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NO RELIEF FOR THE WEARY: VAWA RELIEF DENIED FOR BATTERED IMMIGRANTS LOST IN THE INTERSECTIONS

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I. INTRODUCTION

Congress adopted the Violence Against Women Act of 1994 (VAWA),\(^1\) in part, to provide relief to battered immigrant women. However, there is a substantial and increasing population of women who are precluded from relief by conflicting provisions within the Act. The punishment of perpetrators yields unintended consequences that harm battered immigrant women of color, undermining the effectiveness of affirmative immigration relief. By neglecting the circumstances where the woman is accused as the perpetrator, current provisions fail to address the cycle of violence that may generate false charges against battered women.

The underlying purpose of criminal and immigration laws against domestic violence is to protect victims of domestic abuse.\(^2\) The VAWA provides relief to immigrant victims by empowering them to obtain im-


migration status independent of their abusers. In order to qualify for this relief as a VAWA applicant, however, the applicant must meet statutory requirements that include proof that they have good moral character, a requirement that may not be met if the immigrant women are prosecuted as perpetrators of domestic violence. At the present time, no mechanism exists in either criminal or immigration law to evaluate whether a domestic violence conviction should lead to a loss of VAWA eligibility.

Furthermore, there is no guidance in either body of law to evaluate the woman's motivation. In addition, a further complication emerges because under the new immigration law's definition many domestic violence crimes constitute aggravated felonies.

While some women obtain relief under the current system, many more find themselves left in the shadows and precluded from relief. New methods of treating the issues presented by the victims must emerge to assist them in moving from the margins into a place where their interests can be met. This transition can only occur by confronting the limitations that emerge when their reality is overlooked.

This article focuses on the barriers to relief which emerge from well-

3. See VAWA § 40701.

4. This is an innovation of the VAWA. See VAWA § 40701(a)(1)(C). Other immigrants seeking admission to the United States are not required to prove that they have good moral character. See Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (1994) [hereinafter INA] (providing that non-VAWA applicants simply need to demonstrate that they are not barred from admission under the grounds of inadmissibility).

5. See Melissa Hooper, When Domestic Violence Diversion is No Longer an Option: What to Do with the Female Offender, 11 BERKELEY WOMEN'S L.J. 168, 172-73 (1996) (noting that increased criminal responses lead to an increase in prosecution of women).

6. INA § 101(a)(43)(F) defines "aggravated felony" as "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment imposed is at least one year." INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997). Title 18 defines a "crime of violence" as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.


7. There is a need for the women with power in the domestic violence arena to be aware of the particular needs of immigrant women. See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1265 (1993) (noting that power determines "whether the intersectional differences of women of color will be incorporated at all into the basic formulation of policy").
intentioned, anti-domestic violence reforms adopted and implemented in the immigration and criminal law. Part I outlines the relief promised in the VAWA and provides a review of the modifications in the Immigration and Nationality Act (INA) as a result of legislation adopted in 1996.8 Part II sets forth the intensified punitive response to domestic violence that has emerged in both criminal and immigration law. Part III examines how the intersection of the immigration provisions and the criminal justice system create limitations for immigrant victims of domestic violence rather than the intended relief. Part IV concludes by identifying solutions to be applied in order to better address the realities of the immigrant women who are survivors of domestic abuse and suggests a hierarchy that should be used by prosecutors and the Immigration and Naturalization Service (INS) in evaluating claims involving violence against immigrants.

II. WHAT THE VAWA DOES FOR IMMIGRANTS

The VAWA's adoption set forth two new forms of relief for immigrant battered women.9 First, the VAWA allows qualified women and


In addition, these requirements allowed the abuser to refuse to petition for the elimination of conditional residency and refuse to apply for immigrant status, thus resulting in additional abuse. See Felicia E. Franco, Unconditional Safety for Conditional Immigrant Women, 11 BERKELEY WOMEN'S L.J. 99, 117-18 (1996); Lily Dizon, Abused Illegal Immigrant Wives find New Hope; Law: Husbands Can No Longer Hold Deportation Threat Over Women Now Entitled to Petition on Own Behalf to be Residents, L.A. TIMES, Jan. 6, 1997, at B1 (recounting story of "Rosa" whose husband used immigration threats as power against her).

The Immigration Act of 1990 (IMMAct 90) amended these requirements allowing immigrants who were victims of abuse to petition for status without relying on their abusive spouse. See Loke, supra note 2, at 596-97 (providing a more detailed analysis of the content of these changes); Franco, supra, at 108-10 (setting forth three significant amendments of the Immigration Marriage Fraud Amendments (IMFA)). While these changes promoted opportunities for some victims, far too many did not benefit from the change and, thus, remained subject to the abusive relationships of their legal permanent resident or citizen spouses. See Michelle J. Anderson, Note, A License to Abuse: The Impact of Conditional Status on Female Immigrants, 102 YALE L.J. 1401, 1417 (1993) (noting that the IMMAct 90 changes did not alleviate the adverse effects placed on immigrant women whose husbands did not petition for legal status); Franco, supra, at 110 (arguing that the INS regulations undermined the effectiveness of the 1990 changes); Joan Fitzpatrick, The Gender Dimension of U.S. Immigration
children to self-petition for permanent resident status. Second, the Act allows women and children to request cancellation of removal based upon the presence of domestic violence with proof of United States residency for three years and either a valid marriage to a United States citizen or lawful permanent resident, or birth of a mutual child with the abuser. In addition, the VAWA modifies the evidentiary standard for waivers in petitions to remove the conditional status.

A. Self-Petitioning

To curtail the abuser's power, Congress established the right to "self-petition" for immigrant status. By granting the abused immigrant independent power to petition, the abuser loses some of the power he exercised against the victim. Children may file either their own petitions as victims of abuse, or they may be considered in conjunction with their abused parent's application. To qualify for relief, a self-petitioning spouse must demonstrate: (1) a good faith marriage; (2) good moral

Policy, 9 YALE J.L. & FEMINISM 23, 32 (1997) (discussing continuing problems under the IMFA); see also Linda Kelly, Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act, 92 NW. U. L. REV. 665, 671 (1998) (noting that interim regulations were promulgated March 26, 1996, two years after the adoption of the VAWA) [hereinafter Kelly, Stories from the Front].
12. See INA §216(c)(4), 8 U.S.C. § 1186a(c)(4) (1994) (allowing women to waive the requirements for filing a joint petition and terminate the conditional residency if they demonstrate either, (1) extreme hardship, or (2) a good faith marriage and divorce, or (3) abuse or extreme cruelty directed toward either the alien spouse or child).
13. See 8 C.F.R. § 204.2(c) (1999).
15. The applicant files a form I-360 at the Vermont Service Center with the necessary supporting information. See 62 Fed. Reg. 16607, 16607-08 (1997). The Vermont Service Center is the direct mailing location for all battered spouse and children's self-petitions. See id.
16. See INA § 204(a)(1)(A)(iii)(I), 8 U.S.C. § 1154(a)(1)(A)(iii)(I) (1994). Preliminary eligibility limits relief to a person who is married to a United States citizen or a lawful permanent resident at the time that the application is made, and the marriage must have been entered into in good faith. See Matter of Laureano, 19 I. & N. Dec. 1, 2-3 (B.I.A. 1983) (noting that evidence demonstrating a good faith marriage includes, but is not limited to, proof that one's spouse has "been listed on insurance policies, property leases, income tax forms or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences").
character;\(^7\) (3) extreme hardship to herself or certain family members;\(^8\)

The regulations and the VAWA’s language require the petitioner to be married to the abuser when the petition is filed. See VAWA § 40701(a)(1)(C); 8 C.F.R. § 204.2(c)(1)(ii) (1999); 61 Fed. Reg. 13061, 13062 (1996); see also Linda Kelly, Domestic Violence Survivors: Surviving the Beatings of 1996, 11 GEO. IMMIGR. L.J. 303, 321 (1997) (discussing the tension between combating fraud and ending domestic violence) [hereinafter Kelly, Domestic Violence Survivors]. Common law marriages may also be grounds for relief as long as there is evidence demonstrating a common law marriage. See Kahn v. INS, 36 F.3d 1412, 1414-15 (9th Cir. 1994) (holding that common law marriages recognized by the state are relevant to relief and therefore, it would be inappropriate to allow the Board of Immigration Appeals (BIA) to apply divergent state law in the absence of an express or implied Congressional intention to the contrary). The victim, however, is not required to stay married to the abuser. Once the application is filed, a divorce from the abuser will not affect the application. See 8 C.F.R. § 204.2(c)(1)(ii); 61 Fed. Reg. 13062-63. If the petition is not filed before the divorce or death of the abuser, no relief will be granted through the VAWA. See 8 C.F.R. § 204.2(c)(1)(ii); 61 Fed. Reg. 13062. Filing is not considered complete until all required fees have been paid or waived. See 8 C.F.R. § 103.7(c) (1999); 61 Fed. Reg. 13069. As a general rule, in immigration cases, fee waivers on affirmative visa petitions are not allowed. See 8 C.F.R. § 103.7(c); 61 Fed. Reg. 13069. However, recognizing that many victims will have left their abusive environments with little or no resources the INS will allow a petition with a fee waiver but the petition will not be considered filed until the fee waiver request is granted. See 61 Fed. Reg. 13069.

