A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States

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Low-income immigrant victims of domestic violence face significant—and understudied—social, legal and political obstacles in obtaining divorces from their abusive spouses. Moreover, funding restrictions on legal service providers often prohibit their representation of victims in divorce proceedings, which further reduces immigrant victims’ ability to obtain meaningful divorce relief. These issues are virtually unexamined in the scholarly literature; the problem of the abused, immigrant wife seeking a divorce has been given short shrift.

This Article examines the problems confronting this community then proposes reforms to address its particular needs. Part I explores the unique condition of the immigrant living in the United States and how cultural, social and political constructs often shape an immigrant’s ability to pursue and obtain a divorce. Part II examines the barriers faced by low-income immigrants, whether they are lawfully present in the United States or not. Existing federal laws explicitly designed to protect immigrant victims of domestic violence in abusive marriages can place victims in difficult positions where they must choose between their physical safety (i.e., leaving their abusive spouses) or their immigration status stability (i.e., staying married to their spouses so they can secure their immigration benefit through a spouse). Part III discusses an additional barrier that makes it more difficult for low-income immigrant victims to obtain the legal services they need to escape abusive marriages: funding streams that de-emphasize the importance of divorce in the lives of battered women generally and immigrants in particular. The funding constraints limit what legal service organizations can do for domestic violence victims who need representation in divorce proceedings. Finally, Part IV explores the challenges in reforming the laws and policies that impose barriers for battered immigrants who seek to divorce their abusive spouses. In particular, legislative and political decisions are driven by traditional attitudes towards upholding marriage and disfavoring divorce. These deeply-entrenched attitudes erect obstacles that make it difficult for low-income people to obtain meaningful divorce relief. With these challenges in mind, this Part concludes by proposing legislative, funding source policy and advocacy reforms that address the unique obstacles facing immigrant victims of violence and that would work towards opening the doors to the long-term freedom from abuse and the independence that divorce relief provides.

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INTRODUCTION

Alicia came to the United States in search of a better life after fleeing violence and civil unrest in her native country, El Salvador. 1 While living in the United States, she met and fell in love with an American citizen. She married him, and the couple prospered in many ways. They had three daughters together, and they both worked hard to achieve financial stability. She cleaned rooms in a hotel; he worked as a mechanic. Soon, they were able to purchase a home and a car in Washington D.C. and even to send money to Alicia’s family in El Salvador.

But Alicia’s life was far from the idyllic American dream. Her husband relentlessly sought control over her, isolating her from her friends and community. Then, he began to physically abuse her, repeatedly beating her while threatening her life if she left him. Not knowing what to do or where to turn for help, Alicia endured his abuse until one day when Alicia was not home, her husband violently beat their adolescent daughter. Scared more than ever and afraid for her children, Alicia went to Ayuda, an organization dedicated to helping immigrant victims of domestic violence escape abuse. 2 There, Alicia learned she qualified for a Civil Protection Order (“CPO”) under District of Columbia law. 3 Assisted by an attorney at Ayuda,

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1 The client examples used in this Article are based on real clients of Ayuda and of the author. Names and other identifying information of individuals throughout this Article have been changed.

2 Ayuda has served the immigrant community of Washington D.C. for 37 years. Ayuda’s mission is “to protect the legal rights of low-income immigrants in the D.C. metropolitan area.” Services include: direct representation of clients, including victims of domestic violence; community education on immigrant rights and resources; and training for organizations and government agencies to help them better assist immigrants. See www.ayuda.com.

3 To obtain a CPO under District of Columbia law, the victim must file a Petition and Affidavit for a Civil Protection Order at the District of Columbia Superior Court. To be eligible to obtain a CPO, a Petitioner victim must have at least one of several outlined statutory relationships to the alleged perpetrator (the Respondent); must have a jurisdictional relationship to the District of Columbia as also defined by statute; and the Respondent must have committed or threatened to commit a criminal offense against the Petitioner. See D.C. Code §16-1005 (2009). After a settlement conference, default hearing or an adjudicated trial, a judge may order a CPO for the Petitioner, against the Respondent, which lasts up to one year.
Alicia designed a plan of action to leave her husband. With legal representation, she won her court case and received a year-long CPO, which ordered her husband to stay away from her.\textsuperscript{4} Alicia, however, had not escaped her husband’s reach. Indeed, even during the year in which her CPO was in effect, her husband continued to terrorize her. Alicia attempted to break off their marriage amicably but her husband continued his controlling and abusive ways and made clear that she would never be able to get out from under his control. He focused on his citizenship—and her lack of citizenship—and his control over her as her husband as a source of power. Even though Alicia was lawfully in the country, he threatened that, as her husband, he could “have her deported” if she took another wrong step.

Alicia felt trapped. She desperately wanted to end her marriage and begin a new life with her children, free from her abusive spouse. But she did not know how to proceed with a divorce—or even if she qualified for a divorce under the laws of the United States. She returned to Ayuda for guidance on how to break free of her husband’s control. Although funding restrictions often limit the ability of Ayuda attorneys to help battered immigrants file and obtain divorce relief, Alicia was one of the lucky clients that secured attorney representation in her divorce case. Alicia embarked on the long but essential process to achieve complete freedom from her abuser by filing for and receiving a divorce. Finally able to break free from her

\textsuperscript{4} State statutes differ as to what forms of relief a Petitioner can receive through a protection order. In the District of Columbia, the statute provides that

[i]f, after hearing, the judicial officer finds that there is good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner, the judicial officer may issue a protection order that:

(1) Directs the respondent to refrain from committing or threatening to commit criminal offenses against the petitioner and other protected persons;
(2) Requires the respondent to stay away from or have no contact with the petitioner and any other protected persons or locations;
(3) Requires the respondent to participate in psychiatric or medical treatment or appropriate counseling programs;
(4) Directs the respondent to refrain from entering, or to vacate, the dwelling unit of the petitioner when the dwelling is:
(A) Marital property of the parties;
(B) Jointly owned, leased, or rented and occupied by both parties; provided, that joint occupancy shall not be required if the respondent’s actions caused the petitioner to relinquish occupancy;
(C) Owned, leased, or rented by the petitioner individually; or
(D) Jointly owned, leased, or rented by the petitioner and a person other than the respondent;
(5) Directs the respondent to relinquish possession or use of certain personal property owned jointly by the parties or by the petitioner individually;
(6) Awards temporary custody of a minor child or children of the parties;
(7) Provides for visitation rights with appropriate restrictions to protect the safety of the petitioner;
(8) Awards costs and attorney fees;
(9) Orders the Metropolitan Police Department to take such action as the judicial officer deems necessary to enforce its orders;
(10) Directs the respondent to relinquish possession of any firearms;
(11) Directs the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter; or
(12) Combines 2 or more of the preceding provisions.

D.C. CODE §16-1005(c) (2009).
husband’s control, she and her children moved to a new home and enjoyed lives characterized by peaceful days, instead of violence.

The decision to divorce can be fairly uncomplicated for many. Indeed, almost half of all marriages in the United States end in divorce. Yet the path to divorce for immigrant survivors of domestic violence can be shockingly difficult. While federal law and policy impose substantial burdens on numerous aspects of immigrants’ lives, the burden is perhaps most personally invasive where it impacts intimate decisions about marriage. And draconian consequences can attach to the immigrant’s decision to divorce. Many immigrants who fear those consequences, or who come from nations where divorce is culturally taboo or where the process to obtain a divorce is heavily restrictive, will thus endure marriages rife with physical, emotional and sexual abuse. They often believe that divorce—a necessary pre-condition for freedom from abuse—is simply impossible.

There is surprisingly scant scholarship examining why divorce is seemingly unobtainable for poor immigrant victims of domestic violence. To be sure, there is plentiful and robust scholarship concerning divorce law generally. Similarly, there is substantial scholarship examining the unique circumstances faced by the domestic violence victim who is an immigrant to the United States. But these two schools of research—examining divorce, on the one hand, and immigrant victims of domestic violence, on the other—have rarely merged.

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5 In 2004, 44.5% of men over the age of 25 were divorced, and 47.4% of women over the age of 25 were divorced. Detailed Tables - Number, Timing and Duration of Marriages and Divorces: 2004, U.S. Census Bureau, available at http://www.census.gov/population/www/socdemo/marr-div/2004detailed_tables.html. (last visited August 1, 2010).

6 See infra Part II, discussing legal implications of marriage and of divorce for immigrants.

7 See infra Part I, discussing the cultural and religious barriers that many immigrants face.

8 See id.

9 Scholars and activists have written prolifically about the cultural, social and political underpinnings of divorce, including: the effects of fault and no-fault divorce laws on women, See, e.g., DEBORAH L. RHODE & MARTHA MINOW, Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law in DIVORCE REFORM AT THE CROSSROADS 195–96, 209–10 (Stephen D Sugarman & Herma Hill Kay, eds. 1990); LENORE J. WEITZMAN, The Divorce Revolution: The Unexpected Social and Economic Consequences for WOMEN AND CHILDREN IN AMERICA (1985); SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 19 (2006); the abilities of low-income women to obtain meaningful divorce relief, See infra Part II and accompanying notes, discussing access to justice issues for poor people. See also Milton C. Regan, Jr., Symposium on Divorce and Feminist Legal Theory: Spouses and Strangers: Divorce Obligations and Property Rhetoric, 82 GEO. L.J. 2303, 2307 (1994) (“Until the last two decades or so, divorce law implicitly chose to treat ex-spouses as spouses, albeit with qualifications and reservations. The result was that, at least formally, men were potentially liable for supporting their ex-wives and women were eligible to receive financial assistance from their ex-husbands, as if marital rights and obligations continued after divorce. In the past twenty-five years, divorce law has changed . . . [and] adopted a model that has the effect of treating ex-spouses primarly as strangers. The emphasis has been on a ‘clean break’ between the partners, effectuated by a one-time division of marital assets and restrictions on ongoing financial obligations. . . This approach has not, however, prevented considerable financial distress at divorce for many women.”); and the intersection of family law and domestic violence, including how the dynamics of domestic violence influence a victim’s access to divorce, See, e.g., Karla Fischer, Neil Vidmar & Rene Ellis, The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 SMU L. REV. 2117, 2154 (1993) (discussing the role of mediation in divorce and how victims of domestic violence approach the divorce and mediation process).

This Article addresses the unique social, cultural and legal difficulties facing immigrants seeking divorces from abusive spouses. These difficulties occur for immigrants who are lawfully present in the United States and for those who enter the country unlawfully and remain in undocumented status, and this Article will discuss the problems that both groups experience. Moreover, the Article examines why this issue is particularly problematic for our larger society and why we should work to resolve it.

The Article begins by exploring the unique condition of the immigrant living in the United States and how cultural, social and political constructs often shape an immigrant’s ability to pursue and obtain a divorce. Part II examines how immigration law and policy imposes steep barriers on low-income battered immigrants—and how even laws designed to protect immigrant victims of domestic violence in abusive marriages can force them to choose between their physical safety (i.e., leaving their abusive spouses) or their immigration status stability (i.e., staying married to their spouses so they can secure their immigration benefit through a spouse). This priority—marital status over personal safety—is backwards. We need to better understand the quandaries placed on immigrant victims of domestic violence and work to create reforms that offer long-term, accessible relief. We should, in short, enforce and uphold our laws to protect low-income immigrant victims of domestic violence.

Part III discusses an additional barrier that makes it more difficult for low-income immigrant victims to obtain the legal services they need to escape abusive marriages: funding streams that de-emphasize the importance of divorce in the lives of battered women generally and immigrants in particular. For example, at Ayuda, attorneys are able to help clients who need an array of family law services. But divorce is different. Like many service providers, Ayuda is a non-profit organization that depends on government and charitable grants, and the agencies and institutions that provide those funds impose funding constraints that limit what the organization can do for domestic violence victims who need representation in divorce proceedings.

Finally, Part IV explores the challenges in reforming the laws and policies that impose barriers for battered immigrants who seek to divorce their abusive spouses. In particular, legislative and political decisions are driven by traditional attitudes towards upholding marriage and disfavoring divorce. These deeply-entrenched attitudes erect obstacles that make it difficult for low-income people to obtain meaningful divorce relief. Thus, this population remains uniquely impacted by traditional, more conservative biases against divorce—even when divorce is essential for protecting victims of domestic violence. With these challenges in mind, this Part concludes by proposing legislative, funding source policy and advocacy reforms that address the unique obstacles facing immigrant victims of violence and that would work towards opening the doors to the long-term freedom from abuse and the independence that divorce relief provides.

I. IMMIGRANTS FACE UNIQUE OBSTACLES IN PURSUING AND OBTAINING DIVORCE

Immigration law and policy pervade nearly every aspect of an immigrant’s life, including her decision to marry and divorce. Yet immigration law and policy do not take into account the particularly precarious position of the immigrant domestic violence victim. Instead, despite laws that are designed to protect immigrant victims of domestic violence, immigration laws concerning marriage and divorce impose a range of additional hurdles that can compel victims to stay with abusive spouses.

These laws become particularly problematic given the cultural and social underpinnings that color the immigrant experience in America. Indigency, access to justice, and cultural beliefs all stand as substantial barriers to divorce for immigrant victims of violence. The story of a recent Ayuda client provides a telling illustration.

Ana is a vivacious, self-assured young woman from Ecuador. She is an undocumented immigrant living with her young son and working in the Washington D.C. area. She met her husband when she came to the United States in search of work. During their marriage, he humiliated, degraded and abused Ana to the point where she feared for her safety and the wellbeing of her son. So, one day, she took her little boy and left her husband.

Through the Civil Protection Order (CPO) process, Ana obtained needed distance and protection from her husband. During the year that the CPO was in effect, her husband was in and out of her and her son’s lives. She began to move on and developed a stable life with her son and a new partner, with whom she was happy and looking forward to starting a new life. Still, she needed a divorce from her husband to be completely free from his control over her. But she had no idea how to get the legal help she surely needed to secure a divorce and custody of her son. Moreover, she made about $1,000 a month cleaning houses and had nothing extra to hire an attorney. To complicate her situation further, she sought the return of some of her property from her husband.

Ana’s predicament is all too common. Pursuing a divorce—especially one involving the distribution of property—and a case involving custody of a child is best left to an experienced and competent attorney. However, like many other undocumented immigrants, Ana had little money. She was unable to legally work. Thus, when she was able to find work outside of the legally-prescribed means, she often had to settle for earning less than minimum wage in positions with little or no job security. Moreover, like most immigrants (both those that are undocumented and those that are lawfully in the country), Ana was ineligible for public benefits and thus could not access traditional safety nets for the poor in our country. Without any money to pay for legal representation, many immigrants such as Ana find that locating a competent lawyer is extremely difficult.

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11 The term “undocumented immigrant” refers to an immigrant that is not lawfully present in the country. See infra Part II.A for a thorough description of relevant immigration categories of immigrants.


13 According to a recent report by the District of Columbia Access to Justice Commission that studied the provision of legal services by area non-profit providers, in the District of Columbia in 2005, there were approximately 21 full-time equivalent legal service lawyers providing at least some type of family law services. Of the organizations that participated in the study, most ranked family law among the top 4 services most requested by their client populations. District of Columbia Access to Justice Commission, Justice for All? An Examination of the Civil Legal Needs of the District of Columbia’s Low-Income Community at 14 (2008) available at
Further, legal service organizations for indigent populations often do not have a family law component and even fewer take on divorces, especially those that involve property distribution. With staff comprised of relatively new attorneys, some organizations shy away from complex litigation that require significant expertise and time—and budgetary concerns and funding restrictions can drive organizations away from divorce proceedings entirely.14

As an added layer of difficulty to her indigent status, an immigrant litigant often faces other hindrances. If she struggles with English, she must find a lawyer who speaks her language or has access to interpreter services.15 Thus, her search for good legal representation encompasses much more than a lawyer who will take her case for little or no fee; she needs a competent lawyer who will take her case for little or no fee and speaks her language. Her options dwindle further—and in too many cases, the process of obtaining legal relief can stop at the first question: where do I start?

