁹³ She may file her petition and/or report her abuser to the police without fearing loss of status if he is deported.³⁹⁴ However, one large loophole may prevent the battered immigrant from satisfying this requirement. At the time the battered immigrant files her self-petition, her resident spouse must be in legal status; if she does not file the petition before her batterer loses status, she becomes ineligible.³⁹⁵ In the future, Congress should consider altering this standard to allow for greater relief.³⁹⁶

Despite all of the benefits, BIWPA does not do enough. The financial provisions provide some extra support for battered immigrants³⁹⁷ but not what is most necessary. In order to truly allow battered immigrants access to VAWA relief, they must have access to SSI and food stamps,³⁹⁸ which may be the only way they

388. See *supra* note 353.

389. See Nat'l Task Force, *supra* note 382.

390. See *id.*

391. See Battered Immigrant Women Protection Act § 1506(a).

392. See *id.* § 1507(a)(1)-(2).

393. Compare *id.*, with *supra* notes 203-207 and accompanying text (discussing the implications of the IIRIRA mandate requiring the deportation of domestic violence offenders).

394. See Battered Immigrant Women Protection Act § 1507(a).

395. See *id.* (providing that this protection is available only when the change of status occurs after filing).

396. See *supra* notes 264-272 and accompanying text (discussing the problems inherent in maintaining that the battered immigrant file her petition before her spouse loses status and providing options for changing the standard).

397. See Battered Immigrant Women Protection Act § 1512 (providing for a number of grants to increase law enforcement, prosecution, arrests, treatment, and counseling assistance).

398. See *supra* notes 184-187 and accompanying text (discussing the problems

can survive without the batterer's financial support.³⁹⁹ Furthermore, BIWPA does not address the issue of LSC funding.⁴⁰⁰ Lifting the ban on LSC recipients from assisting undocumented immigrants would empower more battered immigrants to seek legal help and perhaps increase the number of successful self-petitions. Although the Act provides several monetary grants for legal assistance,⁴⁰¹ it is not clear that Congress wishes to lift the ban on using LSC funds to aid undocumented battered immigrants. Regardless of whatever changes Congress makes to the original process, if it does not relieve the stress caused by the Welfare Reform Act and provide better access to legal services, battered immigrants will continue to suffer.⁴⁰²

The final necessary change that BIWPA fails to address is the credible evidence standard. The only provision regarding evidence in BIWPA states that, "what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [INS]."⁴⁰³ In view of what the INS has already established as credible evidence,⁴⁰⁴ this provision is unacceptable. The INS either does not accept or does not realize that a battered immigrant often does not go to the police, the hospital, or other agencies for help.⁴⁰⁵ Therefore, Congress must make statutory provisions for acceptable evidence, expressly including reliance on the petitioner's testimony⁴⁰⁶ and acceptance of secondary evidence.⁴⁰⁷ Unfortunately BIWPA did not include this provision, and VAWA relief will remain unattainable for the large number of

imposed by the Welfare Reform Act upon battered immigrants receiving public benefits).

399. See Loke, *supra* note 5, at 609-11.

400. See Battered Immigrant Women Protection Act §§ 1501-1513. Under a 1996 law, non-profit agencies receiving LSC funding were not permitted to serve the undocumented immigrant community. See *supra* note 178. This was later amended to allow the LSC funded agencies to use non-LSC funds to serve undocumented battered immigrants. See *supra* note 192.

401. See Battered Immigrant Women Protection Act § 1512.

402. This is not to say that the grants discussed in section 1512 of BIWPA do not provide the necessary legal services. Rather, it is simply too early to tell if they will be effective in aiding battered immigrant women with their self-petitions.

403. Battered Immigrant Women Protection Act § 1504(e).

404. See *supra* notes 144-148 and accompanying text (discussing the INS preference for primary documentation of the woman's marriage and battery).

405. See Goldman, *supra* note 4, at 385 (calling for the INS to realize this reality and amend its evidence standards accordingly to permit secondary evidence).

406. See *generally* Kelly, *supra* note 11, at 696-99 (proposing that battered immigrants be treated like political refugees during the petition process).

407. Secondary evidence may include affidavits from friends, neighbors, or family members.

battered immigrants who cannot gain enough "credible" evidence to satisfy the INS.

V. Conclusion

The Battered Immigrant Women Protection Act of 2000 is not perfect. It remedies several access problems and eliminates the extreme hardship requirement for self-petitioners, but it fails to address other necessary changes. Nonetheless, the positive impact on battered immigrant women is likely to be substantial. BIWPA is an important step toward recognizing the many difficulties imposed by the statutory structure of conditional residency and might someday lead to abolition of the entire IMFA system. For the time being, however, it is impossible to measure BIWPA's true impact. Only new INS regulations, promulgated with fairness toward battered immigrants in mind, will allow BIWPA to fulfill its purpose and empower battered immigrant women to leave their desperate situations behind in exchange for brighter futures.