17. See INA § 204(a)(1)(A)(iii). Essentially, good moral character is relevant in determining eligibility for a visa under VAWA. See infra notes 30-31 (discussing the absence of this requirement for other visa holders). While Congress provided little guidance about this requirement, the INS established a three-year good moral character test for VAWA applicants. See 8 C.F.R. §§ 204.2(c)(2)(v) & (e)(2)(v). The INS requires petitioners to submit three years of police records with the application. The regulations also incorporate the standards from INA §101(f), and some provisions in the naturalization requirements that must be established as proof of good moral character. See 8 C.F.R. § 204.2(c)(1)(vii); INA § 101(f), 8 U.S.C. § 1101(f) (1994 & Supp. III 1997). Behavior during that period that will disqualify a petitioner includes: habitual drunkenness, see INA § 101(f)(1); conviction or admission to commission of a drug offense, see INA § 101(f)(3); but see Matter of Grullon, 20 I. & N. Dec. 12, 15 (B.I.A. 1989) (holding that a drug possession charge dismissed under Florida’s pretrial intervention program is not a conviction); conviction or admission to commission of a crime of moral turpitude, see INA § 101(f)(3); Miller v. INS, 762 F.2d 21, 23-24 (3d Cir. 1989) (finding welfare fraud to constitute crime of moral turpitude); engaging in polygamy, see INA § 101(f)(3); deriving income principally from gambling or being convicted of two or more gambling offenses, see INA §§ 101(f)(4) & (5); conviction for an offense for which the petitioner has spent more than 180 days in jail, see INA § 101(f)(7); see also Rivera-Zurita v. INS, 946 F.2d 118, 121 (10th Cir. 1991) (holding that the burden rests with petitioner to prove he was not incarcerated for more than 180 days); conviction for two or more crimes for which the petitioner has been convicted to five years or more, see INA § 101(f)(3); engaging in prostitution, see id.; engaging in alien smuggling, see id.; and giving false testimony for an immigration benefit, see INA § 101(f)(6); see also United States v. Kungus, 485 U.S. 759, 782 (1988) (holding that testimony need not be material); Torres-Guzman v. INS, 804 F.2d 531, 533 n.2 (9th Cir. 1986) (noting that the statement must have been made under oath in a court or tribunal) (citing Phinpathya v. INS, 673 F.2d 1013, 1018-19 (9th Cir. 1981), rev’d on other grounds, 464 U.S. 183 (1984)). In addition, if a petitioner at any time has been convicted of an aggravated felony as defined by INA § 101(a)(43), which includes some state misdemeanors, the defendant will be disqualified. See INA § 101(f)(8); see also INA § 101(a)(43), 8 U.S.C. §
(4) marriage to a United States citizen or legal permanent resident, and (5) residence in the United States with the abusing spouse.


The INS applies these requirements in light of "the average citizen in the community." 8 C.F.R. §§204.2(c)(1)(vii) & (e)(1)(vii). This standard may unfairly compare a battered woman to a non-battered person who is in the community. The INA states that convictions for crimes defined as aggravated felonies are non-waivable bars to a finding of good moral character. See INA § 101(f)(8).

For the purposes of this Act -- No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is or was... (8) one who at any time has been convicted of an aggravated felony (as defined in subsection [101](a)(43)).

Id. Thus, a conviction as an aggravated felon precludes a finding of good moral character.

18. See INA § 204(a)(1)(A)(iii)(II). The phrase "extreme hardship" is not defined in the Act, and "[s]elf petitioners are encouraged to cite and document all applicable [extreme hardship] factors, since there is no guarantee that a particular reason or reasons will result in a finding that deportation would cause extreme hardship." 8 C.F.R. §§ 204.2(c)(1)(viii) & (e)(1)(viii). In a memorandum dated October 16, 1998, the INS clarifies that the extreme hardship requirements must be made on a case by case basis. Furthermore, the finding of abuse does not require the finding of extreme hardship. See Paul W. Virtue, General Counsel, Immigration and Naturalization Service, "Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children, 2, 6, (INS Mem. HQ 90/15-P, HQ 70/8-P) (Oct. 16, 1998), reprinted in 76 INTERPRETER RELEASES 162-69 (Jan. 25, 1999) [hereinafter, Virtue, Extreme Hardship].

19. See INA § 204(a)(1)(A)(iii) & (B)(ii); 8 C.F.R. §§ 204.2(c)(1)(iii) & (e)(1)(iii). The primary evidence of this status is a U.S. birth certificate, naturalization certificate or number, or a copy of the "green card." See 8 C.F.R. § 204.1(g) (1999); 61 Fed Reg. 13063. If the primary evidence is not available or attainable by the self-petitioner, she may request assistance from the INS in ascertaining the abuser's status. See 8 C.F.R. § 204.1(g); 61 Fed Reg. 13063. Once the application is filed, the INS must check computer and paper records in an attempt to determine the abuser's status. See 8 C.F.R. §§ 103.2(b)(17) & 204.1(g)(3) (1999); 61 Fed. Reg. 13063-64. Where the record search is negative or inconclusive, "the self-petition will be adjudicated based on the information submitted by the self-petitioner." 8 C.F.R. §§ 103.2(b)(17) & 204.1(g)(3); 61 Fed. Reg. 13063.


20. See INA § 204 (a)(1)(A)(iii). This requirement may be difficult to establish when the woman has been kept in isolation by the abuser as part of the abuse. It is common for victims of abuse to be isolated. See Jennifer Nislow, The New Yorkers: Battered Women in a Strange Land - An Advocacy Group Helps South Asian Immigrants, NEWSDAY, May 22, 1996, at A29 (reporting that the experience of a Bangladeshi woman, Syeda Sufian, who was "beaten and physically tortured for years" and did not go to the police because her abuse convinced her she would be deported if she went to the police). "Brought by their husbands
A woman who obtains the status of lawful permanent residence through the self-petitioning process is not subject to the conditional residence requirement. This is sensible given that the basis upon which women are seeking relief indicates that the abusive spouse will not be available to jointly petition for the removal of the condition. Thus, a woman with a current visa can use it as the basis of her self-petition and will be granted status as a lawful permanent resident regardless of the length of the marriage. Where a visa is not currently available, the applicant is placed in deferred action status.

A VAWA-qualified woman must not only demonstrate good moral character to qualify for VAWA relief, but she must also maintain good moral character. A non-VAWA visa applicant, on the other hand, is

to a country where they do not speak the language, have no knowledge of the laws or customs, and are dependent on spouses, these women become completely isolated. 

The abusers may preclude victims from contacting family and may threaten them if they attempt any outside contact. See Clare Dalton, Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities, 31 NEW ENG. L. REV. 319, 333-36 (1997) (describing methods of control used by abusers). Undocumented immigrants are isolated further due to lack of work authorization and economic dependency on their abusers. See Ryan Lilienthal, Note, Old Hurdles Hamper New Options for Battered Immigrant Women, 62 BROOK L. REV. 1595, 1626-1627 (1996). If she is undocumented, she also has a fear of detection that works against her ability to satisfy this requirement and feeds into the power that the abuser has over the woman. See Nancy San Martin, Residency Door Opens for Women Abused by Spouses, SUN-SENTINEL (Ft. Lauderdale, Fla.) Sept. 10, 1995, at B1 (reporting the experience of Kathleen, an illegal alien, who stayed with her husband because "she is alone in a country where she lives illegally").