Many immigrants may not even get that far, hindered by misconceptions of the American justice system based on experiences in their home country. Many immigrants come from countries where the justice system is not realistically open to all, but is more of a venue of assistance for the wealthy. Thus, even if a litigant had a viable claim, the court would find for the highest bidder. For example, after a particularly difficult court hearing, an Ayuda client in all seriousness and with complete conviction lamented that her abusive former partner must have given a bribe to the judge. In some countries, there are rigid legal obstacles to obtaining a divorce. Divorce is still prohibited, for example, in the Philippines; in Chile, divorce was not legalized until 2004 and only after contentious debate fueled by conservative political parties and the Catholic Church.16 Ayuda clients have reported that in many Latin-American countries, divorce law favors the partner who stayed in the marital home. Thus, many victims believe that if they left the home, or abandonar el hogar, courts would find in favor of her husband and


14 See infra Part III, discussing how funding restrictions play a large role in what kind of representation lawyers can take on.
15 Even in the District of Columbia, which has a pioneer program funded by the District of Columbia Bar Foundation that provides qualified and certified interpreters to area non-profit service providers, a non-English proficient litigant still struggles to access quality and affordable representation and the courts. Information about the District of Columbia Community Legal Interpreter Bank is available at http://www.ayuda.com/pages/page.cfm?pid=7&id=57 (last visited August 1, 2010). As the Access to Justice Report notes: “All too often, the language barrier prevents LEP [limited English proficient] residents from exercising legal rights effectively or at all. These residents find it difficult to communicate with lawyers. For pro se LEP litigants, the barriers are even greater. Litigants representing themselves already face a difficult task in properly preparing documents for court. Imagine the difficulty in preparing such documents if you do not speak the language. Even seemingly simple tasks, like figuring out where to file a pleading, can be a tremendous hurdle.” Access to Justice Report, supra note 13, at 32.
16 See NAOMI NEFT & ANN D. LEVINE, WHERE WOMEN STAND: AN INTERNATIONAL REPORT ON THE STATUS OF WOMEN IN 140 COUNTRIES 98 (1997).
would award him all jointly-owned personal and real property and grant him custody of their children. In the United States, clients thus feared that such a policy was universal and that they had to stay in abusive marriages or risk losing all property, financial support and their children.

The instability of a victim’s immigration status presents yet another barrier, one which abusive spouses often use as a tool of manipulation and control. For example, a batterer may tell his partner that, as a non-citizen, she has no rights in this country, and that no one will listen to her because she does not speak English or does not have any money. Ayuda clients—after spending years living in abusive relationships—often reported that their batterer would threaten

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17 This was a common fear for many Ayuda clients. See also Aili Mari Tripp and Ladan Affi, Domestic Violence in a Cultural Context, 27 Fam. Adv. 32, 34–35 (2004) (noting that immigrant women often fear losing their children due to threats by their husbands). Ms. Tripp and Ms. Affi also note that, for many immigrant women, the idea of legal protection against domestic violence is an unfathomable concept because in their home countries, reporting domestic violence may lead to country-sanctioned abuse, citing honor killings in Morocco, Jordan, and Syria. See id. Similar stories and statistics abound from other countries. See, e.g., Karen Musalo, Elisabeth Pellegrin, and S. Shawn Roberts, Crimes Without Punishment: Violence Against Women in Guatemala, 21 Hastings Women’s L.J. 161, 166–67 (2010) [hereinafter Musalo, et al., Crimes Without Punishment] (“Expert studies show that one in three women in Guatemala suffer violence in any of its manifestations: physical, psychological, economic, or sexual. . . . [The Public Prosecutor’s Office] reported receiving more than 6,228 complaints of violence within the family directed against women and children during the six month period of January to July 2007. It took some form of action against perpetrators of family violence in 1,768 cases between January and September of 2007, or in approximately less than one-third of the complaints. Furthermore, only two of the cases opened . . . resulted in convictions.”).

18 For example, in the Islam Sunni Hanafi school of law operating in certain areas of Great Britain and governing British Muslim’s requests for divorce, fathers presumptively receive custody of children over the age of seven (male children) and nine (female children). Thus, in the Hanafi school, women risk losing custody of their children if they seek a divorce. See Robin Fretwell Wilson, Privatizing Family Law in the Name of Religion, 18 WM. & MARY BILL RTS. J. 925, 929 (2010).

19 Indeed, non-proficiency in English presents an enormous barrier to services for many immigrant domestic violence victims as so few services are available in languages other than English and few service providers have bilingual staff members. See Donna Coker, Piercing Webs of Power: Identity, Resistance, and Hope in Latcrit Theory and Praxis: Shifting Power for Battered Women: Law Material Resources, and Poor Women of Color, 33 U.C. Davis L. Rev. 1009, 1032 (2000) [hereinafter Coker, Poor Women of Color] (discussing the problems of poor women of color in securing domestic violence assistance and in particular the experience of Latina immigrants: “immigrant Latinas who do not speak English are disadvantaged in the courts, in their encounters with police, and in the offices of social service agencies”); Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1249 (1991) (“Language barriers present another structural problem that often limits opportunities of non-English-speaking women to take advantage of existing support services. Such barriers not only limit access to information about shelters, but also limit access to the security shelters provide. Some shelters turn non-English-speaking women away for lack of bilingual personnel and resources.”). Professor Crenshaw recounts a story told to her from an advocate who was trying to place a Spanish-speaking immigrant victim of domestic violence in a New York shelter and was turned away because the woman could not participate in English-speaking shelter services. Crenshaw, supra note 19, at 1262–63 & n.61. Although the incident occurred approximately eighteen years ago because the letter Crenshaw quotes from the advocate was written in 1992, it may be surprising to learn that such policies still exist. In advocating for a client at Ayuda, I encountered shelter workers who, despite acknowledging having open beds for domestic violence victims, would not allow non-English speaking victims in the shelter because such a person could not participate in the shelter’s English-language counseling requirements. More recently, language-appropriate housing is operational in the District of Columbia for Spanish-speaking immigrant victims of violence, and policies for shelter at least explicitly do not deny shelter to non-English speakers. See, e.g., Casa Gabriella, a shelter specifically for immigrant victims of domestic violence in Washington D.C. See information available at http://www.dashdc.org/housing_if.html#Am_Undocumented. Further, in other District of Columbia shelters, workers and advocates are willing to let bilingual case managers interpret between shelter residents and monolingual English-speaking shelter workers.
to take their children away; or would profess knowledge that if she left, she would automatically receive custody; or report her and their children to immigration authorities. Clients feared that their abuser would harm their families and children back in their home countries if they sought assistance of any kind. Or, knowing that she was not lawfully present in this country, a client may express doubt that she could find a job so that she and her children could survive independent of her spouse.

Finally, deeper threads of culture may keep women in abusive marriages. In some cultures, or in some members’ understandings of their own culture, pervasive norms dictate the propriety of a woman initiating a divorce. Further, there may be deep-seated beliefs about what being a divorced woman in her culture means. A divorced woman in some countries is treated as an outcast, who has no real future or worth. Thus, seeking a divorce seems completely out of the realm of her possibility—for what kind of future would that woman and her children have? Just because she relocated to the United States does not necessarily mean her culturally-created or religious convictions have changed, particularly if she is part of a community here of others from her country, who also hold on to those same beliefs.

One client story paints a stark example. Aziza came to the Washington D.C. area under extreme circumstances. In her home in Pakistan, she was divorced from her first husband. A highly educated woman with a successful career and three children, Aziza was shunned by her community and family in Pakistan because of her divorce. When she met a successful Pakistani who now lived in America and who showed an interest in her, Aziza saw her chance for a new life in a more tolerant country. She agreed to marry him and move to the United States with her children. Unfortunately, the life he promised was not the one he delivered. When she got to this country, her new husband locked her and her children in an apartment and forced Aziza to work and turn over all of her money to him. Her new husband would not allow Aziza or her children out of their room and prohibited them from to speaking to anyone outside the apartment. Aziza was able to escape and find emergency assistance. Yet, how could she procure a divorce so that her abuser could no longer hold control over her?

Moreover, Aziza, a Muslim, feared that her husband had already divorced her under Islamic law and thus she did not have any control over her ability to divorce or be divorced from him. Aziza felt as if she faced a hopeless future. She could not go back to

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20 See Decasas, supra note 10, at 70–74; Orloff et al., Police Response, supra note 10, at 64–70; Dutton et al., Characteristics of Help-Seeking Behaviors, supra note 10, at 293; ASISTA, Realities for Immigrant Populations: How They Experience the System, available at http://www.asistahelp.org/Manuals_and_Organizing_Materials/Realities_for_Immigrant_Populations.pdf. (last visited August 1, 2010); see also Leigh Goodmark, Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases, 37 Fla. St. U. L. Rev. 1, 38 (2009) (“Immigrant women, particularly those who are undocumented or whose partners are undocumented, may fear that involvement in the criminal system will lead to deportation, depriving them of economic, emotional, extended family, or parenting support.”).

21 Under Shari’a (Islamic) law, divorce can only happen in one of three ways: (1) by the unilateral decision of the husband; (2) by mutual decision; (3) or by a judicial decree of separation secured by either spouse. Thus, Islamic law only affords the male unilateral power to terminate the marriage. Further, Islamic custom treats marriage as a private matter and divorce by any means described above may be secured without judicial intervention. See Emily L. Thompson & F. Soniya Ynus, Choice of Law or Choice of Culture: How Western Nations Treat The Islamic Marriage Contract in Domestic Courts, 25 Wis. Int’l L.J. 361, 367 (2007); Wilson, supra note 18, at 930 (“Muslim women also face unique procedural hurdles when divorcing. Women need corroboration of their claims in a divorce while men do not. Women pay more to file divorce... Unless the
Pakistan as a woman with two failed marriages for her community, she feared, would blame her for the failure of her American marriage, though her husband clearly lied to her and abused her. Going back to her country would mean no opportunities for her and a bleak future for her children. Yet, she was wary of what an American divorce would even bring her, as it was not culturally recognized by her community. Further, without her husband’s sponsorship of her and her children’s immigration petition to remain in the United States, they could not legally remain in this country.

With her attorney, Aziza learned about the process of American divorce and how it could bring her various forms of legal relief as well as her personal independence. After much counseling, Aziza decided to pursue a divorce although she knew that the case would bring her face to face with her abusive husband. A strong and resilient person, Aziza went through with the divorce and pursued immigration stability in the United States. Because of her circumstances, she qualified for a visa to remain in the country. Soon after, Aziza had started a new life in this country, sending her oldest child to college, finding a new job and career and succeeding with an independent life.

Although Aziza could proceed beyond her cultural constraints, many battered immigrants, whose culture, religion and/or system of beliefs are integral parts of their identity, cannot see a viable life after a divorce. Thus, working with victims through their cultural framework is an essential component to effective advocacy. Providing adequate funding to agencies that offer culturally and linguistically-appropriate representation, therefore, is essential in ensuring that immigrant victims of violence achieve meaningful divorce relief.

husband agrees, a woman needs the imam’s permission to divorce and generally needs to show the husband’s fault.”). For Orthodox Jews living around the world and as immigrants in the United States (and, indeed, as American-born people), a couple is not considered divorced under Jewish law until the husband gives his wife the get, or the bill of divorce. See Karin Carmit Yefet, Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women’s Marital Freedom, 20 YALE J. L. & FEMINISM 441, 444 (2009). “Israeli law accords Orthodox rabbinical courts exclusive control over marriage and divorce, and those courts in turn grant full control over divorce to men. No one—not the government, not the courts, not even a rabbi—is authorized to divorce a couple except for the husband.” Id. at 442. Without the get, the wife remains an agunah (a “chained” woman) and may not remarry in the eyes of Jewish law. Id. at 443.

Beyond the cultural stigma she would have to endure, she also feared for her and her children’s financial future. Under the law of a number of Islamic schools, at divorce, a husband’s obligation to maintain his former wife (what American law deems alimony or spousal support) ends at the end of the iddat period, which lasts for a few months after the break-up of the marriage. See Wilson, supra note 18, at 948.

Aziza qualified for a T visa. The T visa was created under the Trafficking Victims Protection Act, part of the 2000 reauthorization of VAWA. See Trafficking Victims Protection Act 22 U.S.C. §7102. The T Visa provides a form of immigration relief for victims of trafficking in the United States. To obtain a T visa, a victim must prove that she is or has been a victim of a “severe form of trafficking in persons;” that she has either complied with “any reasonable requests” for assistance in an investigation or prosecution concerning trafficking in persons or is under eighteen years old; and that she would suffer “extreme hardship involving unusual and severe harm” if removed from the United States.” Immigration and Nationality Act §101(a)(15)(T)(i); 8 U.S.C. §1101(a)(15)(T)(i).

As the Access to Justice Report succinctly concludes: “In addition to language skill, there is a need for bicultural staff as well as staff that is culturally competent to develop necessary relationships of trust and confidence. Across cultures, the roles of gender, class, respect for authority, directness of communication, privacy and other issues vary greatly. [Non-profit service] Staff needs to be attuned to these differences. It is very valuable for providers to recruit attorneys who have these skills. There are relatively few lawyers who possess these assets, which makes it challenging for programs to hire staff.” Access to Justice Report, supra note 13, at 40.

See infra Part III for a discussion on funding restrictions for divorce services.
II. IMMIGRATION LAW AND POLICY OBSTRUCT DIVORCE

For those immigrants who overcome (or do not face) particular cultural hurdles, formal law and policy creates another web of tangible obstacles to divorce. Federal immigration law has created a complicated system of quotas and preferences that treat people differently depending on their marital status and the type of immigration status they hold. Holding certain types of immigration status brings substantially more benefits and stability than holding others. This Section provides a brief background on the different types of immigration status that an immigrant may hold and the important benefits—or lack of benefits—derived from them, and then discusses how immigration law and policy affect immigrants’ decision to marry and obstruct the immigrant domestic violence victim’s ability to divorce.

A. IMMIGRATION STATUS

First, a brief review of the general classifications of immigrants is helpful to better explain how the United States government regulates the marriage of and to immigrants. The most stable type of status in this country, of course, is United States citizenship. An immigrant in this country may be able to chart a path towards citizenship through the naturalization process.27 A naturalized citizen has all rights of citizenship: she can vote, travel outside of the country without penalty; and partake in all other benefits of citizenship. Everyone who is not a United States citizen in this country is considered a non-citizen. Of the non-citizens, there are various classifications of status. Most broadly, though, non-citizens are either lawfully present in the country or “undocumented” and therefore not lawfully present.

People who are not lawfully in the United States generally acquire that status in one of two ways. They may enter the country without inspection, which typically means crossing the United States border illegally, undetected by immigration authorities. They may also enter the United States lawfully—perhaps through a tourist, student or work visa—but remain in the country past the expiration date of their visa. This second group of undocumented immigrants is considered “out of status.” Entering the United States without inspection is a crime; remaining unlawfully in the country is a separate crime.28 Not surprisingly, then, undocumented immigrants are often very fearful of authority figures, lest their unlawful entry and/or out of status presence be brought to light, leading to their charge, prosecution and/or removal from the country.29

Compared to United States citizens and other lawfully-present people, undocumented people receive few rights and benefits in this country. Often making the journey to the United States in search of work, because of their precarious and vulnerable immigration status, undocumented immigrants often do not have employment stability, do not receive mandated minimum wages, and do not benefit from other workplace laws designed to protect workers. Moreover, an undocumented immigrant will likely have little or no understanding of the justice

27 It should be noted, though, that not all classifications of immigration status lead to eligibility to become a United States citizen. Many lawful status categories do not have any opportunity to lead to citizenship.
29 Recently enacted policy and legislation give immigrants (those undocumented and those lawfully present) good reason to worry. Arizona, for example, enacted groundbreaking immigration law reform that would make the failure to carry immigration documents a crime and give the local police broad power to detain anyone suspected of being in the country illegally. See Randal C. Archibold, Arizona Enacts Stringent Law on Immigration, NY TIMES, April 23, 2010, at A1 (discussing Arizona SB 1070).
system or of how she may qualify for legal assistance. To maintain their safety and security in this country, the undocumented population lives in the shadows of larger society, hoping to remain undetected. Therefore, an undocumented person is less likely to understand her rights and benefits and less likely to pursue relief through the justice and judicial systems than a person with lawful status.\footnote{The characteristic of being undocumented pervades a person’s identity because such a status entails a very different type of treatment—as opposed to how United States citizens are treated—in many facets of American life. See David B. Thronson, Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts, 11 TEX. HISP. J.L. & POL’y 45, 54–57 (2005). Professor Thronson highlights how the terms “illegal” and “alien” are social constructs that have a dehumanizing effect, noting that the term “alien” functions as “a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering. . . . Persons have dignity and their rights should be respected. Aliens have neither dignity nor rights.” See id; see also Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nopersons, 28 U. MIAMI INTER-AM. L. REV. 263, 273 (1997). In her piece surveying undocumented victims of domestic violence, Professor Margot Mendelson discusses how the vulnerable illegal status of the women colored their perceptions and experiences such that the status itself could not be separated from the experience of being victimized. Margot Mendelson, The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women, 19 BERKELEY WOMEN’S L.J. 138, 179 (2004). Once the women achieved legal immigration status through the VAWA petition process, their perception of entitlement to basic human rights in this country—like safety and shelter—increased dramatically. Id. at 200.}

On the other hand, there are numerous ways for a non-United States citizen to have lawful status in the United States. The two broad categories of lawful status for non-United States citizens are (1) those who are non-immigrants and (2) those who are “immigrants.”\footnote{The immigration law definition of “immigrant” refers only to foreign-born people (1) who are lawfully presently in the United States and (2) who evidence intent to stay in this country permanently and have the requisite permission to do so. Non-citizens who do not intend to stay permanently are legally classified as “aliens.” However, in order to avoid the dehumanizing connotations of the term “alien,” this Article uses the term “immigrant” according to its colloquial meaning to describe any foreign-born person inside the United States.\footnote{Immigration and Nationality Act §244, 8 U.S.C. §1254a. Congress enacted the TPS program in 1990 to provide a method of relief to foreign-born citizens who do not qualify for refugee status, but nonetheless seek safety in the United States. There are three conditions for which TPS may be granted. One, if there is an ongoing conflict in the immigrant’s home country that compromises personal safety. Two, if the immigrant’s home country requests that TPS be granted in light of a natural disaster and of the home state’s inability to deal with the return of their citizens; and, lastly, in the event of extraordinary yet temporary conditions in the foreign state if the United States decides that it is in their best interest to permit the immigrant to stay in the United States. See Ruth Ellen Wasem and Karma Ester, CRS Report for Congress: Temporary Protected Status: Current Immigration Policy and Issues, 2 (January 19, 2010), available at: http://fpc.state.gov/documents/organization/137267.pdf. With TPS status, a person can legally work and remain in this country for a determined amount of time. For example, the United States government has provided TPS status for El Salvadorans in this country since 1991. See Michelle M. Holmes, What About My Kids? Why Congress Should Amend Either NACARA or Temporary Protected Status to Extend Permanent Residency to El Salvadorian, Guatemalan, and Honduran Children, 14 SW. J.L. & TRADE AM. 427, 429, 435–36 (2008). The United States government granted this population TPS eligibility due to the El Salvadoran earthquakes in January and February of 2001 and the political aftermath of the civil war that lasted from 1980 to 1992. See id. at 431–33. At certain intervals, the United States government determines whether or not it will reauthorize the TPS protections for a given population. For example, the most recent extension of TPS for El Salvadorans covers approximately 229,000 people who have been living in the United States and receiving benefits under TPS since 2001. See Wasem and Ester, supra note 32, at 4.}}

Most non-immigrants have only temporary lawful status to remain in the United States; the law presumes that they will leave the United States at some point in the future. Other non-immigrants can have longer-term status such as Temporary Protected Status (TPS), which is given to those who entered the country during certain time periods and who are from countries experiencing natural disaster or political turmoil.\footnote{Notably, not all non-immigrant statuses make... The United States government granted a method of relief to foreign-born citizens who do not qualify for refugee status, but nonetheless seek safety in the United States. There are three conditions for which TPS may be granted. One, if there is an ongoing conflict in the immigrant’s home country that compromises personal safety. Two, if the immigrant’s home country requests that TPS be granted in light of a natural disaster and of the home state’s inability to deal with the return of their citizens; and, lastly, in the event of extraordinary yet temporary conditions in the foreign state if the United States decides that it is in their best interest to permit the immigrant to stay in the United States. See Ruth Ellen Wasem and Karma Ester, CRS Report for Congress: Temporary Protected Status: Current Immigration Policy and Issues, 2 (January 19, 2010), available at: http://fpc.state.gov/documents/organization/137267.pdf. With TPS status, a person can legally work and remain in this country for a determined amount of time. For example, the United States government has provided TPS status for El Salvadorans in this country since 1991. See Michelle M. Holmes, What About My Kids? Why Congress Should Amend Either NACARA or Temporary Protected Status to Extend Permanent Residency to El Salvadorian, Guatemalan, and Honduran Children, 14 SW. J.L. & TRADE AM. 427, 429, 435–36 (2008). The United States government granted this population TPS eligibility due to the El Salvadoran earthquakes in January and February of 2001 and the political aftermath of the civil war that lasted from 1980 to 1992. See id. at 431–33. At certain intervals, the United States government determines whether or not it will reauthorize the TPS protections for a given population. For example, the most recent extension of TPS for El Salvadorans covers approximately 229,000 people who have been living in the United States and receiving benefits under TPS since 2001. See Wasem and Ester, supra note 32, at 4.}
the person eligible to lawfully work; a person can be lawfully in the United States yet unable to support him or herself financially.\footnote{For example, holders of B-1, visitor for business visa; B-2, visitor for pleasure visa; and C-1, ordinary transit visa, are not eligible to work in the United States.}

“Immigrants” have the most stable and permanent status short of full American citizenship. People who have immigrant status are presumed to remain in the country indefinitely and may be eligible to obtain United States citizenship through naturalization.\footnote{With immigrant status, it is usually possible to naturalize and become a United States citizen after continued residency in the country for a specified amount of time and the successful fulfillment of other eligibility requirements. However, achieving immigrant status is often an arduous and lengthy process.} The most stable immigrant status is lawful permanent resident (LPR) status. LPRs cannot vote, but they do have work authorization and are eligible for many other benefits, including access to public benefits after continued United States residency.\footnote{Colloquially, people with LPR status have their “green cards.” See USCIS information “Green Card (Permanent Residence)” available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4e2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ae853ad15c673210VgnVCM100000082ca60aRCRD&vgnextchannel=ae853ad15c673210VgnVCM100000082ca60aRCRD (last visited August 1, 2010).}

This understanding of the immigration-law categorization of foreign-born people in the United States (otherwise termed “immigrants” in the remainder of this Article) provides a useful backdrop to understanding how governmental regulations involving marriage and divorce interplay with immigration status. Such regulations further highlight the benefits and detriments conveyed to the various classifications of immigrants as they enter marriage and navigate the thorny road to divorce.

B. IMMIGRATION LAW AND MARRIAGE

Immigration law pervades an immigrant’s decision to marry and to divorce. Such a government presence in the intimate areas of life is largely unknown to most United States citizens.\footnote{Of course there remains much debate, legislation and proposed policy surrounding the role of the state in regulating the rights of same-sex couples from marrying and adopting children. See, e.g., Kaaryn Gustafson, \textit{Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism}, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 269 (2009); Nancy D. Polikoff, \textit{A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century}, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201 (2009); Melissa Murray, \textit{Marriage Rights and Parental Rights: Parents, the State, and Proposition 8}, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 357 (2009); Anita Bernstein, \textit{For and Against Marriage: A Revision}, 102 MICH. L. REV. 129 (2003). Further, there is a long-standing presumption that the state will intervene in issues surrounding parenting for the protection of children. See Stanley H. Friedelbaum, \textit{Reassessing Family Relations Law: Issues and Inquiries in the State Courts}, 68 ALB. L. REV. 225 (2005) (reviewing cases surrounding themes of family and how the state was found to permissibly regulate and define the family); Milton C. Regan, Jr., \textit{Law, Marriage, and Intimate Commitment}, 9 VA. J. SOC. POL’Y & L. 116, 118 (2001) (“The law has circumscribed parents’ authority over their children for several decades, subjecting unfit parents to loss of custody for egregious violations of legal duties. More recent legal initiatives have sought to emphasize the ineluctable character of financial responsibilities for child support, creating significant penalties for those who fail to live up to these obligations.”).}

Professor Kerry Abrams discusses four stages of marriage and the ways in which the
law invades an immigrant’s marriage: “(1) the courtship stage, in which the couple meets and decides to marry; (2) the entry stage, in which the couple undergoes whatever licensing and ceremonial requirements are necessary to achieve marital status; (3) the intact marriage stage, in which the couple is legally married; and (4) the exit stage, in which the couple divorces, has the marriage annulled or one of the spouses dies.”

This Section discusses more closely the ways in which immigration law intervenes in the second and third stages, setting up the discussion in the next Section on the barriers to divorce.

For an immigrant marrying a United States citizen or lawful permanent resident (LPR), in particular, the United States government closely regulates who can marry whom and when. This interest in regulating marriage to immigrants stems in at least some part from “family unification” or “family reunification” policies espoused by the United States government.

Support for the policy of family unification arises from the notion that American citizens have an interest in forming families and that this interest includes the right to marry people who are not United States citizens.

Since 1945, the United States government has supported policies encouraging the marriage of its citizens through immigration legislation. Beginning with the War Brides Act of 1945, foreign citizens who married United States citizens received quick and easy access to immigrant visas and could immigrate in unrestricted numbers as immediate relatives. If the immigrant married an LPR of the United States, s/he faced annual quota restrictions on the number of immigrant visas allocated for these spouses. In 1986, the United States Congress changed the marriage process and created the Immigration Marriage Fraud Amendments (IMFA) as part of the Immigration Control and Reform Act (IRCA).

Primarily, the IMFA ostensibly seeks to prevent a person from securing immigration benefits through marriage fraud by providing that any immigrant deriving status from a marriage of less than two years is a “conditional lawful permanent resident” (or conditional resident). To remove the conditional applying for a marriage license. See id. at 1675 & n.181; Gustafson, supra note 36, at 290. Professor Onwuachi-Willig notes that these efforts are racialized and target Black and Latino populations, who are seen as the stereotypical “welfare queens.” Onwuachi-Willig, supra note 36, at 1665–70. Conversely, as is outlined and argued in this Part, government involvement seemingly has an opposite effect, i.e., that of making marriage more complicated and calculated, for poor immigrants. As most immigrants in this country are ineligible for public assistance, see supra note 12, these opposing government goals concerning marriage have a fiscal component that is perhaps not coincidental.

See Abrams, supra note 37, at 1637; see also Aubry Holland, The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law, 96 CALIF. L. REV. 1049, 1061 (2008) (noting that the structure of immigration law, by ennumerating family preference categories, is driven by the policy goal of family unification).

See infra Part IV discussing cultural and political preferences for upholding the marriage institution while disfavoring divorce.

See Abrams, supra note 37, at 1637; see also Sfasciotti & Redmond, Marriage, Divorce and the Immigration Laws, 81 ILL. B.J. 644 (1993).

residency status, the immigrant and the United States citizen or LPR spouse must apply to do so with the United States Citizenship and Immigration Service (USCIS)\textsuperscript{44} within 90 days before the second year anniversary of having received conditional status. If at this time the couple cannot prove that their marriage continues to be valid, the immigrant may become removable (or deportable).\textsuperscript{45} The passage of the IFMA in 1986 correlated with a time of newly heightened anti-immigrant sentiment.\textsuperscript{46} Given that political climate, it is not surprising that Congress made it significantly more difficult for foreign-born people to receive immigration status by marrying United States citizens or LPRs.

The governing immigration statute, the Immigration and Naturalization Act (INA), which incorporates the IRCA reforms, contains substantial penalties for entering into a fraudulent marriage to receive an immigration benefit.\textsuperscript{47} Though the Immigration and Naturalization Service (INS)\textsuperscript{48}—the agency now known as USCIS—did not keep records prior to 1986 about how many marriages through immigration were determined to be fraudulent or bona fide, in passing the IMFA, Congress used INS statistics from a 1983-1984 study that purported to show that roughly 30\% of marriage-based visa petitions were based on fraudulent marriage.\textsuperscript{49} It was later discovered and widely reported, however, that the 1983-1984 study results were unreliable and that Congress acted on this faulty information and the ongoing anti-immigrant sentiment to create the IMFA.\textsuperscript{50} Despite its faulty basis, the IMFA set the tone for later reforms that would affect immigration through marriage. As a secondary result, subsequent laws designed to help battered immigrant spouses obtain immigration stability while leaving abusive spouses

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\textsuperscript{44} USCIS is part of the United States Department of Homeland Security and is the government agency that Oversees lawful immigration to the United States.

\textsuperscript{45} See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986); see also infra Part II.B and C discussing the conditional resident petition process.

\textsuperscript{46} Anti-immigration sentiment among Americans was at an all-time high at this time. A New York Times/CBS News poll in 1986 indicated that half of those surveyed wanted to lower immigration levels in the United States, compared to a third in 1965 when asked a similar question. Andy Plattner, Congress Feels Mounting Pressure to Curb Tide of Illegal Aliens; Immigration Reform: Weighing Cost of Failure, U.S. NEWS & WORLD REPORT, August 11, 1986, at 20.

\textsuperscript{47} Immigration and Nationality Act §275(c); 8 U.S.C. §1325(c) provides for criminal penalties of up to five years in prison and a $250,000 fine for knowingly entering into a fraudulent marriage for immigration purposes.


\textsuperscript{49} See Sfasciotti & Redmond, supra note 42, at 645.

\textsuperscript{50} Id. See 65 Interpreter Releases, INS Admits Survey Not Valid, No. 35, September 11, 1989, at 1011–12; Azizi v. Thornburgh, 719 F. Supp. 86, 96 & n. 11 (D. Conn. 1989). See also Charles Gordon, Symposium: Legal Immigration Reform, The Marriage Fraud Act of 1986, 4 GEO. IMMIGR. L.J. 183, 184 (1990). Cf. Abrams, supra note 37, at 1686–87 ("It is difficult to evaluate how effective IMFA has been in practice. Although reliable statistics do not exist, there is evidence that even with what appears to be a fairly stringent process, fraudulent marriages still frequently occur. Marriage fraud rings are occasionally discovered and prosecuted. For example, in 2006 federal immigration officials indicted twenty-four people for engaging in marriage fraud. . . . Numerous other schemes have been prosecuted in the past three years. The frequency of the prosecutions and the number of people involved suggest that even with the procedures set forth in IMFA and its implementing regulations, immigration officials miss substantial instances of fraud. At the same time, though, there is a limit to the amount of time immigration officials can spend investigating marriages and, for couples who are legitimately married, there is a cost associated with repeated interviews and a fear of ‘failing’ the IMFA test. More importantly, reported cases indicate that some immigration officials have difficulty telling a ‘real’ marriage from a ‘fraudulent’ one, and that just as many fraudulent marriages slip through the cracks, some genuine marriages are not recognized as such.").
incorporated strict restrictions and requirements that complicated the separation and divorce process.\textsuperscript{51}

It should not be surprising that federal immigration law has a lot to say about marriage. Legal immigration status is a hot commodity in this country. Many seek it, and Congress limits access to a select group of people, including those who are family members of LPRs or United States citizens. As a hallmark of immigration law and the benefits gained by immigrants through marriage to a United States citizen or LPR, immigration laws are designed to recognize only bona fide marriages—or marriages entered into in good faith—between an immigrant and a United States citizen or an LPR. To prove the bona fides of the marriage, the couple must submit substantial proof, which is closely scrutinized by immigration officials. These policies are designed to discourage people from entering into fraudulent marriages for immigration benefits.

Most new immigrants to this country who obtain LPR status do so through the family-based lawful residency petition process.\textsuperscript{52} In 2005, for example, almost 300,000 immigrants were granted LPR status as spouses of United States citizens or of LPRs.\textsuperscript{53} Importantly, at all times in the long and arduous immigration petitioning process, the United States citizen or LPR spouse effectively holds the reins and controls the success or failure of his spouse’s immigration stability.\textsuperscript{54} He can withdraw his support for her immigration petition at any time, thereby making her immediately removable from the United States.\textsuperscript{55}

The petition for permanent residence process begins with a United States citizen or LPR spouse (the “petitioner”) first filing the Form I-130, Petition for Alien Relative (“Relative Petition”) for his immigrant spouse (the “beneficiary”) with USCIS. In filing the Relative Petition, the couple asserts that the couple married in good faith.\textsuperscript{56} The next step is to formally file for LPR status by filing the Form I-485, Application to Register Permanent Residence or Adjust Status (“Application to Adjust Status”).\textsuperscript{57} When the beneficiary spouse may file the Application to Adjust Status, though, depends on certain factors, including whether the petitioner spouse is a United States Citizen or an LPR and—if the petitioner spouse is an LPR—the beneficiary’s country of birth.\textsuperscript{58} Spouses of United States citizens are considered “immediate

\textsuperscript{51} In her work discussing how patterns of discrimination uniquely affect those domestic violence victims whose identity intersects various subordinated classes, Professor Kimberlé Crenshaw discusses how the IMFA, which was a “policy designed to burden one class—immigrant spouses seeking permanent resident status—exacerbated the disempowerment of those already subordinated by other structures of domination. By failing to take into account the vulnerability of immigrant spouses to domestic violence, Congress positioned these women to absorb the simultaneous impact of its anti-immigration policy and their spouses’ abuse.” Crenshaw, supra note 19, at 1249–50.