23. In non-VAWA cases, the conditional residency applies unless the parties are married for more than two years prior to filing for immigration status. See INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1) (1994).


not required to demonstrate good moral character at the time of adjusting this status to legal permanent residency. 26 A criminal conviction for an aggravated felony or for a crime of moral turpitude will preclude such a finding. 27

In the event that the abuser makes a criminal complaint in retaliation, such as one made by the abuser to leverage power, adverse and unforeseen consequences emerge for the immigrant woman. 28 If an abused woman is charged with domestic violence, a conviction may have extended adverse consequences. Although the VAWA applicant may obtain a waiver of the provision that renders an applicant inadmissible because of a crime of moral turpitude conviction under INA section 212(h), 29 it is unclear whether such a waiver eliminates the conviction for purposes of qualifying as a person of good moral character under the VAWA requirements. In other words, the waiver of the crime for admissibility purposes does not guarantee that the crime cannot be used to bar a finding of good moral character. This poses unique problems for VAWA applicants because the lack of good moral character is not a specific bar to admission for non-VAWA adjustment applicants, but lack of good moral character precludes VAWA relief. 30 Additionally, if the conviction is for an offense that is not only a crime of moral turpitude but also within the definition of aggravated felony, there are no waivers, and although standing alone, this would not preclude adjustment for other visa holders, 31 it mandates an adverse result for VAWA applicants who cannot meet the eligibility requirements of the VAWA.

26. See INA § 212 (noting the list of grounds of inadmissibility and that lack of good moral character is not within the section).

27. See INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227 (a)(2)(A)(iii) (Supp. III 1997). See also infra note 75 (discussing domestic violence crimes as crimes of moral turpitude). The conviction of a crime of moral turpitude is not a conclusive bar to admissibility, but it is wise to obtain a waiver.


31. See In re Michel, BIA Pub. 3335, Inv. No. A74-342-000, at 3 (Jan. 30, 1998) (holding that an aggravated felon visa holder may adjust his status in the United States even though he would be barred from entry if he left the United States); Susan L. Pilcher, Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant, 50 ARK. L. REV. 269, 297, 329 (1997) ("The aggravated felon whose offense was neither a crime of moral turpitude nor a crime relating to controlled substances, for example, is facially eligible for adjustment standards.").
B. Cancellation of Removal under Section 240A

There are no regulations that define the criteria for cancellation of removal for a VAWA applicant.\(^{32}\) Under the INA, an individual in removal proceedings may apply for relief from removal if they qualify as a victim of domestic abuse, as defined in the VAWA.\(^{33}\) A positive determination of eligibility may waive removal and grant the battered woman lawful permanent residency.\(^{34}\) To qualify for cancellation of removal, the immigrant battered woman must meet the following requirements:

1. she was battered or subject to extreme cruelty by a U.S. citizen or legal permanent resident spouse during marriage while she was in the United States, or she is the parent of a child of a U.S. citizen or legal permanent resident and the child has been subjected to physical abuse or extreme cruelty;\(^{35}\)
2. she has been continuously physically present in the United States for three years immediately preceding her filing the application;\(^{36}\)
3. she is a person of good moral character;\(^{37}\) and
4. leave-

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34. See INA § 240A(b)(2).

35. See INA § 240A(b)(2)(A). Unlike the self-petitioning rules, the cancellation provisions do not require the woman to be the spouse of an abuser at the time of the application. See id. If she is applying due to violence to herself, she simply needs to demonstrate that there was abuse during the marriage to the U.S. citizen or legal permanent resident. See id. (precluding relief for violence committed by a non-citizen or non-legal permanent resident). The statute requires the abuse be "by a spouse or parent who is a United States citizen or lawful permanent resident." Id. If no marriage to the abuser existed, but the battered woman and abuser share a child in common who has been battered or subjected to extreme cruelty, the cancellation provisions allow both her and the child to obtain cancellation of removal. See id.

36. See INA § 240A(b)(2)(B). Current law sets forth a statutory definition of what will eliminate continuous physical presence. See INA § 240A(d), 8 U.S.C. § 1229b(d) (Supp. III 1997). It is broader than the old suspension provision which made any absence a basis of ineligibility. See INA § 244(a)(3), 8 U.S.C. § 1254(a)(3) (1994), repealed by IIRIRA § 308(b)(7), 110 Stat. 3009-546, 3009-615 (1996). Notwithstanding the new relaxed standard, the three-year continuous physical presence requirement poses two hurdles for the applicant. See INA § 240A(b)(2)(B). First, she cannot have left the United States for an aggregate of 180 days, and she cannot have any single absence longer than 90 days. See INA § 240A(d)(2). Second, the time period for establishing physical presence tolls once a notice to appear is issued. "[A]ny period of continuous residence or continuous physical presence in the United
ing the United States would cause extreme hardship to herself or her children.\textsuperscript{38}

If a VAWA applicant is divorced and reports to or is found by the INS before she has been present in the United States for three years, she will not qualify for a cancellation of removal.\textsuperscript{39} This provision heightens the possibility of retaliation by the abuser and increases the chance that the woman will remain hidden from assistance likely to subject her to INS detection.

C. Removal of Conditional Residency

Women who enter the United States through a petition filed by a United States citizen spouse or a legal permanent resident, who have been married for less than two years, are not granted full immigration status as a legal permanent resident.\textsuperscript{40} They are subject to a conditional residency requirement which is removed by a joint petition of the spouses made within ninety days of the end of the two-year period.\textsuperscript{41}
Pursuant to amendments passed in the Immigration Act of 1990 (IMMACT 90), a battered immigrant woman may terminate her conditional resident status without the aid of her abusive spouse by obtaining a waiver. To obtain the waiver, she must show that she was abused or subjected to extreme cruelty committed by a citizen or lawful permanent resident spouse, or her children were battered or subjected to extreme cruelty by a citizen or lawful permanent resident spouse. In the VAWA, Congress eased the evidentiary burden regarding proof of extreme cruelty and directed the INS to accept "any credible evidence" for this waiver.

This change, however, is not codified in the regulations, and the INS regulations still limit the type of evidence allowed to prove extreme cruelty. A conditional resident need not prove extreme cruelty if she demonstrates physical abuse. Requiring women to demonstrate extreme hardship reinforces the anti-fraud aspect of the Immigration Marriage Fraud Amendments (IMFA), but does not adequately protect abused women.

1986, created a conditional residency status that attaches to every visa holder entering the U.S. in a marriage of less than two years. See Pub. L. No. 99-639, § 2(a), 100 Stat. 3537, 3541 (amending INA § 216 as codified at 8 U.S.C. § 1186a(g)(1) (1994)). The conditional residency requirement may be waived (1) where removal of the alien would cause extreme hardship; (2) when a good faith marriage resulted in divorce; or (3) when a participant of a good faith marriage has been battered or subject to extreme cruelty by the other. See INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4) (1994); see also Anderson, supra note 9, at 1411-13 (providing a more detailed analysis of the IMFA).

See Pub. L. No. 101-649, § 701, 104 Stat. 4978, 5085-86 (1990) (amending INA § 216(c)(4) as codified in 8 U.S.C. § 1186a(c)(4) (1994)). The IMMACT 90 changes authorized the use of the hardship waivers to ameliorate potential harm caused by the adoption of the conditional resident status. See id. However, the INS has yet to adopt a rule implementing the portion of the VAWA that provides guidelines on the evidence to justify removal of conditions on residence imposed under § 216. See 73 INTERPRETER RELEASES 399, 400 (Apr. 1, 1996).