\textsuperscript{52} See Julie Dinnerstein, Options for Immigrant Victims of Domestic Violence, 190 PLI/NY 161, 163–64 (2009) (“Of the 1,266,264 noncitizens granted LPR status in the United States in fiscal year 2006, 63 percent were those who received residence through a family-sponsored category.”).

\textsuperscript{53} See Abrams, supra note 37, at 1629.

\textsuperscript{54} See, e.g., Dinnerstein, supra note 52, at 164.

\textsuperscript{55} See id. at184 (citing 8 CFR §216.4(a)(2)).


\textsuperscript{57} See application instructions and form, available at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f61476543f6d1a/?vgnextoid=3fa2c1a6855d010VgVCM10000048f36a1RCRD&vgnextchannel=d346d26d17df110VgnVCM1000004718190aRCRD.

\textsuperscript{58} See Lichter, supra note 38, at 235 (“In order to avoid domination of family immigration by nationals of countries with existing large anchor populations in the United States, priority dates are also tracked by country of chargeability. While no one nationality is favored, no particular country may comprise in excess of 7% of the total visas allotted within a particular category. The country of chargeability is generally the country of birth of the
relatives” and may file the Application to Adjust Status concurrently with the Relative Petition.\textsuperscript{59} Spouses of LPRs, however, are considered lower-tier “preference relatives” and must first file the Relative Petition, await its approval, and then continue to wait to file the Application to Adjust Status until their preference category makes its way through the backlog of family-based petitions and reaches the front of the family petition line.\textsuperscript{60} When they have waded through this backlog and reached the front of the line, the beneficiary spouse can finally file the second form, the Application to Adjust Status.

This tedious and time-consuming process takes on exceptional significance for victims of domestic violence caught in this administrative backlog. According to the U.S. Department of State Visa Bulletin, which forecasts the number of visas that are available based on preference category and when such visas will be available, in August 2010, a beneficiary spouse will have to wait approximately one to two years from the initial filing of the Relative Petition before she can proceed to the second step and file the Application to Adjust.\textsuperscript{61} But, this is merely an estimate, and the wait date given in the Visa Bulletins may change from month to month, forecasting longer or shorter waits.\textsuperscript{62} In recent history, people in these same preference categories would typically wait between 4 to 7 years before they could file the second form, the Application to Adjust Status.\textsuperscript{63} Importantly, the waiting period is determined by the petitioner spouse’s immigration status and the country of the beneficiary’s birth, none of which the immigrant spouse can control or alter.\textsuperscript{64} Beyond the mere annoyance that such bureaucracies

\textsuperscript{59} See Immigration and Nationality Act §201(b)(2)(A)(i). This option is available as long as the beneficiary spouse is lawfully present in the United States. Id. If the beneficiary spouse is applying through the local consulate while living overseas, s/he may file the Application to Adjust Status after the Relative Petition is adjudicated. Id.

\textsuperscript{60} See INA §203(a); see also Dinnerstein, supra note 52, at 164 (“In contrast to immediate relatives, those who are deemed ‘preference relatives’ are not immediately eligible to file for LPR status. Instead, they must wait in line until their priority date (the filing date that becomes the intending immigrant’s placeholder on line) is ‘current.’ The term ‘current’ is used to indicate that the intending immigrant has reached the front of the line.”).


\textsuperscript{62} See Lichter, supra note 38, at 234–35 (“Although the Visa Bulletin will indicate an approximate wait time for an available visa, it is neither a prediction nor guarantee of availability for a particular category. The Bulletin reports the State Department’s best ‘guesstimate’ as to which beneficiaries may go forward with the immigration process at a particular time, without resulting in over-subscription of the categories. Categories may remain stagnant for months, move forward only a day or a week each month, or even retrogress, depending on the number of applicants, movement between categories, and changes to the immigration laws.”).

\textsuperscript{63} See Telephone Interview with Eric Unternahrer (July 19, 2010). Mr. Unternahrer has worked at Ayuda in Washington D.C. for 7 years as an immigration law paralegal and more recently as a BIA-Accredited Representative. See also Abrams, supra note 37, at 1636 (“Spouses of U.S. residents (green card holders), on the other hand, achieve green-card status through the ‘family preference’ category, which is subject to annual quotas. Accordingly, they must submit to long waits before they can join their U.S. resident spouses. Currently [2007], the wait is approximately five years.”); Dinnerstein, supra note 52, at 164 (“In contrast to immediate relatives, those who are deemed ‘preference relatives’ are not immediately eligible to apply for LPR status. Instead, they must wait in line until their priority date (the filing date that becomes the intending immigrant’s placeholder on line) is ‘current.’ The term ‘current’ is used to indicate that the intending immigrant has reached the front of the line. Only at that point—anywhere from about five years to over 22 years (under current family backlogs), depending on the preference category and country of origin of the noncitizen—can the noncitizen apply for LPR status.”); Lichter, supra note 38, at 232 (“Even after approval of the immigrant petition, less favored ‘preference immigrants’ will generally wait years before an immigrant visa may become available.”).

\textsuperscript{64} Spouses of LPRs enjoy a relatively high preference category, second in line only to the unmarried sons and daughters, 21 and over, of United States citizens. See Immigration and Nationality Act §203(a).
create for a typical applicant, the waiting period takes on extreme significance for a battered immigrant, wondering if putting up with the abuse for years in order to stabilize her immigration status is worth the reward.

Next, as part of the USCIS approval process of the Application to Adjust Status, the couple will be interviewed in person to determine whether or not their marriage was bona fide at its inception. They are questioned by a USCIS official—perhaps separately—about intimate details of their personal lives and marriage: who attended their wedding; what does their bedroom look like; how many siblings does their spouse have.\textsuperscript{65}

If the couple has been married for less than two years when the beneficiary spouse’s Application to Adjust Status is finally approved by USCIS, the beneficiary spouse will become a “conditional resident.”\textsuperscript{66} As discussed, the conditional residency status was created in the Immigration Marriage Fraud Amendments (IMFA) to test relatively new marriages, attempting to decipher which were entered into for fraudulent purposes and which were entered into for genuine reasons.\textsuperscript{67} As a final step before the approval of conditional residency, though, the couple must appear for the in-person interview in which they are questioned about the bona fide nature of their marriage.

When the immigrant has been a conditional resident status for two years, the couple may proceed to a third step, filing a joint petition to lift the conditions, the Form I-751, Petition to Remove Conditions on Residence (“Petition to Remove Conditions”), thereby completing the application process to become an LPR.\textsuperscript{68} The Petition to Remove Conditions must be filed during the ninety-day period immediately preceding the two-year anniversary of the grant of conditional residency, effectively requiring that the couple stay married for two more years.\textsuperscript{69} After the two-year wait and after the couple files the Petition to Remove Conditions, they may have to appear for another in-person interview to prove again to USCIS that their marriage was

\textsuperscript{65} Professor Abrams discusses how immigrants applying for conditional residency are burdened to portray a relationship that they think USCIS will find to be a bona fide marriage. Thus, the couple must be prepared for a wide range of personal questions and are often compelled to hide the true nature of their relationship in lieu for what they (or their lawyers) deem will best match what immigration authorities are looking for. See Abrams, supra note 37, at 1691–94.

\textsuperscript{66} With the passage of the Immigration Marriage Fraud Amendments (IMFA) in 1986, any immigrant who obtains immigration status based on marriage to a United States citizen or lawful permanent resident is granted conditional resident status if the marriage is less than two years old when the petition is granted. 8 U.S.C. §1186a(a)(1), Immigration and Nationality Act §216 (a)(1) as added by Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, §2(a), 100 Stat. 3537. See E-mail from Eric Unternahrer to Mariela Olivares (July 20, 2010) (on file with author) (“conditional residence is granted if marriage is less than two years old on the date the spouse adjusts status via the Form I-485”).

Practitioner Julie Dinnerstein notes an important reality: “Spouses and children of LPRs, like USC’s, can be granted conditional residence. See INA §216. In practice, however, as the backlogs for spouses and children of LPRs are longer than two years, spouses and children of LPRs are not currently being granted conditional status. Should the backlogs move more quickly, spouses and children of LPRs would be subject to conditional permanent residence.” Dinnerstein, supra note 52, at 161 & n.12. See also E-mail from Eric Unternahrer, supra note 66 (“since I have begun working with immigration law I have never seen a case of a preference category spouse a.k.a. spouse of LPR obtaining conditional status, because the wait is so long that by the time their priority date is current, they have already passed the two years of marriage and are therefore granted permanent status. I’m not sure if that will change now that visa lines have accelerated.”). This Article examines the process as contemplated by the statute but the harsh realities of the family-based petition backlog should not be lost in this discussion.

\textsuperscript{67} See supra Part II.B, pp.14–15, discussing the IMFA legislation.

\textsuperscript{68} Immigration and Nationality Act §216(c)(1); 8 U.S.C. §1186a(c)(1).

\textsuperscript{69} 8 C.F.R. §216.4(a).
bona fide at its inception. If the parties fail to file the Petition to Remove Conditions during the 90-day window or fail to appear for any USCIS interview, the immigrant’s conditional residence will be terminated, and she will be become removable from the country.

Indeed, throughout the entire petitioning and interview process, the United States citizen or LPR spouse can simply and without reason withdraw his support for his spouse’s residency. Thus, abusers often threaten their spouses that they will withdraw the paperwork or not go to the immigration interviews if she angers him in any way. As an ultimate and heartbreaking tool of abuse, some batterers live up to the threats and notify USCIS that they are no longer sponsoring the immigration petition or purposefully miss the interviews or forbid their spouse from attending, knowing that such actions could likely result in the immigrant’s forceful removal from the country.

In short, the United States citizen or LPR spouse retains an immense amount of control and power over his or her spouse’s ability to remain in this country. Moreover, as discussed, many victimized immigrants in this country have little knowledge of the available help, and/or because of funding restrictions and limitations on non-profit legal service providers, are not able to access competent, culturally-appropriate legal representation. The existence of an immigration remedy for a victimized spouse does not necessarily result in the victim accessing the service.

C. REPERCUSSIONS OF DIVORCE IN OBTAINING IMMIGRATION RELIEF

To protect the immigrant domestic violence victim from her spouse using her precarious immigration status as an added tool of power and control, immigration law and policy have evolved to allow for certain types of immigration law relief, including waivers from the joint spousal petition requirement and a self-petitioning option to legalize immigration status through the Violence Against Women Act (VAWA). Yet, failures in the implementation and scope of these policies can place victims who seek to divorce or separate from their abusers in the difficult position of choosing between their physical safety and their immigration status stability.

For example, if an immigrant beneficiary spouse contemplates separation and divorce from her petitioning United States citizen or LPR spouse while her residency application is pending, she can place her immigration status in jeopardy. Initiating a divorce case either before or while USCIS is processing her application will likely increase the scrutiny that USCIS will place on the bona fides of the marriage, an essential element to prove when seeking an immigration benefit through marriage. Moreover, if the marriage was terminated before two

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70 8 C.F.R. §216.4(b)(3). At this stage, because the parties would have had an interview with USCIS when they filed the Application to Adjust Status, USCIS may or may not decide to make the parties come in for a second interview. See Telephone Interview with Eric Unternahrer, supra note 63.

71 Immigration and Nationality Act §216(c)(2), 8 U.S.C. §1186a(c)(2); see Greene, supra note 56, at 7.

72 Domestic violence victim clients of Ayuda commonly described these behaviors of their abusive spouses. See infra Part III.

73 If, for example, the beneficiary spouse has separated or initiated divorce proceedings while her Petition to Remove Conditions is pending, USCIS may look more closely at the bona fide nature of her marriage. See USCIS Memorandum from Donald Neufeld, Acting Associate Director, I-751 Filed Prior to Termination of Marriage (April 3, 2009), available at: http://www.uscis.gov/files/nativel/751_Filed_%20Prior_Termination_3apr09.pdf: “USCIS may not deny a [I-751] petition solely because the spouses are separated and/or have initiated divorce or annulment proceedings. However, legal separation or initiation of divorce or annulment proceedings may suggest that the [conditional resident] entered into the marriage for the sole purpose of procuring permanent resident status.”
years of conditional residency status elapses, she is no longer eligible for family-based immigration relief.\textsuperscript{75} In that event, the immigrant’s conditional residence status is terminated, and USCIS will begin a proceeding to remove the immigrant from the United States, unless the immigrant spouse either (a) obtains a waiver of the requirement that her husband sponsor her residency petition\textsuperscript{76} or (b) submits a successful VAWA self-petition.\textsuperscript{77}

As to the immigrant’s first option, there are four ways in which an immigrant spouse can obtain a waiver of the joint petition requirement:\textsuperscript{78} (1) death of the spouse;\textsuperscript{79} (2) extreme hardship to the immigrant spouse;\textsuperscript{80} (3) divorce or annulment;\textsuperscript{81} or (4) battery or extreme cruelty by the United States citizen or LPR spouse.\textsuperscript{82} To obtain the waiver, the immigrant must provide sufficient evidence to convince USCIS of the strength of the waiver claim. Two types of waivers are discussed here: the divorce waiver and the battery or extreme cruelty waiver (also known as the battered spouse waiver).

The divorce waiver is only available once a family or domestic relations court has entered a divorce judgment.\textsuperscript{83} Moreover, this application requires proof that the marriage was bona fide

\textsuperscript{\textendnote{75}{See 8 C.F.R. §216.4(a)(1); 8 C.F.R. §216.5(a)(1)(ii).\textendnote{76}{See Immigration and Nationality Act §204(a).\textendnote{77}{See Sfasciotti & Redmond, supra note 42, at 644. Following the passage of the Battered Immigrant Women Protection Act of 2000 (part of VAWA 2000 reauthorization), battered immigrant women may self-petition through VAWA for permanent resident status if their marriage terminated in divorce within two years prior to the filing of the self-petition and if the divorce was due to abuse. See also The Alabama Coalition Against Domestic Violence, “Violence Against Women Act of 2000 as Passed by the Senate and the House” for other changes that improved access to protection for immigrant women with the passage of VAWA 2000, available at http://www.acadv.org/VAWAbillsummary.html. (last visited August 1, 2010).\textendnote{78}{8 C.F.R. §216.4(a)(1); 8 C.F.R. §216.5(a)(1)(ii); see Greene, supra note 56, at 9.\textendnote{79}{To qualify for a waiver due to death of a spouse, the immigrant must present a copy of the spouse’s death certificate, the waiver application, and documentary evidence that the marriage was entered into in good faith. See Form I-751 for documentation required to show death of spouse at http://www.uscis.gov/files/form/I-751instr.pdf.\textendnote{80}{Extreme hardship is not defined in the statute or in the regulation. Instead, whether the immigrant spouse experienced extreme hardship is a discretionary judgment made by USCIS. See Immigration and Naturalization Service, Marriage Fraud Amendment Regulations, 53 FR 30011 (August 10, 1988). In considering an application for an extreme hardship waiver, only those factors that arose subsequent to the immigrant’s entry as a conditional permanent resident should be taken into account. Thus, the only relevant hardship for the immigrant must have existed during the two-year conditional residence period. See Immigration and Nationality Act §216(c)(4); 8 C.F.R. §216.5(e)(1); Sfasciotti & Redmond, supra note 42, at 646. Moreover, USCIS considers that removal from the United States presents a hardship for all immigrants and thus expects that the hardship indeed be "extreme." See 8 C.F.R. 1216.5(e)(1). Therefore, in practice, the eligibility and strict proof requirements for the extreme hardship waiver do not make it a viable option for most immigrants seeking immigration relief due to domestic violence.\textendnote{81}{Immigration and Nationality Act §216.\textendnote{82}{Immigration and Nationality Act §216.\textendnote{83}{See Memorandum to Director, Vermont Service Center, from William R. Yates, Associate Director of Operations, USCIS, Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of Marriage (April 10, 2003) [hereinafter Yates Memo], reprinted at 8 Bender's Immigr. Bull. 976, 980–81 (June 1, 2003). According to more-recent USCIS policy, a person filing for the divorce waiver may file the Form I-751 before a court has entered a final judgment for divorce. See USCIS Memorandum from Donald Neufeld, Acting Associate Director, I-751 Filed Prior to Termination of Marriage (April 3, 2009) [hereinafter Neufeld Memo], available at: http://www.uscis.gov/files/nativedocuments/751Filed_%20Prior_Termination_3apr09.pdf. Importantly, though, under this more recent policy, the person’s divorce waiver request is held in abeyance for 87 days while she attempts to finalize the divorce. As explained more fully at supra pp. 20–21, it is highly unlikely that a person can obtain a final divorce in less than three months, and perhaps even more difficult for a battered immigrant whose spouse is...}
at its inception. It is not surprising, then, that initiating or proceeding with a divorce soon after conditional residency is granted will call into question the good faith nature of the marriage. This creates a potential proof conundrum for the conditional resident battered immigrant: she must prove that the marriage was entered into in good faith while also seeking a waiver of the joint Petition to Remove Conditions due to a divorce. By seeking a waiver of the joint filing requirement on the divorce waiver grounds, she risks close scrutiny of the bona fides of her marriage. But, if she waits until her Petition to Remove Conditions is approved before initiating a divorce, she is forced to stay in an abusive marriage even longer.