44. See INA § 216(c)(4).

45. See, e.g., 8 C.F.R. § 216.5(e)(3)(iv)-(vii). For example, despite the clear mandate of VAWA, the INS has not modified the regulations that require a report by a licensed mental health professional to support a waiver based on extreme cruelty. See id; Sandra D. Pressman, The Legal Issues Confronting Conditional Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives, 6 MD. J. CONTEMP. LEGAL ISSUES 129, 141-45 (1994-95) (providing a critical analysis of these requirements); Margaret M.R. O'Herron, Note, Ending the Abuse of the Marriage Fraud Act, 7 GEO. IMMIGR. L.J. 549, 555-59 (1993).

46. See INA § 216(c)(4)(c).

47. See Franco, supra note 9, at 122 (exploring the judicial and administrative meaning
If the woman is a conditional resident who does not possess a strong case of battery or abuse, she may obtain a good faith marriage or extreme hardship waiver. To qualify for the good faith waiver, the applicant must show the marriage has legally ended through divorce or annulment. To qualify under the extreme hardship provision, the applicant must demonstrate that the hardship occurred during the period that the applicant was admitted on a conditional basis.

Reviewing the anti-domestic violence actions adopted in the immigration and criminal law demonstrates the relevance of these requirements. Part III further documents the methods of punishment adopted in each of these areas.

III. THE PUNITIVE RESPONSE TO DOMESTIC VIOLENCE

The emergence of harsh penalties against the perpetrators of violence complicates an applicant's ability to qualify for the relief contemplated by the VAWA. While harsh penalties for perpetrators and the VAWA specified standards for victims appear to be valid in obtaining the safety of victims, these methods created problems rather than solutions. Enhanced punitive approaches in criminal law intersect with the relief espoused in immigration law, and the results for battered immigrant women can be disastrous.

A. Response to Domestic Violence in Immigration Law

In addition to the ameliorative victims' relief promulgated by the

of extreme hardship in VAWA cases); Teran, supra note 9, at nn.84-85 and accompanying text (providing a critical analysis of extreme hardship requirements). The interim rule provides a good summary of the INS's thoughts on what will constitute extreme hardship. See 61 Fed. Reg. 13061, 13067 (1996). The following are factors which have been considered as relevant in an extreme hardship determination:

(1) age of the person; (2) age and number of the person's children, and their ability to speak the language and adjust to life in another country; (3) serious illness of the person or his or her child which necessitates medical attention not adequately available in the foreign country; (4) person's inability to obtain employment in the foreign country; (5) person's and the person's child's length of residence in the United States; (6) existence of other family members legally residing in the United States; (7) irreparable harm that may arise as a result of disruption of educational opportunities; and (8) adverse psychological impact of deportation.

Id. at 13067.

48. See INA § 216(c)(4)(A) & (B).
49. See INA § 216(c)(4)(B).
50. See INA § 216(c)(4).
IMMACT 90 and the VAWA, Congress created new grounds for punishing abusers.\textsuperscript{51} Heightened immigration consequences for domestic abuse were incorporated in the INA. Specifically, Congress (1) created new grounds for deportation based on domestic violence and violation of protection orders;\textsuperscript{52} (2) expanded the aggravated felony definitions which cover many acts of domestic abuse;\textsuperscript{53} and (3) adopted a new definition of conviction expanding the number of cases which can create adverse immigration consequences.\textsuperscript{54}

1. Domestic Violence Charges as Grounds of Deportation

The Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) establishes a broad new ground of deportability based on convictions of domestic violence, stalking, or child abuse as well as violations of civil or criminal protection orders.\textsuperscript{55} Any case which involves a crime constituting "domestic violence" triggers immigration consequences.\textsuperscript{56} Deportation can occur if the violence was directed at

a current or former spouse of the person, [or] an individual with whom the person shares a child in common, [or] an individual who is cohabitating with or has cohabitated with the person as spouse, [or] an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs. . . . \textsuperscript{57}

Violations of protection orders also create a ground of deportability.\textsuperscript{58} This deportation ground may stem from a violation of a civil or criminal order if the order is entered by a court to protect "against
credible threats of violence, repeated harassment, or bodily injury." 659 The provisions became effective with enactment of the IIRIRA on September 30, 1996 and are not retroactive. 66

2. Domestic Violence Charges as Aggravated Felonies

The most serious immigration consequences result to individuals convicted of aggravated felonies. 660 The Anti-Drug Abuse Act of 1988 created the category of crimes defined as aggravated felonies for immigration purposes. 661 Since 1988, Congress expanded the list of aggravated felonies to twenty-one subsections, each listing several different types of crimes. 662 The provisions are retroactive and apply to every qualifying conviction entered before, on, or after September 30, 1996. 663 The most significant aggravated felony in the domestic violence context is a crime of violence. 664

In 1990, Congress added crimes of violence to the list of aggravated felonies. 665 Section 321(a)(3) of the IIRIRA amended the provisions by expanding the definitions to include crimes with a one-year sentence. 666 As defined in title 18 U.S.C. section 16, a crime of violence includes both

an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . a felony . . . that, by its nature, involves a substantial risk that force against the person or property of another may

59. Id.


65. See INA § 101(a)(43)(F).


be used in the course of committing the offense.\textsuperscript{68}

Under the definition, the first form of violence is not limited to "felony" convictions. State misdemeanor offenses, including domestic violence offenses which meet all of the requirements of the definition, may also be an aggravated felony under the immigration laws.\textsuperscript{69}

Although the IMMACT 90 required an imposed sentence of more than five years for aggravated felony status,\textsuperscript{70} the IIRIRA reduced the five-year sentence to one year.\textsuperscript{71} Furthermore, any sentence given by the court is considered to be "imposed," even if it is not served.\textsuperscript{72} Because the amendments apply to convictions entered on, after, or before the passage of the IIRIRA, they apply retroactively.\textsuperscript{73}

Under the current law, prior convictions of a charge now considered an aggravated felony, trigger adverse immigration consequences.\textsuperscript{74} Furthermore, as long as a crime involves violence against the person or property of another, and a one-year sentence is imposed, the crime is an aggravated felony for immigration purposes.\textsuperscript{75}

Prior to this expansion of the aggravated felony definition, deportation for criminal conduct often turned on an adjudication of an act as one which involved moral turpitude.\textsuperscript{76} Traditionally, the BIA did not

\textsuperscript{68} 18 U.S.C. § 16(b) (1994).
\textsuperscript{73} However, the amendments only apply to immigration actions taken "after the date of enactment," which was September 30, 1996. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. III 1997). Therefore, immigration proceedings instituted before September 30, 1996 must be re-filed or amended to have the broader aggravated felony provisions affect an alien. See id.
\textsuperscript{74} See In re Lettman, BIA Pub. 3370, Inv. No. A17-599-144 (Nov. 5, 1998), available in 1998 WL 811588 (finding an alien subject to deportation for a conviction of an aggravated felony regardless of the date of the conviction).
\textsuperscript{75} See INA § 101(a)(43)(F). The IIRIRA amended the prior law regarding what constitutes a conviction, making it clear that any reference to a term of imprisonment "is deemed to include the period of incarceration or confinement ordered . . . regardless of any suspension. . . ." INA § 101(a)(48)(B) (codifying the amendment by section 322 of the IIRIRA Pub. L. No. 104-208, § 322(a), 110 Stat. 3009-546, 3009-628 (1996)).
\textsuperscript{76} Lawfully admitted aliens can lose their immigration status and be deported either on a single conviction for a crime of moral turpitude committed within five-years of entry, or two
consider simple assaults as crimes of moral turpitude and, therefore, convictions did not lead to deportation.\textsuperscript{77} In 1996, the Board of Immigration of Appeals determined that a corporal act of violence directed against a spouse, co-habitant or parent of the perpetrator's child is a crime of moral turpitude.\textsuperscript{78} This holding, however, does not extend deportation consequences to all domestic violence cases and the BIA continues to evaluate each case to determine whether moral turpitude exists.\textsuperscript{79} In immigration proceedings initiated after April 24, 1996, a crime of moral turpitude is any crime that \textit{may} carry with it a sentence of one year.\textsuperscript{80}


(i) Crimes of moral turpitude
Any alien who-
(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) of this title) after the date of admission, and
(II) is convicted of a crime for which a sentence of one year or longer may be imposed is deportable.
(ii) Multiple criminal convictions
Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

\textit{Id.}

\textsuperscript{77} In \textit{Toutounjian v. INS}, a district court reviewed the history of assault as a crime of moral turpitude: "The crime of moral turpitude includes a broad spectrum of misconduct, ranging from relatively minor offenses, e.g., simple assault, to serious offenses, e.g., assault with a deadly weapon." 959 F. Supp. 598, 603 (W.D.N.Y. 1997). Some decisions have found that moral turpitude is not an element of simple assault. \textit{See}, e.g., Matter of Short, 20 I. & N. Dec. 136, 139 (BIA 1989); \textit{but see} Matter of Danesh, 19 I. & N. Dec. 699, 670 (BIA 1988) (stating that assault "may or may not involve moral turpitude" and finding aggravated assault to be a crime of moral turpitude).

\textsuperscript{78} \textit{See In re Tran}, BIA Pub. 3271, Inv. No. A28-005-431 (Mar. 28, 1996) (holding that a conviction for inflicting corporal injury on a spouse, contrary to a California statute, constituted a conviction of a crime of moral turpitude); \textit{accord} Grageda v. United States, 12 F.3d 919, 929 (9th Cir. 1993) (holding willful infliction upon a spouse of corporal injury resulting in a traumatic condition is a crime of moral turpitude).

\textsuperscript{79} \textit{See}, e.g., In the Matter of B., 5 I. & N. Dec. 538, 539-41 (BIA 1953) (holding that simple assault on a police officer is not a crime of moral turpitude); In the Matter of O., 4 I. & N. Dec. 301, 307 (BIA 1951) (holding that rioting accompanied by assault of an official is not a crime of moral turpitude); In the Matter of P., 3 I. & N. Dec. 5, 6-7 (BIA 1947) (holding crime of assault with intent to do great bodily harm is not crime of moral turpitude).

Although a single crime of moral turpitude does not lead to deportation unless the conviction occurred within five years of entry, and a criminal defendant charged with a misdemeanor domestic violence offense is not subject to the new domestic violence ground of deportability unless the offense occurred on or after September 30, 1996, most simple assaults, even misdemeanors, are defined for immigration purposes as aggravated felonies because they are crimes of violence. The result is that a simple assault directed against an intimate has escalated from an offense that, absent extreme circumstances, was not even a crime of moral turpitude, to a crime that may be an aggravated felony, which causes severe limitations on eligibility for relief under VAWA.

3. New Definition of Conviction

Importantly, IIRIRA changed the definition of "conviction." Previously, a crime did not constitute a "final conviction" unless the conviction met a three-prong test, which included a guilty or nolo contendere plea, the imposition of some form of punishment or limitation in liberty, and a judgment or adjudication of guilt or innocence. Today, a conviction is defined for immigration purposes as follows:

a formal judgment of guilt of the alien entered by a court, or if adjudication of guilt has been withheld, where –

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Furthermore, the BIA determined that for immigration purposes deferred adjudications are final convictions. The new definition of "conviction" allows the INS to argue that a conviction is final, notwithstanding required the imposition of a one year sentence. See INA § 241(a)(2)(A)(i)(II), 8 U.S.C. 1257 (a)(2)(i)(II) (1994).

82. See INA § 237 (a)(2)(A).
ing post conviction relief, provided that there is something on record to support the conviction.\textsuperscript{88} As a result, an immigrant faces a dilemma. If the immigrant accepts an offer of diversion and makes an admission on the record, she has a conviction for immigration purposes.

In addition, the provision defining "a term of imprisonment" as that time ordered by a court\textsuperscript{89} greatly expands the number of cases which carry a term of imprisonment of more than one year and therefore increases the number of cases that qualify as aggravated felonies.\textsuperscript{90} This change, in conjunction with the new aggravated felony definition means that many crimes of domestic violence are now aggravated felonies. As noted above, this creates a potential bar to VAWA relief which does not exist for other visa applicants.\textsuperscript{91} In the typical case, a new aggravated felony conviction would render an applicant deportable, but would not make them inadmissible. Therefore, non-VAWA applicants are allowed to adjust their status, while the VAWA applicant's visa can be denied on the ground of lack of good moral character. The good moral character requirement which exists for VAWA applicants creates an adverse and uneven result.

B. Response to Domestic Violence in the Criminal Justice System

In addition to the VAWA immigration provisions, Congress adopted several new criminal sanctions as a general response to domestic violence.\textsuperscript{92} The VAWA criminal provisions exemplify a larger trend to expand criminal laws dealing with abusers of women and children.\textsuperscript{93} The

\begin{itemize}
\item \textsuperscript{88} In a recent decision, an immigration judge held that "[t]he withdrawing of the respondent's plea and entering of a nolo contendere plea to a misdemeanor does not alter the fact of the state felony conviction because, again, of the change in what constitutes a conviction under immigration law." Matter of Galán, BIA Pub., Inv. No. A13-103-690, at 6 (July 8, 1998) (decision on file with the author.)
\item \textsuperscript{89} See INA § 101(a)(48)(B).
\item \textsuperscript{90} See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997) (defining crimes of violence with a term of imprisonment of more than one year as an aggravated felonies).
\item \textsuperscript{91} See supra notes 30-31 and accompanying text.
\item \textsuperscript{93} See Angela Corsilles, Note, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?, 63 FORDHAM L. REV. 853, 853 n.1 (1994); see generally Eve S. Buzawa & Carl G. Buzawa, Introduction to DOMESTIC
intent of this shift in philosophy has been driven by advocates' desire to protect the victims of domestic violence.  

The shared underlying concern of all of these efforts is to decrease adverse impacts of domestic violence. However, the proponents of these various approaches have failed to evaluate how the intersection of the approaches can, and do, cause problems rather than relief for immigrant victims of domestic violence. The following sections discuss several of the criminal law reforms that have been adopted to combat domestic violence.

1. Mandatory Arrest and Other Police Policies

Preceded by the adoption of laws which allow "warrantless arrests when there is probable cause in misdemeanor domestic violence incidents," mandatory arrest statutes occurred as a response to the Minneapolis Domestic Violence Experiment. This experiment tested three different approaches by police to domestic violence calls and concluded that arrest was the most effective. The authors of the report, however, urged the adoption of a pro-arrest, not a mandatory arrest, policy.

The Attorney General's Task Force on Family Violence endorsed the finding of the report and also encouraged a pro-arrest policy.

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94. See Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 HARV. L. REV. 1850, 1870 (1996) [hereinafter Hanna, No Right to Choose]. "In the domestic violence context, the goal is to punish the batterer in order to protect the potential victims." Id.

95. See, e.g., Holly Heyser, Domestic Abuse Convictions Rise Under New Law's Power, VIRGINIAN-PILOT & THE LEDGER-STAR (Norfolk, Va.), May 2, 1998, at A1 (noting that the goal of new Virginia domestic violence law was to reduce the incidence of domestic abuse).

96. See Crenshaw, supra note 7, at 1265 (discussing "the intersectional differences of women of color" in the context of the movement against domestic violence). Crenshaw discusses the adverse impacts that a white feminist agenda has on the provision of services to women of color who are also victims of domestic violence. See id.


99. See id. at 12.

100. See id.

However, anti-domestic violence advocates used the report and recommendation to argue for the adoption of mandatory arrest laws. Currently, twenty-nine states and the District of Columbia and Puerto Rico, use some form of mandatory arrest policy in a domestic violence situation.