Moreover, in many jurisdictions, there are required periods of the couple’s separation before a person can even file for divorce. In the District of Columbia, for example, if one spouse does not want to end the marriage, the other spouse has to wait one year of continued separation before filing an initial divorce complaint. Then, she may have to wait another four or five months before an initial court hearing on her divorce complaint. If the divorce is contested, the case could take years in family court. Thus, there is a high likelihood that the two-year conditional residency period will pass before she can obtain a final divorce judgment and qualify for a divorce waiver. Although the law allows her to file for a waiver after the two-year conditional residency period has lapsed, this option leaves her “out of status,” making her ineligible for work authorization and susceptible to removal. Thus, in these likely scenarios, the efficacy of the divorce waiver is mooted by the practicalities of the immigration legal system.

As another waiver option, a battered immigrant who began the joint petition process with her LPR or United States citizen spouse may file a waiver of the joint Petition to Remove Conditions filing requirement for reasons of battery or extreme cruelty. Alternatively, a battered immigrant who never obtained conditional residence with the help of her batterer may be eligible to seek immigration relief through a Form I-360 VAWA self-petition (or “VAWA self-petition”) and thereby obtain LPR status entirely on her own.

likely unwilling to cooperate with a request for a speedy divorce. Moreover, even in the best of circumstances where two parties are in full agreement about desiring the quickest divorce possible, statutory waiting periods and court backlogs make obtaining speedy divorces often impossible. If the battered immigrant does not obtain the divorce and file the final judgment with USCIS within the 87 days, her Form I-751 divorce waiver will be denied and she will be placed in removal proceedings.

84 See supra Part II.B; see Greene, supra note 56, 9–10.

85 See Neufeld Memo, supra note 83: “[L]egal separation or initiation of divorce or annulment proceedings may suggest that the [conditional resident] entered into the marriage for the sole purpose of procuring permanent resident status.”

86 Among U.S. jurisdictions, the statutory durational requirement that the couple live “separate and apart” from one another ranges from six months to three years. See NATIONAL SURVEY OF STATE LAWS 396–411 (Richard E. Leiter ed. 6th ed. 2008).

87 If the divorce is not voluntary on the part of both parties, then both parties to the marriage must live “separate and apart without cohabitation for a period of one year next preceding the commencement of the action.” D.C. CODE §16-904.

88 See Dinnerstein supra note 52, at 184 (citing 8 CFR §216.4(a)(2)).

89 Immigration and Nationality Act §216(c)(2)(C); 8 U.S.C. §1186a(c)(4)(C); see Greene, supra note 56, at 10.


91 Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, VAWA was the first piece of federal legislation enacted in the United States designed to help curb domestic violence. The purposes of the legislation were to (1) create a coordinated community response to domestic violence, sexual assault and stalking crimes; (2) strengthen federal penalties for repeat sex offenders, including the federal “rape shield law;” (3) create full faith and credit provisions, requiring states and territories to enforce protection orders issued by other states, tribes and territories; (4) create legal relief for battered immigrants, making it more difficult for abusers to use immigration law to prevent victims from calling the police or seeking safety; and (5) allow victims to seek civil
In both the battered spouse waiver application and the VAWA self-petition, the battered immigrant must establish, among other requirements,\(^\text{92}\) that she (1) entered into her marriage in good faith; and (2) suffered battery or extreme cruelty at the hands of her spouse.\(^\text{93}\) First, to prove that she entered into her marriage in good faith, she needs to explain her reasons for marrying her spouse—perhaps an odd requirement from the perspective of most married people. As one immigration law practitioner advises other lawyers helping battered immigrant clients: “While falling in love after a period of dating might be a common scenario . . . family pressure, arranged marriage, desire for economic stability for oneself and one’s children, and accidental pregnancy are also common and valid reasons—from an immigration perspective—for a decision to marry. However, the more your client’s experience differs from a theoretical American marriage experience, the more explaining you will need to do [in the immigration application].”\(^\text{94}\)

Additionally, USCIS expects tangible evidence to prove that the marriage was entered into in good faith. Thus, to prove the validity of her marriage, an immigrant should provide copies of her marriage certificate, joint financial documents, birth certificates of children in common, and any personal effects—like cards, emails or videos that indicate a loving relationship.\(^\text{95}\)

Second, a VAWA self-petitioner or battered spouse waiver applicant will need to prove that she suffered physical battery or extreme cruelty at the hands of her spouse. According to USCIS, battery or extreme cruelty includes but is not limited to being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.\(^\text{96}\)

To prove battery and/or extreme cruelty, a successful application should include evidence like police reports, protection orders or medical records.\(^\text{97}\) But because of deep fears and

\(^{92}\) A VAWA petitioner must also prove her good moral character and that she lived with her abuser spouse. Immigration and Nationality Act §204(a)(1)(A)–(D).

\(^{93}\) In the battered spouse waiver option, the immigrant is a conditional resident—and has thus already proven the bona fides of her marriage through her previous filings and interview(s). When filing the Petition to Remove Conditions and requesting a battered spouse waiver, she must again prove the bona fides of the marriage, though she may not be required to go through an interview. See Telephone Interview with Eric Unternahrer, supra note 63. If she did not go through this process and did not yet file the Application to Adjust or have an interview, she likely will have to prove the bona fides of her marriage in the battered spouse waiver application. See id.

\(^{94}\) Dinnerstein, supra note 52, at 171–72.

\(^{95}\) See, e.g., id.

\(^{96}\) Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution are also considered acts of extreme mental cruelty or battery. Immigration and Nationality Act §701(b)(4)(C)(1990); 8 CFR §216.5(e)(3)(i); see also Sfasciotti & Redmond, supra note 42, at 649.

\(^{97}\) See Greene, supra note 56, at 10; Crenshaw, supra note 19, at 1248 (“The evidence required to support a [battered spouse] waiver can ‘include, but is not limited to reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies.’”) (citing H.R. Rep. No. 723(I), 101st Cong. 2d Sess. 78 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6759)). Practitioner Dinnerstein notes that a lawyer for a battered immigrant seeking immigration relief must work to secure any supporting evidence for successful petitions: “Overall, the key idea is that lack of perceived hard evidence in the way of police reports or court records should never prevent an immigrant victim of domestic violence from seeking relief . . . Rather, it is your job as your client’s lawyer to recount your client’s story and include any supporting evidence that may be available.” Dinnerstein, supra note 52, at 175. This advice highlights the complexities of the application process and, thus, the
mistrust of authority figures, a battered immigrant is generally less likely than a United States citizen to call the police or follow up on police reports and prosecution.\textsuperscript{98} Similarly, she may not feel safe or comfortable going to court to procure a protection order.\textsuperscript{99} Or perhaps more fundamentally, she may not understand her eligibility for a protection order or know where and how she can get help to obtain one, especially given the dearth of legal service organizations serving immigrants.\textsuperscript{100} On a more general level, victims of domestic violence do not universally have documents detailing the abuse they suffered—or for that matter—documents that detail their valid marriage, like emails and Valentine’s Day cards. Many leave the home in the midst of violence, taking with them nothing more than their children and the clothes on their backs.\textsuperscript{101} Many choose not to go to the police or the courts for personal, strategic and other rational reasons. Unfortunately, this shortage of documentation may prove fatal to a victim’s quest in obtaining a waiver of the joint Application to Remove Conditions requirement or relief through the VAWA self-petition process.\textsuperscript{102}

Further, immigration relief through the VAWA self-petition process is only available to a small subset of immigrant domestic violence victims. In order to receive VAWA benefits, a victim can hold any immigration status herself but must be married to or divorced from either a United States citizen or an LPR.\textsuperscript{103} As the legislative history explains,\textsuperscript{104} the eligibility importance that a battered immigrant petitioner have competent counsel, a difficult proposition for the reasons explained in this Article.

\textsuperscript{98} \textit{See} Coker, \textit{Poor Women of Color}, supra note 19, at 1031 (discussing a common fear among Latino immigrants of police: “the experience of political repression or civil war [in their home countries] may affect the responses to battering of some Latina immigrants. These experiences may foster distrust of governmental authority and most especially of the police”); Crenshaw, supra note 19, at 1257 (“Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile.”).

\textsuperscript{99} \textit{See} Coker, \textit{Poor Women of Color}, supra note 19, at 1018 (“Women may be less sure than are lawyers and judges that legal orders and safety are equivalent . . . Interviews with battered women demonstrate that women sometimes drop protection orders or refuse to cooperate with prosecution because they were successful in using the threat of legal intervention to gain concessions from their abuser.”).

\textsuperscript{100} \textit{See infra} Part III.

\textsuperscript{101} At Ayuda, for example, it was not uncommon for clients to come in the doors carrying a suitcase and their children. Rosa, for example, came to Ayuda one day, having left her partner the evening before with only her children and their stroller. In a violent rage, her partner beat her and then ordered her and their children out of the home and refused to allow Rosa to get the children’s (ages 1 and 3) shoes or the baby’s bottle of milk sitting on the kitchen counter.

\textsuperscript{102} \textit{See} Crenshaw, \textit{supra} note 19, at 1248 (noting that for immigrant women, limited access to social service and legal resources makes it difficult for them to obtain the needed evidence for their waiver application).

\textsuperscript{103} Irrelevant to the focus of this Article, a petitioner may also receive VAWA relief if s/he is the parent or child of an abusive United States citizen or an LPR. \textit{See} 8 U.S.C. §1154(a)(1)(A)(v); Immigration and Nationality Act §204(a)(1)(A)(v).

\textsuperscript{104} \textit{See} H.R. Rep. 103-395 Subtitle D, Section 241: “This section amends sections 204(a)(1) (A) and (B) of the Immigration and Nationality Act to allow limited categories of alien spouses to self-petition for immediate relative status or second preference status. Under current law only the United States citizen or lawful permanent resident spouse is authorized to file a relative petition, and this spouse maintains full control over the petitioning process. He or she may withdraw the petition at any time for any reason. The purpose of permitting self-petitioning is to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse. . . . This section further amends Section 205 of the Immigration and Nationality Act to prevent abusive citizen and resident spouses from undermining an alien spouse’s self-petition by divorce. Under current law and regulations, divorce results in the automatic revocation of an immediate relative petition and a second preference petition. This section closes a loophole in the statute and ensures that in the case of abused spouses and abused children who are self-petitioning, divorce may not be the basis for revocation of the petition.”
requirement for VAWA derives from the fact that as a spouse of a United States citizen or an LPR, this immigrant spouse would be entitled to the option, with her spouse’s support, to petition to become a LPR through the family-based petition process. Because of her position as a battered wife, though, it is unlikely that her spouse would petition for her, and, more importantly, she should not be required to stay in an abusive marriage to secure immigration relief. Thus, because her spouse enjoys a presumption of permanency in this country, this particular battered spouse should benefit from the same presumption. Additionally, the VAWA eligibility limitation for battered spouses married to United States citizens or LPRs stems from Congress’s intent to prevent a batterer from using the family-based petitioning process as another tool of abusive control over his immigrant spouse.

Although the availability of VAWA benefits for this population provides essential relief and allows many victims to leave an abusive marriage, the eligibility limitation closes the door to scores of other victims who are married to immigrants outside of these two categories or who are not married to their abuser. Because the battered spouse of a person with temporary protected status or of an undocumented immigrant, for example, is not eligible for lawful residency through the family-based petition process, these victims are excluded from VAWA relief.

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105 See supra Part II.B.

106 There are other differences for those who pursue immigration stability through the conditional resident petitioning process versus the VAWA self-petitioning process. To petition for a spouse through the conditional resident process, the immigrant spouse must follow specific rules as to when she can come to the United States and what she is allowed to do while here (e.g., her ability to work and travel abroad). In contrast, typically, the VAWA self-petitioner must be present in the United States when she petitions and can file her petition as soon as she compiles the necessary information for her petition.

107 See supra note 104; see also Mayte Santacruz Benavidez, Learning from the Recent Interpretations of INA 245(a): Factors to Consider When Interpreting Immigration Law, 96 CAL. L. REV. 1603, 1620 (2008) (“the primary purpose for creating the self-petitioning process was to prevent the U.S. citizen or LPR batterer from using immigration law as a means to blackmail and control the noncitizen spouse”).

108 This Article focuses on the plight of the immigrant domestic violence victim who seeks a divorce and is met with multiple barriers in achieving divorce. Because of this focus on divorce, this Article does not discuss the extreme vulnerabilities faced by victimized immigrants who are not married to their abusers. Ironically, then, the institution of marriage again provides heightened protections to some (e.g., through the VAWA self-petition and the battered spouse waiver process), while ostracizing others who do not marry their abusive partners.

109 In response to the predicament of these victims of domestic violence, the VAWA 2000 reauthorization created a new category of visas, the U visa. The U visa is for victims of crime who cooperate with law enforcement in the investigation of the crime and/or the prosecution of the perpetrator. An immigrant with any type of immigration status can petition for the U visa, if eligible. The U visa aims to provide stability to those domestic violence victims who are not married to their abusers or whose abusive spouses are not United States citizens or lawful permanent residents. Yet, the requirement that the victim participate with law enforcement provides difficult as many immigrants are too afraid of the police and court system to bring charges against their batterer. Moreover, the U visa applicant must provide a certification letter from a law enforcement official to USCIS as part of her application, which also can be a burdensome obligation. See Memorandum to Director, Vermont Service Center, from William R. Yates, Associate Director of Operations, USCIS; Centralization of Interim Relief for U Nonimmigrant Status Applicants (Oct. 8, 2003), available at: http://www.uscis.gov/files/pressrelease/UCntrl100803.pdf for instructions on how to apply for a U visa, and the requirements, including a certification letter from a law enforcement official. Moreover, the VAWA reauthorization of 2009 incorporated employment authorization benefits for certain victims of domestic violence, including spouses of people in the country temporarily for employment purposes. See Dinnerstein, supra note 52, at 187 (“In addition to the immigration options for domestic violence that are essentially variations on benefits available to similarly situated nonabused family members of USCIs and LPRs, there is an employment authorization benefit for abused spouses of “A,” E-3, “G,” and “H” visa holders that does not lead to LPR status.”) (citing VAWA 2005 at §814(c), codified at Immigration and Nationality Act §106)).
Furthermore, in order to qualify for VAWA, the self-petitioner may be divorced from the abusive spouse but cannot have been divorced for more than two years before filing for VAWA relief. It is unclear why the time limitation is two years, and not longer. For the fortunate victims who are able to successfully obtain a divorce, they may not immediately know about their eligibility for VAWA relief. Some victims of violence self-petition for VAWA relief and decide not to pursue a divorce—perhaps for personal, financial or religious reasons. USCIS officials who have not received proper training on the dynamics and intricacies of domestic violence may thus raise red flags about the self-petitioner’s eligibility for immigration relief if she has not pursued a divorce. Indeed, these non-divorced women could thus encounter harsh questioning about the validity of their requests for relief, insinuating that if the violence had been that bad, why did she not divorce her husband? In other words, an immigrant may face difficulties if she pursues a divorce before petitioning for VAWA (through proof and time-limit hurdles), and she may face difficulties if she pursues VAWA relief before she seeks a divorce (at the hands of an incredulous factfinder).