Certain states require a mandatory arrest only in certain situations. See ARIZ. REV. STAT. ANN. § 13-3601(B) (West Supp. 1998) (requiring mandatory arrest if physical injury or deadly weapon is involved); IOWA CODE ANN. § 236.12(2) (West 1994) (requiring mandatory arrest when abuse results in injury or where weapon is involved); KY. REV. STAT. ANN. § 403.760(2) (Banks-Baldwin 1998) (requiring mandatory arrest for violation of protection order); LA. REV. STAT. ANN. § 46:2140(1)(2) (West 1999) (requiring mandatory arrest when officer believes that there is impending danger or commission of aggravated or second degree battery); MASS. GEN. LAWS ch. 209A § 6(7) (West 1998) (mandatory for violation of court orders and aggravated assaults); MICH. COMP. LAWS ANN. § 776.22 (West Supp. 1999) (requiring police departments to establish policies reflecting that in most domestic abuse calls should result in arrest); MO. ANN. STAT. § 555.085 (West 1997) (requiring mandatory arrest if probable cause exists that there is a violation of a protective order or if there was a previous incident within the past twelve hours); NEB. REV. STAT. § 42-928 (1998) (requiring mandatory arrest if probable cause exists that there is a violation of a protective order); N. J. STAT. ANN. § 2c25-21 (1998) (same); OHIO REV. CODE ANN. § 2935.032 (Anderson 1996) (requiring local agencies to establish policies requiring arrest where the offender knowingly caused or attempted to cause serious physical harm); OR. REV. STAT. § 133.310 (1997) (requiring mandatory arrest if protective order exists or if accused is on release from a recent domestic violence incident); PA. CONS. STAT. ANN. tit. 23 § 6113(a) (West Supp. 1999) (requiring mandatory arrest if protective order exists); S.C. CODE ANN. §§ 16-25-70(B) (Law Coop. Supp. 1998) (requiring mandatory arrest if injury has occurred); TEX. CODE CRIM. P. ANN. art. 14.03(b) (West Supp. 1999) (requiring mandatory arrest if probable cause that protective order was violated).

There are three states that indicate preferred arrest policy. See MONT. CODE ANN. § 46-
In the mandatory arrest states, the law requires an arrest if there is any evidence of a committed assault. The laws remove responsibility for filing criminal charges from the victim, and, thus, limit the discretion of the police. According to anti-domestic violence advocates, mandatory arrest policies promote the safety of the victim and limit the liabilities of police departments.

In addition, they argue that mandatory arrest is a strong deterrent to domestic violence. Opponents note that the Spouse Assault Replication Program (SARP) studies, which attempted to replicate the Minneapolis Experiment, failed to provide any consistent results, and did not support the initial findings that arrest is the most effective method of dealing with perpetrators. Furthermore, commentators found not only that arrest of abusers fails to have a deterrent effect, but that it may in fact increase repeat violence, especially over time and with unemployed batterers.

A second concern raised by opponents of mandatory arrest is the increase of dual arrests in many jurisdictions. Even where a police department imposes a mandatory or preferred arrest strategy, police "officers who embrace victim-blaming, perpetrator-exculpating perspectives routinely resist the directive and either arrest both parties or conclude

6-311(2)(a) (1997) (in cases of injury, weapon, imminent danger, or a restraining order violation); N. D. CENT. CODE § 14-07.1-10(1) (Michie 1997); TENN. CODE ANN. § 36-3-619(a) (1996). For a similar listing of statutes current through 1994, see Ruttenberg, supra note 97, at 180 n.44.


105. See Wanless, supra note 104, at 538. Courts have held police departments liable when they failed to act in domestic violence situations. See Bracher, supra note 104, at 162-65; Machaela M. Hoctor, Comment, Domestic Violence as a Crime against the State: The Need for Mandatory Arrest in California, 85 CAL. L. REV. 643, 651-55 (1997); Wanless, supra note 104, at 538-39; Zorza, Must We Stop, supra note 102, at 935 (discussing the legal challenges which prompted changes in police department responses to domestic violence).

106. See Wanless, supra note 104, at 552-53.

107. This is the name for the replication studies conducted in five jurisdictions. See Fagan, supra note 98, at 14. The following five jurisdictions have produced reports, Colorado Springs, Colorado; Dade County, Florida; Milwaukee, Wisconsin; Omaha, Nebraska; and Charlotte, North Carolina. See Zorza, Must We Stop, supra note 102, at 929.


109. See Hoctor, supra note 105, at 657, 682.

110. See Zorza, Must We Stop, supra note 102, at 929, 967-68 (responding to opponents of mandatory arrest law who claim arrest does not deter unemployed abusers).

111. See Wanless, supra note 104, at 565 ("[a] dual arrest occurs when the victim is arrested along with her abuser"); see also infra, notes 145-46.
that probable cause does not exist to believe that the accused has com-
mited the crime alleged."\textsuperscript{112} To counteract this tendency, some laws ad-
dress a mutual aggressor's situation by adopting language which limits
arrests to the "primary aggressor."\textsuperscript{113} In addition, the VAWA encour-
gages states to adopt mandatory arrest policies and discourages the use of
dual arrest practices.\textsuperscript{114}

However, even in jurisdictions where the officers are advised to ar-
rest the "primary aggressor," immigrant women and women of color are
disadvantaged. Where the determination of the primary aggressor is not
defined narrowly, discretion is restored to the police, and this adversely
affects immigrant women.\textsuperscript{115} When the determination of who is the ag-


\textsuperscript{113} \textit{See} ARIZ. REV. STAT. ANN. \textsection{} 13-3601(B) (West Supp. 1998) (requiring probable
cause that both parties independently committed the act, excluding acts in self defense); CAL.
PENAL CODE \textsection{} 836(3) (West Supp. 1999) (stating that where dual protective orders exist the
officer shall make reasonable efforts to identify and arrest the primary physical aggressor);
COLO. REV. STAT. ANN. \textsection{} 18-6-803.6(2) (West 1999) (mandating that complaints from two or
more persons shall be evaluated separately); FLA. STAT. ANN. \textsection{} 741.29(4)(b) (West Supp.
1999) (stating that arrest is the preferred response with respect to the primary aggressor and
not the person who acts reasonably in self defense); IOWA CODE ANN. \textsection{} 236.12 (West 1994)
(ordering that the officer arrest the primary aggressor if there is an injury, intent to
inflict serious injury, or a firearm); MD. ANN. CODE art. 27 \textsection{} 594B(d)(2) (1996) (stating that if
there is mutual battery the officer shall consider who the primary aggressor is and who may
have acted in self defense); MASS. GEN. LAWS ANN. ch. 209A \textsection{} 6(e) (West 1997) (requiring
that in the case of dual arrest, every officer must set forth reasons for the dual arrest); MICH.
COMP. LAWS ANN. \textsection{} 776.223(b)(ii) (West Supp. 1999) (setting forth the criteria to be evalu-
ated when determining whether to arrest one or both parties); MO. ANN. STAT. \textsection{} 455.085(3)
(West 1997) (stating that the officer shall arrest primary aggressor and consider intent of ac-
cused, history of abuse, and extent of the injury); MONT. CODE ANN. \textsection{} 46-6-311(2)(6) (1997)
(stating that factors to consider when determining the primary physical aggressor include the
prior history of domestic violence, the severity of the injuries, whether an act was done in self
defense, and the size and strength of each person.); N.H. REV. STAT. ANN. \textsection{} 173-B:9 (1994)
(directing the officer to arrest the primary physical aggressor); N.Y. CRIM. PRO. LAW \textsection{}
140.10(4)(c) (Consol. Supp. 1999) (directing the officer to arrest the primary aggressor, to
consider the extent of injuries, whether the person is threatening or in the future will be
threatening, and whether the person acted in self defense); R.I. GEN. LAWS \textsection{} 12-29-3(c)(2)
(1994) (directing arrest of primary physical aggressor); S.C. CODE ANN. \textsection{} 16-25-70(D) (Law
Co-op. Supp. 1998) (stating that when determining who the primary aggressor is, the officer
shall consider the history of abuse, the severity of injuries, the evidence, the likelihood of fu-
ture injury, and whether one party acted in self defense); UTAH CODE UNANN. \textsection{} 77-36-2.2(3)
(1998) (requiring the officer, when arresting the primary aggressor, to consider prior com-
plaints, the severity of the injury, and whether one party acted in self defense).

\textsuperscript{114} \textit{See} VAWA, Pub. L. No. 103-322, \textsection{} 2101(c), 108 Stat. 1902, 1932 (1994) (codified at
42 U.S.C. \textsection{} 3796hh(c) (1994)); \textit{see also} Stevenson, \textit{supra} note 92, at 889-90 (discussing re-
quirements under the "Grants to Encourage Arrest Policies" and the VAWA provisions, 42
U.S.C. \textsection{} 10415(b)(3)(A) (1994)).

\textsuperscript{115} \textit{See} Vicky Stefter and Donna Lewen, Editorial, \textit{The Vulnerability of Immigrant
gressor is left to the discretion of the police, even well-trained officers fall into old patterns of assessing this status and may determine that the immigrant woman is the aggressor.