Finally, the VAWA self-petitioning process—like the battered spouse waiver application process— is complicated and can be daunting for even an experienced immigration practitioner, let alone an abused immigrant trying to seek relief on her own. If battered immigrants do not have access to competent lawyers, it is all the more difficult to write and file successful petitions and provide successful testimony and appearances at subsequent immigration interviews and/or hearings. If a victim of violence with unstable immigration status has managed to remain in

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111 See id. The two-year provision was added by the Battered Immigrant Women Protection Act of 1999 to provide relief for battered immigrant spouses. Prior to the passage of this bill, divorced immigrant spouses could not apply for VAWA relief. Although it is unclear why two years, Congress cited (with little explanation) fraud concerns as reasons to limit the window for self-petitioning by immigrant spouses. See Hearing Before the Subcommittee on Immigration and Claims on the Committee on the Judiciary House of Representatives, H.R. 3083, July 2000, Serial No. 116, pp 30, 73.
112 See Dinnerstein, supra note 52, at 182.
113 See id. The VAWA Form I-360 self-petition process itself does not typically involve an in-person interview, though USCIS retains discretion to interview petitioners for any reason. Once the successful VAWA self-petitioner applies to become a LPR through the Form I-485, though, she will be interviewed to determine her eligibility for the immigration status. See Dinnerstein, supra note 52, at 182. During this interview process, a self-petitioner may encounter skeptical interviewers poorly trained in the dynamics of domestic violence or who wish to re-adjudicate the merits of the VAWA I-360 self-petition. See id. (“[S]ome DAOs [District Adjudication Officer] will seek [improperly] to re-adjudicate the VAWA self-petition, questioning the approved VAWA self-petitioner about the facts of her case and the evidence submitted.”).
114 It is not surprising that immigrants represented by counsel are far more successful in their claims for immigration relief than immigrants who proceed alone. See, e.g., Andrew L. Schoenholtz & Jonathan Jacobs, The State of Asylum Representation: Ideas for Change, 16 GEO. IMMIGR. L.J. 739, 743 (2002) (analyzing INS Asylum Office data for fiscal years 1998 and 1999 and noting that asylum seekers seeking affirmative asylum—i.e., in which the applicant applies for asylum prior to the initiation of removal proceedings—who were represented by counsel were six times more likely to be granted asylum than unrepresented asylum seekers).
115 Depending on the procedural posture of the immigrant’s case and her immigration status, she may have to appear at a hearing(s) before an immigration judge. See Dinnerstein, supra note 52, at 181. The absence of counsel in those cases can present a terrifying experience: “The government will be on one side with its awesome power, extensive institutional experience, and sophisticated understanding of the law. An immigration judge will be presiding, who might be sympathetic to the immigrant’s story, but who would benefit from an adversarial presentation. And the immigrant will often be standing all alone, unfamiliar with the complex web of laws that will determine whether he or she stays in the United States or is sent to a foreign country far from his or her family. A ruling from the judge will determine whether the immigrant goes or is permitted to stay, while a single inadvertent misstep from the immigrant may result in the waiver of valuable rights.” Jennifer L. Colyer, Sarah French Russell,
the shadows and undetected by USCIS, filing any petition for immigration relief opens the door to her detection and perhaps removal from the country. For all of these reasons, filing a compelling and complete petition or application is critical; having an experienced, competent lawyer is crucial.

The difficulties surrounding the intersection of divorce relief and immigration law are especially complicated for a poor immigrant domestic violence victim. Facing hard questions about which option to choose—leave an abusive spouse and jeopardize immigration status; or stay with an abusive spouse and hope that an immigration remedy presents itself—assumes that the victim even knows of the possibility of a remedy. Moreover, the dearth of legal service providers representing low-income litigants in divorce proceedings places abused spouses in precarious legal positions. Funding restrictions that prohibit lawyers from providing divorce representation result in drastic consequences for these battered immigrants seeking freedom from abusive marriages. Without a lawyer, she risks her chances at divorce, immigration relief—and possibly—she risks her own removal from the country.

III. NON-PROFIT FUNDING RESTRICTIONS OBSTRUCT IMMIGRANTS’ ABILITY TO OBTAIN DIVORCE RELIEF

Understanding the precarious position of immigrant victims of domestic violence caught in the intersecting web of divorce and immigration law, an easy suggestion to ameliorate these difficulties would be to ensure that vulnerable clients receive competent and effective attorney assistance. Unfortunately, the current state of public and private funding for services to poor domestic violence victims does not take into account the realities of this population. Thus, although battered immigrants desperately need expert advice and representation in securing divorce relief, funding for family law services to domestic violence victims is often influenced by philosophical preferences for representation in child custody and protection order proceedings, which are either explicitly or implicitly favored over divorce representation. In light of these funding preferences—and despite the fact that those forms of relief are often incomplete from the point of view of domestic violence victims—few qualified legal service providers are able to offer divorce representation. This funding crisis represents another entrenched barrier to divorce relief.

As essential background to this discussion, this Section first briefly discusses the history of domestic violence funding in the United States. Then, this Section explores the current state of public and private funding restrictions for divorce services for poor immigrant victims of domestic violence.

The current state of funding priorities is best understood by first reviewing a brief history of governmental intervention and response to domestic violence. Simply put, there was no governmental response to domestic violence to speak of until the battered women’s movement came into prominence in the 1960’s. Well into the mid- and late-twentieth century, the
The predominant attitude towards family law in the United States was best summarized by the “family privacy theory,” which holds that “out of respect of the sanctity and intimacy of the family, the legal system shouldn’t intervene in domestic violence situations and problems between spouses.” Thus, because courts and legislators (who historically have been men) deemed that what happened in a family should remain in the family and that interventions are not needed, there was no movement by funding sources to help domestic violence victims through legal interventions.

The shift to assisting victims of domestic violence and allocating the government funding to back up such efforts began with the 1984 passage of the federal Family Violence Prevention and Services Act (FVPSA), which is the precursor to the 1994 VAWA. With FVPSA funds, between 1986 and 1994 the number of programs that served victims of domestic violence increased by more than 50%. This critical change in prioritizing the importance of assisting battered women was made possible in part by the first dedicated government and mainstream private foundation funding streams. Such streams were bolstered by changing governmental philosophy and academic research that explored the phenomenon of domestic violence and its negative effects on women and families. Thus, this era marks the first federal governmental

Europe where wives were legally considered their husbands’ chattel, and a disobedient woman risked public punishment. . . . From the early colonial period onward, American courts followed British law by affirming the husband’s right of ‘domestic chastisement.’ In the words of the Mississippi Supreme Court, this rule allowed a husband to use ‘salutary restraints in every case of a wife’s misbehavior, without being subjected to vexatious prosecutions resulting in the mutual discredit and shame of all parties concerned.’ It was not until the late 19th century that the states finally abandoned the explicit endorsement of a husband’s use of physical force to discipline his wife.”

Professor Leigh Goodmark writes about the effects on the culture of privacy in the historical ignorance of law enforcement to arrest and prosecute batterers who abuse their partners: “Before the battered women’s movement began to publicly characterize attacks on married women as criminal assaults, abuse of one’s wife was widely viewed as a husband’s prerogative. State authorities were inclined to ignore such acts as beyond the province of the state, regardless of the injury inflicted on the victim or her pleas for assistance.”

Professor Kimberlé Crenshaw discusses the family privacy theory in the context of racial and cultural suppression of domestic violence in her discussion of how antiracist politics in some ways enforce a culture of domestic violence against poor women and women of color. See Crenshaw, supra note 19, at 1257. She writes: “There is also a more generalized community ethic [in communities of color] against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people. The home is not simply a man’s castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society. However, but for this ‘safe haven’ in many cases, women of color victimized by violence might otherwise seek help.”

Examples in popular culture also fueled the tide towards legislative advocacy for anti-domestic violence efforts. See, e.g., Daniel B. Wood, Simpson Case Spotlights Spouse Abuse in US, CHRISTIAN SCI. MONITOR, June 23, 1994, at 2. Mr. Wood discusses how the O.J. Simpson murder trial raised attention to domestic violence issues across the country, spurring advocacy organizations to lobby Congress for legislative reforms.
recognition of the critical need for funding dollars to combat the problem of domestic violence in the United States.

This increased and necessary emphasis on funding services for domestic violence victims in the last three decades is a welcome reallocation of priorities. However, the shift to services to victims of violence does not equate to universal representation for the problems that victims face. Rather, funding streams place high priority on assisting victims of violence with discrete areas of legal representation, mainly protection order proceedings and child custody and child support cases. Critically absent from these priorities is funding dedicated to assisting battered women seek divorces from their abusive spouses.

Moreover, this shift in funding domestic violence services brought new conditions and demands on organizations and advocates that highlighted certain types of services and representation and ignored or de-emphasized others. To accommodate the new conditions brought by new funding, domestic violence advocacy organizations became more hierarchical and more attuned to the demands of governmental funding. Organizational bureaucracies were established, often tied to the demands of government grant objectives, rather than identified community needs. Domestic violence service providers became less focused on victim empowerment and victim needs; and, as a result, they significantly changed the ways that they helped victim clients in two ways. First, service providers limited their missions and services to fit with a limited niche focus of their agencies. Second, because of funding demands, service providers changed their mode of service delivery to victims to focus on measurable goals or outcomes that did not necessarily match the stated goals of their clients.

These shifts in focus resulted in important and detrimental effects on organizations’ abilities to provide targeted services to the range of problems victims of domestic violence face. First, requiring that domestic violence organizations specialize in services that fit a stated mission often results in advocates’ inability to perform holistic services for victims. Instead, agencies tailor their available services based solely on the agency’s specialization, which is often set by funding mandates and requirements. This focused delivery has been defined as service-

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123 Moreover, funding mechanisms embrace policies based on standards that are largely white and middle-class and that do not take into account the experiences of poor women of color, including immigrants. See Crenshaw, supra note 19, at 1250 (“These uniform standards of need [i.e., those that are formulated from a white, middle-class victim perspective] ignore the fact that different needs often demand different priorities in terms of resource allocation, and consequently, these standards hinder the ability of [domestic violence] counselors to address the needs of nonwhite and poor women”); see also Coker, Poor Women of Color, supra note 19 at 1025–26. Further, reaching out to immigrant victims of violence who do not conform to this universal standard often means increased costs because of demands for interpretation and other specialized needs in accessing services. Yet, these types of advocacy are not always seen in terms of quantifiable measures of success required by funding sources. See Crenshaw, supra note 19, at 1251 (“Increased costs are but one consequence of serving people who cannot be reached by mainstream channels of information.”).

124 Goodman & Epstein, supra note 117, at 38.

125 Id. at 38–39. Professors Goodman and Epstein discuss five reasons that the anti-domestic violence movement shifted from a survivor-focused model to a model focused on the needs that came with government intervention and funding, including the two noted above. In addition, they note that “domestic violence service providers faced increasing pressure to (1) distance themselves from the organized antipoverty movement; (2) develop conventional hierarchical organizational structures and hire traditionally credentialed staff; (3) specialize so that services fit with the limited mission of the agencies of which they were a part; (4) focus on measurable ‘outcomes’ that were often distinct from the stated personal needs of individual survivors; and (5) develop clear criteria that limited the range of victims eligible to gain shelter entry.” Id.

126 Id. at 42. See also Goodmark, supra note 20, at 30 (“In the world of services for women who have been battered, however, empowerment is often defined by what service providers can give to women who have been
defined advocacy in contrast with victim-defined advocacy, which serves the victim based on her own identified needs. Such practices continue as agencies have specific narrow missions, spreading the funding wealth among agencies while creating segregated and piecemeal services for clients that do not always meet the clients’ needs—including, their ability to obtain a divorce from abusive spouses. As an unintended result, agencies become embedded in their niche of service and develop territorial sensitivities about their work and place within the advocacy community. Such sensitivities are also due to the fact that funding sources are always limited, and to maintain even status quo levels of service and staff, each organization must guard its advocacy territory in the eyes of funding mechanisms.

A second way in which funding has fundamentally and negatively affected service delivery to clients, resulting in a lack of divorce services, stems from the numerous conditions and restrictions set by funders on domestic violence organizations to achieve measurable results. Thus, agency missions became defined by numbers—how many clients did they see; how many protection orders did they get; how many pamphlets did they give out—rather than what difference they made in eradicating domestic violence in the lives of individuals and communities. Once again, to hold onto their closely guarded funding territories, agencies narrowly define their missions and goals so as to appeal to funding mechanisms’ demand for quick and quantifiable results.

As a result, legal service provision is geared towards quick, quantifiable achievements that satisfy grant managers and funding decision-makers. Long-term relief that is difficult to quantify and results in small numbers (e.g., a year-long divorce case on paper only represents a victory for one client) is not attractive for funding sources. Competing for a smaller and smaller piece of the funding pie—as dollars decrease and more organizations compete for them—legal service providers aim instead to showcase their large achievements (e.g., provided an advice and counsel session to 200 clients in the walk-in clinic) rather than take on the potentially more complicated and time-consuming divorce litigation.

Currently, the largest single funding stream for civil legal assistance for domestic violence victims in the United States is through federal VAWA monies. Administered by the Office of Violence Against Women (OVW), an agency of the United States Department of Justice, the VAWA federal grant process provides hundreds of millions of dollars to social and legal service organizations throughout the country. The VAWA grant process is governed by statutory mandates in VAWA 1994 and the subsequent reauthorizations in 2000, 2005 and 2009. Importantly, none of the statutory mandates expressly imposes any prohibitions on funding for divorce services.

battered . . . Too often, though, those choices have been constrained by what service providers, advocates, and policy makers deem acceptable alternatives for women who have been battered”).


In a parallel results-model funding scheme from the federal government’s insistence on promotion of marriage in the PRWORA efforts (see infra p.34 and accompanying relevant footnotes), in 2000, the U.S. Department of Health and Human Services devised a set of rules and set aside $10 million to reward the “ten states that had the greatest increase in the proportion of children living in homes headed by a married couple.” See Gustafson, supra note 36, at 289 & n.99.

Goodman and Epstein, supra note 117, at 43–44.

See OVW Overview of Grant Processes at http://www.ovw.usdoj.gov/overview.htm (last visited August 1, 2010).

See Immigration and Nationality Act §204.
The VAWA statute directs funding into various programs. Typically, the federal OVW allocates funding to the states and territories, which then have their individual state office or agency disseminate the funding to local agencies and organizations. The Legal Assistance to Victims (LAV) grant is the largest and the most competitive of the OVW grant programs. The LAV grant pays legal service providers to assist victims of domestic violence with holistic legal representation. Importantly, according to the OVW policy handbook for LAV grantees (that is, those organizations that have been awarded a federal LAV grant), the LAV grant allows attorneys to represent victims of domestic violence in divorce proceedings and contemplates that such assistance may be an essential component to helping the victim. Thus, an LAV grantee “must provide comprehensive legal services to sexual assault, stalking and domestic violence victims. Services should include representation and/or referral for emergency and nonemergency protective order hearings and other legal matters arising as a consequence of the abuse or violence, including family, immigration, administrative agency, or housing matters, protection or stay away order proceedings or other similar matters.” Thus, the LAV grant guidelines recognize a broad array of legal issues that a domestic violence victim may face because of the abuse and require service providers to meet these varied needs. In practice, attorneys funded through LAV grants are able to represent a victim of domestic violence in a myriad of proceedings, including in her divorce.

On the other extreme, the OVW Services*Training*Officers* Prosecutors (STOP) grant program, another large font of monies dedicated to helping victims of domestic violence (among other client populations), disallows the provision of divorce representation. According to the STOP provision in the VAWA statute, STOP monies are designed to “develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women.” STOP grants may be used (among other purposes) for the purpose of “developing, enlarging, or strengthening victim service programs, including sexual assault, domestic violence and dating violence programs, [and] developing or improving delivery of victim services to underserved populations.” Thus, in the statutory provisions governing the STOP program and its implementation, there are no concrete barriers to providing divorce representation to domestic violence victims.

To help sub-grantee jurisdictions manage their STOP program funds, OVW has created guidelines outlining permissible and impermissible uses of STOP grant money. These guidelines serve as guidance for grantee organizations and to those agencies contemplating a grant application. In OVW’s Frequently Asked Questions document to the state sub-grantees about the administration of STOP monies, OVW asserts that the “primary purpose of legal

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133 For example, the federal OVW provides monies to the District of Columbia Office of Victim Services, which in turn solicits proposals from Washington, D.C. providers to award the federal pass-through dollars.
135 See id.
137 Id.
139 Id. at (b)(5).
representation [provided by grantees] must be to protect the victim’s safety. Funding through the STOP program was not intended to pay the fees charged by attorneys for divorce services, legal separations, and other actions falling outside the scope of the statute. Support for legal services, such as custody or visitation, must be examined on a case-by-case basis, [and] must be directly related to enhancing a victim’s safety.”

This interpretation is not based on statutory language—the statute as quoted above authorizes funds for “victim services.” The statute does not limit services to “victim safety,” and it certainly does not define services for “victim safety” in a way that would exclude divorce-related services. Nor is the prohibition against providing divorce services consistent with the realities of countless battered immigrant victims of violence whose ongoing safety is contingent upon their ability to divorce their spouses. Nor does OVW explain why custody and visitation proceedings can be related to victim safety on a “case-by-case” basis, while divorce proceedings cannot. Nevertheless, because OVW has interpreted the statute to prohibit funding for divorce representation, providers cannot use STOP funds for that purpose. This distinction has shaped the standard practice for legal service providers: custody and visitation representation are allowed while divorce services are excluded.

Finally, to illustrate the cycle pervading the funding-service system, policy advocates do not pursue additional avenues of funding to provide divorce services—even to the benign extent of questioning why an LAV grant allows divorce representation while a STOP grant does not. The reasoning is simple: such advocacy has little policymaker support. Approving millions of dollars to encourage poor people to marry, legislators are hardly moved to embrace legal assistance for divorce. By not helping low-income immigrant domestic violence victims obtain divorce services through government-funded legal representation, policymakers easily ignore a largely voiceless and powerless population.

Traditional academics, policymakers, lawyers and judges—who are still largely white and American-born—are not attuned to the plight of this community. Further, as foreign-born people, many of whom have unstable immigration status, these victims of violence have no political clout and often cannot vote. Thus, there is no individual benefit for policymakers to consider the fate of low-income immigrant victims of domestic violence when determining legislative and funding priorities.

IV. THE REFORM CHALLENGE: POLITICAL AND CULTURAL DISTASTE FOR DIVORCE INFLUENCES LEGISLATION AND POLICY

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141 See supra Part III.

142 See Kevin R. Johnson, The Intersection of Race and Class in Immigration Law and Enforcement, 72 LAW & CONTEMP. PROBS. 1, 18 (2009) (discussing the political implications of the inability of certain racial and ethnic groups of immigrants to vote in the United States); Kevin R. Johnson, A Handicapped, Not “Sleeping” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities, 96 CAL. L. REV. 1259, 1262–63 (2008) (“Latina/os as racial and political minorities often have suffered the disfavor of the majority. The group’s lack of political power as a minority is exacerbated by an oft-ignored fact: a significant portion of the community is composed of noncitizens, who lack the right to vote. With only about 75% of all Latina/os in the United States being U.S. citizens (with a large percentage (34.3%) compared to whites (25.5%) under 18 and not eligible to vote), the group enjoys substantially less raw political power than minorities of roughly equal numbers with higher percentages of citizens, such as the African American community. Immigrants themselves have historically been lightning rods for fear and loathing among the general public. A history of discrimination is vividly apparent in the majority’s repeated passage of initiatives that have injured Latina/os and immigrants.”).
The problems and challenges facing the immigrant victim of domestic violence are varied and complex. Met with difficulties in navigating cultural differences and misunderstandings; coping with language barriers; and fearing police and other authority figures, she faces many obstacles in daily life. Moreover, if she has a precarious immigration status, she may have to contend with how separation and divorce from an abusive spouse could affect her immigration stability. If she seeks a divorce, she also may encounter new challenges when she tries to find a lawyer or seeks relief through the court system.

Keeping in mind these varied and interconnected challenges, the law must meet the victim where her needs lie, rather than where it determines she should be. In providing help, resources and—ultimately legal representation—to a low-income immigrant victim of domestic violence, advocates and funding mechanisms must account for the realities of the victim. Achieving this goal will require legislative reforms, funding source reforms, and reforms that speak to advocacy priorities.

Yet, undercutting this critical reform movement are long-standing and deeply-embedded political and cultural preferences that disfavor divorce. Traditional American attitudes promoting marriage and disfavoring divorce have had a dramatic effect on legislation governing immigration law and funding policy for legal service providers. This Section first discusses how this preference to uphold the marriage institution at all costs has led to ineffective—and at times, harmful—legislation and policies affecting battered immigrants seeking to divorce. Finally, this Section concludes with suggestions for legislative, funding source and advocacy reforms that will clear a path for battered immigrants to obtain freedom from abusive spouses through divorce relief.

A. AN HISTORICAL PREFERENCE FOR UPHOLDING MARRIAGE IMPOSES BARRIERS FOR BATTERED IMMIGRANTS SEEKING A DIVORCE

In the United States, divorce has been viewed with skepticism rooted in traditional attitudes towards marriage and the family. Even today, many legislators, policymakers and non-profit funding decision-makers consider divorce to be a mechanism used by spouses to get hold of property or financial security, resulting in broken families, harm to children and an overall

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143 Professor Donna Coker argues that domestic violence laws and policies must embrace a material resources test, which calls for “in every area of domestic violence intervention strategy . . . priority should be given to those law and policies which improve women’s access to material resources. . . . The material resources test requires first that priority be given to those programs, laws or policies that provide women with direct aid.” Coker, Poor Women of Color, supra note 19, at 1009–10 (2000). She further argues that the “standard for determining the impact on material resources should be the situation of women in the greatest need who are most dramatically affected by inequalities of gender, race, and class. In other words, poor women, and in most circumstances, poor women of color should provide the standard of measurement.” Id. at 1010. Similarly, Professor Mari Matsuda writes on the use of the anti-subordination principle in testing equality in law by measuring the effects on the laws on the population who is most affected by policies of inequality and argues that all should embrace this phenomenon. See, e.g., Mari Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323, 325–26 (“The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge. . . . Looking to the bottom for ideas about law will tap a valuable source previously overlooked by legal philosophers.”).
detriment to society. Thus, while there are few legal barriers to divorce for those who can afford it, when it comes to non-profit or publicly-funded assistance, the hostility towards divorce often takes precedence over the needs of low-income people and of victims of domestic violence.

This hostility towards divorce derives from both legal and cultural views of marriage and how marriage defines the “family” in American society. The cultural origins of the preeminent importance of the marriage institution have been widely debated, discussed and researched. And while there are differences in the myriad approaches to valuing marriage, they hold in common the view that because marriage is an inherently worthy institution, divorce is inherently suspect. This widespread view of divorce as a threat to the institution of marriage.

144 See, e.g., ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 72 & n.4 (2007) (noting researchers who have used their findings on the positive correlation between marriage and happiness to advocate for marriage as social policy that would benefit society).

145 See supra Part II.

146 Professor Kaaryn Gustafson cites statistics about American families headed by single parents and those headed by two parents who cohabit but are not married. See Gustafson, supra note 36, at 277–79. She notes the continued pervasiveness of the cultural distaste for the “non-traditional” family form: “There has always been a diversity of family forms. But the norm of marriage-centered family and married living is dissipating. Still, it is taking a long time for many Americans to loosen their grip on the idea that children whose biological fathers are not legally married to their biological mothers are ‘illegitimate.’” Id. at 279; see also Bernstein, supra note 36, at 135–137 & n.19 (discussing and citing to arguments for the dissolution of the marriage institution as the hallmark of what we define as “family”).

147 For example, one school of thought holds that because the institution of marriage incorporates traditional views of the role of husband (i.e., man) and wife (i.e., woman), marriage is worthy of celebration for that reason alone. See West, supra note 144, at 57 & fn. 1 (discussing the “neonatural” defense of marriage and its most vocal proponents); Gerard V. Bradley, Law and the Culture of Marriage, 18 NOTRE DAME J. L. ETHICS AND PUB. POL’Y 194, 198 (2004) (“Marriage does not exist for law, or for the polity, or for the success of the nation-state . . . Things are the other way around. Law supports certain institutions of civil society for the sake of the common good. The common good is that ensemble of social conditions which make it more or less easy for persons to perfect themselves, to live worthwhile lives. Law supports these institutions for the sake of genuine human flourishing.”); Robert P. George and Gerard V. Bradley, Marriage and the Liberal Imagination, 84 GEO. L.J. 306 (1995). Another conception of marriage regards marriage as a civil and legal institution that makes its participants happy, healthy and richer and believes that marriage is worthwhile based on these beneficial effects. See West, supra note 144, at 70 & fn. 35 (discussing the “social utilitarian” defense of marriage and citing principally the work of Linda Waite and Maggie Gallagher: THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY (2000)). Authors Waite and Gallagher discuss research findings that support the power of marriage in making married people happier than unmarried people: “When it comes to avoiding misery, a wedding band helps. Married men and women report less depression, less anxiety, and lower levels of other types of psychological distress than do those who are single, divorced, or widowed.” Waite and Gallagher, supra note 147, at 67. Third, a community view of marriage holds marriage as an expression of a virtuous character that upholds a sense of dedication to intimate others, above a self-centered paradigm. See West, supra note 144, at 89 (noting that, under this view, the values of marriage – commitment and responsibility – are threatened by the modern day hyperindividualist and consumer-oriented society that emphasizes individual gain); see also Regan, supra note 36, at 123.

148 Of course, for every valuation and promotion of marriage, there is a critique. Critics of the legal institution and its parallel insistence on defining family as occurring within marriage abound. See, e.g., Bernstein, supra note 36, at 135–36 & n.19, 20, 21 (discussing many of the writers—legal theorists, philosophers and authors of other perspectives—who propose the abolition of marriage). Family law expert Martha Albertson Fineman is widely credited as one of the most vocal and persistent critic on the institution of government-sponsored and supported marriage. See, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228 (1995) (“we should abolish marriage as a legal category and with it any privilege based on sexual affiliation”); see also Gustafson, supra note 36, at 300–02.

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marriage—from whatever philosophical, religious, economic and/or personal basis—is readily detectable in the ways in which our government places legislative roadblocks in the immigration law process and funds non-profit legal and social services for low-income women and victims of domestic violence.\(^\text{149}\)

Indeed, even in the domestic violence context, divorce proceedings are often viewed as tinged with pettiness, rather than understood as the remediation of an inherent power imbalance within the marital relationship. These attitudes fail to account for the circumstances faced by a domestic violence victim. For example, as part of a request for a Civil Protection Order (CPO) in the District of Columbia, clients can petition for certain forms of relief, including financial relief, spousal support and the return of joint property.\(^\text{150}\) In the absence of a court order mandating spousal support or property distribution, many abusers are very unlikely to provide these items to a victimized spouse or even to engage in rational mediations about the distribution of property. Further, after living in an abusive marriage where she may have been unable to exert control over her financial status, she may feel especially empowered through the court process to demand she be treated equally in the distribution of the couple’s assets. Alicia, for example, in her CPO case insisted on obtaining possession and use of the couple’s car, even though it was old and unreliable, because she worked hard to buy that car and relied on it to take her children to after-school events. Demanding the car in her CPO case, though, was about much more than Alicia needing the material asset. It was a chance, at last, to be in control of her life.

The importance of divorce in the lives of poor immigrant domestic violence victims is also lost on policymakers and funding decision-makers, who adhere to an idealized and outdated view of the importance of the nuclear family, bound together through the legal and cultural tie of marriage. Rather than advocating for the rights of people to end their unhealthy marriages, policymakers instead focus on and fund “marriage promotion” initiatives ostensibly intended to staunch the effects of poor, unmarried mothers raising their children in poverty.\(^\text{151}\) In its groundbreaking 1996 overhaul of the welfare system, implementing The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Congress even touted marriage in its legislative findings, stating that “Marriage is the foundation of a successful society;” and “Marriage is an essential institution of a successful society which promotes the interests of children.”\(^\text{152}\) PRWORA’s Congressional findings declared the importance of marriage and

\(^{149}\) Arguing to reframe policy debates away from the preoccupation with marriage, Professor Gustafson notes the fallacies embraced by policymakers: “Policymakers tend to ignore some fundamental realities, namely: that families are not always carefully crafted nuclear structures with a heterosexual man serving as the nucleus; that family structures tend to follow the economic and caretaking needs of family members rather than idealized notions of family; that families are amorphous entities, with interdependence often extending between households: that government policies tend to do a poor job of recognizing the complexity of family; and that government’s narrow focus on marriage rather than broader attention to family has left many families legally and economically vulnerable.” Gustafson, supra note 36, at 272.

See supra Part III, discussing the prohibitions and restrictions on legal service providers’ abilities to represent victims of violence in divorce proceedings.

\(^{150}\) See supra note 4.

\(^{151}\) See, e.g., Gustafson, supra note 36, at 285–86 (policies developed in the last two decades “have reduced cash resources for low-income women and their children while establishing streams of funding to educate low-income families about the virtues of marriage and married fatherhood.”).

childbearing within marriage, rather than focus on the detrimental effects of poverty on children and families.\textsuperscript{153}

Moreover, by heavily regulating the intact marriage as it appears in the immigration system—effectively forcing immigrants to stay married to their United States citizen or LPR spouses to secure immigration relief, even if living in a marriage infected by domestic violence—\textsuperscript{154} American law and policy hinders immigrants’ freedom to end unhealthy and unhappy marriages. Because poor people and, particularly poor immigrants, are a disenfranchised and culturally and politically marginalized group, there are few voices advocating for a change in the way our laws and policy affect their rights to obtain legal representation and meaningful divorce relief.\textsuperscript{155}

Importantly—and for some reason, lost in this debate— a preference for upholding marriage as a worthy institution is \textit{not} mutually exclusive with a policy that accepts the importance of divorce. Indeed, in a marriage infected by domestic violence, the institution of marriage is marred. Thus, even if the legal and cultural institution of marriage should be upheld for \textit{all} of the reasons touted by scholars and politicians, a clear distinction should be made between a “healthy” marriage and one defined by violence.\textsuperscript{156} Valuing an unhealthy, abusive marriage degrades the institution of marriage as a whole for all of us. Recognizing the importance of divorce for victims of domestic violence only strengthens the argument for the benefits and importance of healthy marriage. To be sure, a marriage based on power imbalances and abuse is no marriage at all.\textsuperscript{157}

Against this backdrop of the political, cultural and social distaste for divorce, the challenge to reform existing immigration laws and funding source policies becomes clear. Yet, implementing critical reforms is necessary to effectively help low-income immigrant victims of domestic violence secure vital long-term relief through filing and securing divorces while achieving immigration status stability.

B. LEGISLATIVE REFORMS

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\textsuperscript{153} See Gustafson, \textit{supra} note 36, at 287–88 & n.91; Murray, \textit{supra} note 36, at 404 (“Although the [PRWORA] reform efforts ostensibly were focused on facilitating the transition from welfare to regular employment and economic independence, marriage was offered as an effective way to privatize economic dependency, eliminating the need for public support and intervention.”). Federal funding for marriage promotion initiatives continued and expanded under the George W. Bush administration, including $90 million in 2002–2003 for marriage-related research and demonstration projects and $150 million in 2006 for five years of marriage promotion efforts by the states. \textit{See} Gustafson, \textit{supra} note 36, at 289–90. In these PRWORA revisions, the correlations between marriage and lifting oneself out of poverty were even more pronounced. \textit{See} Onwuachi-Willig, \textit{supra} note 36, at 1678 & 1680 (“Even more important to President Bush’s plan and to H.R. 240 [the 2005 House version of PRWORA reform that directly associated out-of-wedlock births with an increased likelihood of welfare], however, is the underlying theory that marriage will domesticate welfare recipients to the point that government will no longer be responsible for supporting people who currently depend on public benefits”).

\textsuperscript{154} See \textit{supra} Part II.B, discussing the family-based petitioning process.

\textsuperscript{155} See Johnson, \textit{supra} note 142.

\textsuperscript{156} Citing a survey of low-income parents, Professor Gustafson notes that “respondents showed negative attitudes towards marriage when other factors such as high levels of conflict, violence, and partners with drug/alcohol problems were present.” Gustafson, \textit{supra} note 36, at 294 & n.127.

\textsuperscript{157} Statistics showing that having two married parents is better for children than being raised by a single parent does not take into account well-established research showing that children may suffer significant harm when they witness one of their parents abusing the other. \textit{See} Lundy Bancroft & Jay G. Silverman, \textit{The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics} (2000).
First, reform in immigration laws can provide critical stability to immigrant victims of violence. The legislation governing the joint spousal petition process must be reformed so that it does not obstruct victims of domestic violence from divorcing their abusive spouses. Survivor-focused immigration law relief must recognize a victim’s potentially precarious situation if she seeks a divorce. USCIS has legitimate reasons to require immigrants to prove that they entered into a bona fide marriage so as not to encourage fraudulent immigration claims through family-based residency petitions. The petitioning process, therefore, should be shaped by a common-sense approach for those who have to prove both their good faith marriage and their need for a divorce or separation due to their spouse’s abuse. Filing for a battered spouse or divorce waiver or self-petitioning for VAWA relief should not inhibit a finding that the marriage was entered into in good faith. Thus, compelling and credible evidence through, for example, affidavits—in which the immigrant and any other friends, family or advocates can vouch for her marriage and/or the abuse she suffered should amount to sufficient proof in the waiver application.\footnote{Because a domestic violence victim—especially one with precarious immigration status—may not call the police or pursue other avenues of help, the policy should not expect such elements of proof for a successful waiver application. Rather, if a petitioner is able to make a compelling case, then documentary proof should be corroborating—but not essential—elements to a successful waiver application.}

Moreover, as the compilation of proof—even affidavit proof—requires a degree of knowledge and savvy on the part of the immigrant, the current proof and petition requirements favor those immigrants who are educated or wealthy enough to hire a good lawyer to compile the best application. To ensure that this process does not disfavor the poor battered immigrant who does not have access to these resources, the petition and waiver process should account for such difficulties, through filing extensions or a dedication to case-by-case review that recognizes knowledge and literacy deficiencies. Additionally, in keeping with reforms regarding survivor-focused funding allocations, advocates should be financially supported in representing victims of violence to create and file credible and compelling waiver applications and petitions.