Police, as part of society, bring long-standing attitudes to incidents which unfavorably portray immigrant women. Such attitudes may cause law enforcement to perceive the woman as having an "angry demeanor" and to be more likely to believe the man when determining which of the two is the aggressor. Once the credibility of one of the partners becomes an issue, the immigrant woman, who has less familiarity with the language and legal process, is disadvantaged in comparison to male perpetrators who are United States citizens or legal permanent residents with more established ties to the United States. Furthermore, police officers resistant to domestic violence claims may tell the parties that a return to the scene could lead to a dual arrest.

Women, THE SEATTLE TIMES, Mar. 16, 1995, at B5. The story of Susana Blackwell illustrates the perception which attaches and harms immigrant women. See id. Susana was shot to death by her estranged husband in the King County Courthouse while she was seeking legal protection from him. See id. News reports following her death by her husband labeled her a "mail order" bride and declared "'Gunman felt duped by bride from the start.'" Id. The disparaging remarks seemed to shift the responsibility from the gunman to his victim. See id. This shift demonstrates how an abuser's depiction can diminish the victim's ability to obtain relief. Id.

116. See Donald G. Dutton, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 219 (1995). Dutton explains that the police have the same general perceptions as the rest of society with regard to domestic violence situations which affects how they deal with domestic violence situations. See generally id. at 218-249.

117. Liza Mundy, Fault Line In Virginia: The enduring problem of domestic violence has a new solution: an unforgiving law that in its first four months has led to the arrests of thousands of husbands, wives and parents, THE WASH. POST, Oct. 26, 1997, (Magazine) at 11, available in 1997 WL 14709247 at *8 (discussing police attitudes in context of domestic violence in general and not necessarily all women).


119. In response to complaints about these procedures some states that have instituted laws that prevent officers from threatening or suggesting future arrests of parties involved that may prevent the parties from reporting future incidents. See CONN. GEN. STAT. ANN. § 46b-38b(b) (West Supp. 1999); GA. CODE ANN. § 17-4-20.1(a) (1997); MASS. GEN. LAWS ANN. ch. 209A § 6(e) (West 1998); MO. ANN. STAT. § 455.085 (West 1997); N.D. CENT. CODE §14-07.1-10(2) (1997); S.C. CODE ANN. § 16-25-70(E) (Law Co-op. Supp. 1998); TENN. CODE ANN. § 36-3-619(d)(1) (1996); UTAH CODE UNANN. § 77-36-2.2(4) (Lexis 1998).
2. Mandatory Prosecution and "No Drop" Policies

Problems with the methodology of the Minneapolis Experiment and negative findings in the SARP replication studies tended to reduce the belief in the effectiveness of mandatory arrest policies standing alone. Advocates argued that the result was a shift in discretion from the police to the prosecutors and that such policies unnecessarily placed responsibility for arrest and prosecution with the victim.\(^{120}\) In response advocates pushed for mandatory prosecution and "no-drop" policies, in order to remove charging decisions from the victims.\(^{121}\)

These policies are characterized as either "soft" or "hard" no-drop policies.\(^{122}\) In soft no-drop jurisdictions, the victim need not file a complaint in order to initiate criminal proceedings against an abuser.\(^{123}\) Instead, the prosecutor files the charges.\(^{124}\) In addition, there are no adverse consequences taken against a victim who refuses to cooperate after the charges are filed.\(^{125}\) The efforts of the state remain focused on supporting and empowering the victim to follow through with the prosecution.\(^{126}\)

In contrast, under hard no-drop prosecution policies, prosecutors are obliged to try even those cases in which the victims do not willingly participate.\(^{127}\) To pursue the prosecution, victims are subpoenaed against their will, may be prosecuted if they recant, or held in contempt if they...
refuse to testify.\textsuperscript{128} In some jurisdictions, mandatory prosecution laws are generating uncompromising attitudes in police and prosecutors' offices. For example, in Virginia Beach, prosecutors declare that, "'[w]e're not going to drop the charges just because the victim wants to."\textsuperscript{129} This approach increased the number of guilty pleas in domestic violence cases.\textsuperscript{130}

In some circumstances, the abuser takes a plea to avoid placing their partner in the position of testifying or being placed in jail. Unfortunately, a plea undertaken for these reasons does not address the underlying causes of domestic violence and fails to resolve the power imbalance which is present in the relationship. As a result of a plea, the complexity of domestic violence situations is lost, and the prosecutor in a no-drop jurisdiction becomes driven by the desire to obtain a disposition. Opponents of the mandatory prosecution schemes argue that the aggressive approach of many prosecutors has the negative effect of re-victimizing the abused woman.\textsuperscript{131}

Many prosecutors respond to all victims as if they will drop charges.\textsuperscript{132} This dynamic creates an adversarial position between the state and woman victim, and may even reinforce the emotional ties between the abuser and the victim.\textsuperscript{133} The forceful treatment of the victim by the state gives the abuser more leverage to use in keeping the woman from reporting the incident in the first place.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{128} See Hanna, No Right to Choose, supra note 94, at 1866 (describing the actions of the Anchorage prosecutors in 1983 who, under a hard no-drop policy, jailed Maudie Wall overnight when she refused to testify against her husband); Gena L. Durham, Note, The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem, 71 S. CAL. L. REV. 641, 650 (1998).
\item \textsuperscript{129} Heyser, supra note 95.
\item \textsuperscript{130} See Bill McKeown, Closing up Legal Seams/Family Violence Laws Often Fall Short, THE COLO. SPRINGS GAZETTE TELEGRAPH, Mar. 29, 1998, at A1 (Colorado Springs Judge Rebecca Bromley stating that about ninety percent of defendants take a plea bargain). In addition, the evidentiary standards in domestic violence cases are relaxed to the point that an accused man is presumed guilty. See Cheryl Hanna, The Paradox of Hope: The Crime and Punishment of Domestic Violence, 39 WM. & MARY L. REV. 1505, 1516 (1998) [hereinafter Hanna, The Paradox of Hope].
\item \textsuperscript{131} See Richard J. Gelles & Murray A. Straus, Compassion or Control: Legal, Social, and Medical Services in INTIMATE VIOLENCE 172-80 (1988) (concluding that mandatory prosecution policies disempower the victims as they take the control of the situation out of their hands). See also Hoctor, supra note 105, at 685.
\item \textsuperscript{132} See Hanna, No Right to Choose, supra notes 94, at 1894-98 (addressing no-drop policy opponents' concerns about revictimization); Durham, supra note 128, at 651-53.
\item \textsuperscript{133} See Durham, supra note 128, at 652 (arguing that actions of the prosecutor may act to increase control by the abuser).
\item \textsuperscript{134} See id. at 653. As one commentator notes, "[p]erversely, in all too many cases, the
Fundamentally, he is able to tell her that she will be subject to arrest, or deportation, if she reports the incident. Against the backdrop of fear and coercion directed by the state toward the victims of domestic violence, the drop in the numbers of reports of domestic violence may reflect the sense of hopelessness that exists for the abused woman who sees the state as just as great a threat as her abuser.\(^{135}\) Furthermore, immigrant women who have escaped regimes which were oppressive or unwilling to address domestic violence are especially wary of promises made by the state.\(^{136}\) Finally, many scholars have demonstrated that women of color experience the criminal justice system differently than white women and have more to fear from contact with authority.\(^{137}\)

Opponents of mandatory prosecution also argue that an approach which compels the testimony of the victim does little to eliminate the negative stereotypes that are held by the public about victims of domestic violence.\(^{138}\) Compelled testimony is perceived as untruthful and this feeds into the tendency of the public to either minimize the harm or blame the victim for her harm.\(^{139}\)

The increased attention to domestic violence creates an atmosphere where prosecutors are reluctant to negotiate cases involving allegations of domestic abuse.\(^{140}\) The desire to obtain a conviction keeps the prosecutor from the traditional role of evaluating each case and using good judgment.\(^{141}\) The consequence of this shift has adverse ramifications in both immigration and criminal law. The realities of many battered im-

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\(^{135}\) See Durham, supra note 128, at 653.