Further, given statutory waiting periods and court backlogs—unavoidable delays that are out of the hands of a battered immigrant seeking a divorce—the requirement that the divorce be finalized before a person can receive the divorce waiver of the joint petition requirement moots the efficacy of the divorce waiver. Instead, the policy should be that the commencement of a divorce proceeding is sufficient to substantiate the divorce waiver ground. Indeed, the governing statute itself is ambiguous as to the requirement that the divorce judgment be final, leaving it up to USCIS interpretation. The statute states that a waiver of the joint petition requirement may be granted if the immigrant spouse can establish that the “qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the [joint filing] requirement.”\footnote{Although there is no official record of USCIS interpretation from this time, immigration practitioners speak to the policy, and one 1989 Interpreter Release describes the INS policy. See INS Discusses Marriage Fraud Issues, 66 No. 44 Interpreter Releases 1268 (November 13, 1989) (relating comments from Lawrence J. Weinig, INS Deputy Assistant Commissioners for Adjudications, in response to a question about the propriety of filing the}
During the George W. Bush administration, however, the policy shifted to equate a “terminated” marriage with one terminated by a court decree of divorce. In a 2003 public Memo from William R. Yates, the Associate Director of Operations at USCIS to the Director of the VAWA Vermont Service Center, Mr. Yates stated that USCIS requires that the marriage must be terminated prior to the filing of the waiver.\footnote{See Yates Memo, supra note 83 (explaining that the memo was in response to “several questions” regarding whether a conditional resident can file a waiver of the joint petition requirement after commencement of divorce proceedings but prior to final termination of the marriage. The memo states that the statute “requires” the marriage be terminated prior to filing of the waiver and clarifies that to be USCIS policy.).} More recent USCIS policy softens the policy by holding the divorce waiver application in abeyance for 87 days while the immigrant applicant seeks the final divorce judgment from a court.\footnote{See Neufeld Memo, supra note 83.} As discussed fully above,\footnote{See supra pp. 20–21, discussing statutory waiting periods before filing for divorce and court delays in divorce hearings.} however, it is highly unlikely that a battered immigrant—or any litigant, for that matter—will be able to obtain a final divorce judgment in 87 days due to statutory waiting periods and court backlogs. Moreover, funding restrictions for legal services curtail lawyers’ ability to represent vulnerable battered immigrants in divorce proceedings, making the divorce process even more complicated and fraught with anxiety.\footnote{See supra Part II.} Statutory waiting periods to obtain a divorce and court backlogs that delay divorce hearings are mere annoyances for most. For a battered immigrant desperate for a divorce from an abusive spouse, however, the stakes are high: if she is unable to obtain the court decree of the final divorce and send it to USCIS within the 87 days, she will be removable from the United States.\footnote{See Neufeld Memo, supra note 83.}

USCIS policy should be changed to embrace the previous policy interpretation, allowing for flexibility of when the court enters a final judgment and allowing the immigrant spouse to file and obtain the divorce waiver prior to the issuance of a divorce decree. In this way, a battered immigrant can more readily use the divorce waiver process, which may amount to less onerous and emotionally-charged proof requirements for her than the battered spouse waiver process.

Moreover, because the VAWA self-petition process provides a critical form of relief for immigrant victims of violence, the eligibility for such relief should be extended to other immigrant victims of violence beyond the spouses of United States citizens and lawful permanent residents. If the purpose behind VAWA relief is to assist immigrant victims of domestic violence escape abusive marriages, why should such critical relief be limited to a small group of people? If an immigrant married to an asylee, to a person in temporary status, to a foreign diplomat or even to an undocumented immigrant faces violence at the hands of her spouse, VAWA protections should afford her a way out of the marriage such that she can...

\footnote{See Neufeld Memo, supra note 83.}
stabilize her immigration status, be able to work legally and achieve independence and financial security away from her spouse.

Although many may argue that such a policy would open the floodgates to immigrants obtaining this immigration relief either legitimately or through fraudulently fabricating abuse allegations, it is unlikely that this change in policy would lead to this result. As VAWA guidelines place stringent proof requirements as to the good faith nature of the marriage and of the abuse that the victim suffered at the hands of her spouse, a self-petitioner still would be required to meet those proof hurdles before obtaining relief. Thus, it is not that the ability of the immigrant to obtain relief would become easier; the change would simply affect the eligibility for new petitioners. In an analogous policy shift, in 2009, the Barack Obama administration cleared the way for victims of domestic violence to qualify and receive asylum in the United States on the basis of domestic violence.166 Looking past cries that such a policy change would open the floodgates to foreigners seeking asylum in this country through claims of domestic violence, the concern for protecting vulnerable victims of violence proved more pressing.167 Though a similar change to VAWA allowances of eligible petitioners would allow more people

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166 In April 2009, The United States Department of Homeland Security (DHS) issued a supplemental brief to the Board of Immigration Appeals (the “Board”) for the Board’s consideration in the case of a Mexican woman seeking asylum in the United States. In the brief, DHS supports granting asylum to people who claim that they are fleeing domestic violence in their home countries, if they also met other eligibility requirements. See DHS Supplemental Brief, available at http://media.npr.org/documents/2009/jul/DHS.pdf. The DHS Supplemental Brief also notes that DHS is still in the process of drafting appropriate regulations that would codify this policy shift. See Supplemental Brief at p.5 & n.4.

167 See id. at p.13 & n.10: “To the extent that there may be concern that the availability of asylum to victims of domestic violence would result in an overwhelming number of applications, several factors should allay these concerns. Although domestic violence is a problem in a substantial number of countries worldwide, most victims of domestic violence abroad would not have the resources of ability to leave their situations and come to the United States. . . . In addition, U.S. Citizenship and Immigration Services (USCIS) has granted asylum to victims of domestic violence under the DHS interpretation advanced in the DHS brief submitted to the Attorney General in Matter of R-A- in 2004 [the case of Rody Alvarado] . . . and this has not resulted in any notable increase in claims. In fact, the overall number of asylum applications filed with USCIS has remained steady over the last five years;” see also Musalo, et al., Crimes Without Punishment, supra note 17, at 163. In Crimes Without Punishment, the authors discuss the pioneer United States asylum case based on domestic violence, that of Rody Alvarado from Guatemala. Ms. Alvarado was initially granted asylum in 1996 but the Board of Immigration Appeals reversed the decision. The decision to remove her from the United States was delayed for 13 years, until the Obama administration finally supported the decision to allow domestic violence as a viable means to apply for asylum in 2009. As the authors note, “One of the main factors contributing to the delay in deciding her case was the government’s fear of ‘opening the floodgates,’ i.e., the belief that violence against women, including domestic violence, is so prevalent around the world that if asylum were to be granted to Rody Alvarado, it would cause a deluge of women fleeing such abuse to come to the United States.” Id. Of course, another more cynical view—though perhaps not explicitly espoused by the United States government—is not that the floodgates would be opened to those legitimately fleeing abuse from their native countries but rather that foreigners seeking asylum would fraudulently claim that they suffered domestic violence in their home countries. Although it is too soon to know if the new administration’s explicit allowance of domestic violence asylum claims will indeed dramatically increase those seeking asylum over the long-term (i.e. beyond the last five years), one can look to the similar governmental floodgate fears regarding asylum based on female genital mutilation (FGM). Describing the 1996 pioneer asylum case based on FGM—that of Fauziya Kassindja—Professor Musalo notes, “Fauziya Kassindja was granted asylum, but the dire predictions of a flood of women seeking asylum never materialized. In fact an INS publication explicitly noted that ‘although genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM’ after the Kasinga decision [Kasinga was an INS misspelling of the applicant’s last name, Kassindja].” Karen Musalo, Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?, 14 V A. J. SOC. POL’Y & L. 119, 132–33 (2007) (hereinafter Musalo, Floodgates).
to obtain legal status in the United States, it is difficult to see how that reason alone should dissuade policymakers from helping victims of domestic violence.\footnote{Some will argue that allowing for more people to be eligible for VAWA relief would create perverse incentives to manufacture claims of domestic violence. This Article does not argue that immigration fraud on the basis of fraudulent marriages does not occur. Yet, asserting that eligibility for relief should not be expanded because of the incentives for fraud it creates obscures the rationale behind domestic violence advocacy and relief mechanisms. In other words, if we care about helping immigrants escape domestic violence, it does not make sense to restrict those who can secure help because of an assumption regarding the ulterior motives that could result. Furthermore, any time a desired benefit is offered to a vulnerable population (or any population, for that matter), it follows that perverse incentives may be created to secure the benefit. That reality, though, should not dissuade us from helping those who critically need the benefit. For another argument for allowing concern for victims of violence to outweigh perceived perverse incentives, see Musalo et al., Crimes Without Punishment, supra note 17, at 163: “The fear of floodgates is, for the most part, unfounded. Perhaps more importantly, from an ethical and moral perspective, the fear of floodgates is not a legitimate basis for refusing to provide refugee status to individuals who are otherwise deserving of, and qualify for, such protection. The international refugee protection regime that has been accessed to by the majority of nations came into being after World War II, which was characterized by the shameful failure of many countries to provide safety to Jews fleeing the Holocaust. The potential number of refugees who might request relief was not a justifiable basis for refusing protection then, and it is not a legitimate basis for doing so now.” See also Musalo, Floodgates, supra note 168, at 129–32 (2007).}

C. FUNDING SOURCE REFORMS

Reforms in the government funding processes for non-profit legal service providers are also critically needed. Permitting immigrant victims of domestic violence to access necessary divorce relief is in keeping with protecting the most vulnerable in our society and helping them achieve independence. Government and private funding mechanisms aimed at helping those most in need of assistance and helping protect families and children should protect victims of violence who seek to make a final break from an abusive spouse and allow funding for divorce representation. Thus, grants to providers should allow the providers to allocate the funding as demanded by their client communities and, if identified by the service agencies, embrace legal representation and social service support in divorce cases. The dialogue on how we allocate and spend federal monies must encompass and represent the whole realities facing indigent victims of violence, rather than focus on outdated notions that favor preserving marriage and that hold divorce in disregard.\footnote{Professor Coker discusses how her material resources test “does not require the state to make judgments about what choices are in battered women’s best interest. . . . resources should be made available to women so that, with assistance, they can make a determination about the best course of action based on their own set of circumstances.” See Coker, Poor Women of Color, supra note 19, at 1020.} To ignore this unmet need does a disservice to poor people desperately seeking a way out of abusive marriages.

A focus on the needs of the survivor of violence—rather than on the priorities of policymakers, which may or may not correspond to the actual need—is likely to affect more significant and lasting change in the lives of families affected by domestic violence.\footnote{In arguing that the standard to determine a programs’ success at improving victims’ access to material resources should be based on the programs’ effects on poor women of color, Professor Coker notes that traditional programs for battered women sometimes fail to meet the needs of the very poor, those that are deemed to have deviant characteristics from the norm, and/or those who are not English-speaking. See Coker, Poor Women of Color, supra note 19, at 1025–26. Much of this misplacement of priorities by advocates is at least in part because the focus on the needs of the very poor—or within the context of this Article, the poor immigrant—does not enter into policymakers’ funding decisions. Yet, as Professor Coker asserts, using the most vulnerable population, which faces the most severe effects of subordinating tactics, as the standard to determine efficacy of programs will likely}
recognition of the need for long-term relief, victims of violence are effectively kept in abusive marriages, always linked and tied to their batterer in numerous ways that can extend far beyond immediate physical and emotional proximity. She remains financially linked to an abusive husband if they filed taxes jointly; had credit cards or bank accounts in both names; or owned real or personal property together.\textsuperscript{171} She may be tied to him through name if she took his name when they married. But if she is able to divorce, she may be much more likely to achieve personal, independent success and happiness away from an abusive partner.

These measures of independence and success could—and should—be recognizable markers of achievement for advocates and funding sources, even if not quantifiable nor upheld as traditional priorities for funders. Indeed, the universality of the success of domestic violence interventions among all affected populations is a myth; people and populations differ in their needs and in the efficacy of intervention programs. Rather than setting goals and deadlines that conform to a strict “how many federal dollars equal quantifiable success measures,” funding mechanisms should allow local programs and coalitions—who have the expertise, knowledge and insight into affected local communities—to determine what kinds of goals would appropriately measure success.\textsuperscript{172} Although this goal may be difficult to count because it operates on a long-term basis, advocates, policymakers and funders must simply get creative in how objectives are measured so as to holistically meet the needs of the victim. Thus, rather than require funding objectives that pinpoint a number of protection orders an organization has to procure for victims, for example, funding sources can require organizations to compile narratives about how their clients have progressed through the divorce process.

D. ADVOCACY REFORMS

Finally, advocacy priorities should encompass the provision of divorce relief for victims of violence and work to educate the immigrant communities, the providers who serve them, and the judiciary and public service gateways on the rights of immigrant domestic violence victims. Included in this education and outreach arena, it should be a primary goal to understand the importance of divorce in a survivor’s journey to break the final obstacles to her independence. Through this work, immigrants will better understand their ability to divorce and work to procure

\textsuperscript{171} See Donna Coker, \textit{Addressing Domestic Violence Through a Strategy of Economic Rights}, 24 WOMEN’S RTS. L. REP. 187, 188 (2003) (“Some battering men appear to seek out women that are economically vulnerable; but even if this were not the case, the batterer’s behavior often has a devastating economic impact on the victim’s life. Abusive men cause women to lose jobs, educational opportunities, careers, homes, savings, their health, their ability to enter the workplace.”).

\textsuperscript{172} See Coker, \textit{Poor Women of Color}, supra note 19, at 1054 (discussing the ineffectiveness of mandatory arrest policies to curb domestic violence in some communities of color: “Federal dollars should not support universal (state-wide) mandatory arrest policies . . . Rather, funding should encourage local assessments of the impact of arrest policies on poor women of color. In addition, funding criteria should support those programs that represent broad based coalitions that are either focused on particular neighborhoods or particular racial/ethnic groups. Such coalitions are more likely to have the local knowledge required to assess the situation for poor women of color.”); \textit{see also} Coker, \textit{Crime Control and Feminist Law Reform}, supra note 170, at 848 (discussing a coordinated community response advocacy effort that “consists of significant services for battered women as well as savvy, institutionally integrated—yet independently minded and funded—advocates for women.”).
a divorce, if that end meets their needs. Legal service providers and policymakers will also understand the importance of divorce representation in the survivor’s journey to independence from a batterer.

CONCLUSION

For immigrants like Alicia, Aziza and Ana, life in the United States can bring both blessings and hardship. The opportunities in this country motivate them to work hard—to pursue financial independence and freedom for themselves and their children. However, immigrant victims of domestic violence are not free even in their own homes, where instead they endure physical, emotional and sexual abuse at the hands of controlling and manipulative spouses.

Long, sad experience teaches us that, for those immigrants, the surest path to freedom depends on the government and runs through the courts—and many battered spouses will find that they cannot be free or safe without a divorce from their abusive spouses. Yet the current state of immigration law and policy, together with the irresistible drive of funding mechanisms, has erected steep barriers to divorce for low-income immigrant victims of domestic violence. While our national attitudes towards family law and battered spouses in particular have progressed over the past half-century, traditional attitudes towards divorce continue to uniquely impact these marginalized and vulnerable members of society.

It is time for change. The safety of abused spouses should come first; it should not be trumped by philosophical concepts of marriage or divorce that are simply inapplicable to relationships infected by abuse (and that, in any event, have been virtually cast aside by mainstream Americans who can divorce essentially at-will). The decisionmakers of key funding agencies should work to eliminate the incentives that prompt service providers to focus on easy numbers rather than the hard task of addressing victims’ needs. The laws governing immigration status should be rewritten so that they cannot be manipulated by abusive spouses as yet another tool of control, and they should be reformed so that they no longer punish battered spouses for divorcing their abusers. These reforms are straightforward; they can plainly be accomplished without giving in to unfounded fears of opening the floodgates to immigration and marriage fraud; and there is no reason to delay. Through this reform process, the barriers to achieving divorce relief for low-income immigrant victims of domestic violence can be overcome. As this final obstacle to survivor independence is cleared, more people will live a life of respect and freedom in the United States.