\(^{136}\) See Virtue, Extreme Hardship, supra note 18, at 5.


\(^{138}\) See Durham, supra note 128, at 653-54 (noting that the tendency to blame the victim is enhanced in minority communities).

\(^{139}\) See Durham supra note 128, at 657.

\(^{140}\) See generally Donna Wills, Domestic Violence: The Case for Aggressive Prosecution, 7 UCLA WOMEN'S L.J. 173 (1997) (providing an example of the aggressive approach of one veteran prosecutor).

\(^{141}\) See Pilcher, supra note 31, at 331 (quoting the ABA STANDARDS FOR CRIMINAL JUSTICE-PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-1.2 (1993) and noting that according to the ABA standards, the prosecutor's duty is "to seek justice, not merely to convict").
migrant women are directly impacted by the introduction of these harsh penalties designed by Congress to assist them.

A second consequence of the use of mandatory arrest, prosecution and "no drop" policies is the heavy penalization of perpetrators in an effort to "protect" female victims. A similar intent emerges in immigration through the enactment of a new ground for deportation which applies to both criminal violations of domestic violence laws, and civil and criminal violations of domestic violence orders.

For women seeking assistance the availability of relief may be minimal given the inadequate training of law enforcement officers. In jurisdictions where women do seek the assistance of the police, many are told that they will also be subject to arrest. In jurisdictions which al-

142. See Fagan, supra note 98, at 39; Fedders, supra note 137, at 289; and see also Hanna, No Right to Choose supra note 94.


any crime of violence (as defined in section 16 of title 18, of the United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any state, Indian tribal government, or unit of local government.


any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

145. For example, a Missouri statute requires that "if the police are called back within twelve hours of the first call, someone must be arrested." Gail S. Zarosa, When Battered Women Strike Back, 7 U.S. A.F. ACAD. J. LEGAL STUD. 102, 101 (1996-97). Standing alone, this requirement creates a disincentive to call the police. She may view the statement as a threat that she will be arrested. See Zorza, supra note 97 at 966 (noting that in Milwaukee, a similar warning was issued that "would surely have intimidated many of the victims from ever calling the police again"). See also Lynn Gillin, Letter to the Editor, Analyzing the Issues in Battered Women Cases, THE NEW ORLEANS TIMES-PICAYUNE, Mar. 21, 1997, at B6 available in 1997 WL 4211225.
low for dual arrests, or where the woman appears less credible in the
eyes of the police, seeking assistance to document a VAWA claim is im-
possible, as it creates a situation where the woman will be arrested and
subsequently detected by the INS.

In these circumstances, the victim’s unwillingness to seek or find re-
relief can be attributed to an underlying failure in the policy formulation
to consider the impact these solutions to domestic violence may have on
immigrants, especially women of color. Policymakers have not ade-
quately considered the impact that this intersection of criminal and im-
migration law has on immigrant women of color. As a result, current
solutions do not treat the complexity of the choices facing immigrant
women.

IV. THE COLLISION COURSE FOR JUSTICE

Domestic violence advocates, and the policies that they urge, assume
women are victims and men are perpetrators. In fact, domestic vio-
lence advocates note that ninety-four percent of abuse is male against
female. The application of aggressive anti-domestic violence laws,
however, has caught many unintended victims in its net. In jurisdictions
which have adopted mandatory arrest policies, the arrests of women for
domestic violence have increased dramatically.

In Tarrant County, Texas, ten to fifteen percent of the domestic
violence cases each year involve female defendants. In Los Angeles,
the rate has more than doubled in five years, and women accounted for

146. This problem is related to, but distinct from, the issues raised by Crenshaw when
she describes the particular "intersectional" needs of women of color. See generally Cren-
shaw, supra note 7; at 1265. Crenshaw discusses the adverse impacts that a white feminist
agenda has on the provision of services to women of color who are also victims of domestic
violence. See id. at 1265. More importantly, attempts to criminalize domestic violence fail to
recognize the unique situation of immigrant women and have caused related conflicts.

147. See Andrea Brenneke, Civil Rights Remedies for Battered Women: Axiomatic & Ig-
nored, 11 LAW & INEQ. J.L. 1, 14 (1992) (arguing that a civil rights model should be adopted
to move away from the use of "victim" to define a "battered woman").

148. See Zorza, Must We Stop, supra note 102, at 980 (citing Angela Browne, WHEN
BATTERED WOMEN KILL 8 (1987)).

149. See John Johnson, A New Side to Domestic Violence: Arrests of women have risen
sharply since passage of tougher laws; critics say some men manipulate the system – others say
female abusers have long been overlooked, L.A. TIMES, Apr. 27, 1996, at A1, available in 1996
WL 5263963 (quoting Joan Zorza); Stephen J. Schulhofer, The Feminist Challenge in Criminal
Law, 143 U. PA. L. REV. 2151, 2163-64 (1995) (observing that an abused woman may be ar-
rested in mandatory jurisdictions if the partner alleges that she hit him).

150. See Nancy Donisi, Domestic Abusers Brought to Justice: New laws reflect changing
14.3% of the domestic arrests made in 1995. These findings are consistent with a 1998 study conducted by the National Institute of Justice that found between ten and fifteen percent of those arrested for battering are women.

In several jurisdictions, the SARP studies found an increase in the number of women arrested after the adoption of mandatory arrest policies. This trend has also adversely affected immigrant women, who are likely to be women of color. Given dual arrests occur when there is doubt about who is the primary aggressor, and because the police act in ways which discriminate against female complainants in low status areas where immigrant women of color reside, women of color are arrested more often than educated women who do not fit into stereotypes as abusers.

In fact, many immigrant women of color get caught in a no-win situation. The power dynamic precludes them from seeking outside assistance, and when they finally do affirmatively seek assistance, they are viewed as aggressive and considered the abuser. Their vulnerability is also exacerbated by the male partner's ability to negotiate the criminal justice system.

151. See Johnson, supra note 149.


153. See Zorza, Must We Stop, supra note 102, at 980-81 (noting that the percentage of female offenders "varied from 2% in Minneapolis, 4% in Omaha, 9% in Milwaukee, 11% in Colorado Springs, and to 18% in Charlotte").


155. "[A] case worker at the Domestic Violence Program of the Virginia Department of Human Services relates that local police and judges treat Latina women seeking intervention condescendingly: 'I know situations where the battered woman was detained because the husband twisted around the story and the policemen believed him.' Katherine M. Culliton, Legal Remedies for Domestic Violence in Chile and the United States Cultural Relativism, Myths, and Realities, 26 CASE W. RES. J. INT'L. L. 188, n.20 (1994) (quoting Carol A. Douglas, Latin American Immigrant Women: Battered in the U.S., in OFF OUR BACKS, May 1990, at 3); see also Joyce Shelby, Battered Immigrants Have Way Out in Group, N.Y. DAILY NEWS, Jan. 24, 1996, Suburban at 3 (telling how one abused woman refused to go the police because she did not think they would believe her over her husband who was considered a "model citizen").
A. Case Studies: Demonstrating the Problems When the Immigrant Woman is Arrested

As in any alleged criminal assault the actions of an accused immigrant may be characterized as self-defense, non-existent, mutual combat, or an outright assault. When the perpetrator is an immigrant, liability is complicated by the fact that there may simply be a lapse in understanding about the norm in the United States or a misinterpretation of her actions by neighbors and the police.156

Notwithstanding, the underlying circumstance, an immigrant woman's involvement with the criminal justice system impedes her ability to qualify for VAWA relief because it creates problems in meeting VAWA eligibility requirements. Advocates foresaw some of the adverse effects, and argued against these provisions.157 As noted above, domestic violence as grounds for deportation was not adopted in the VAWA, but became so in the IIRIRA.158

1. Self Defense and Dual Arrest Policies

Mandatory arrest laws help women and men who are in danger of assault but at the same time they create a new category of victim, those unnecessarily arrested.159 Women are arrested even where the statutes limit arrests to "the primary aggressor." Additionally, in some states the statutes require an arrest of both parties when the "primary aggressor" cannot be identified.160 Finally, arrest is often predicated on physical


157. See Kathryn J. Rodgers, Prepared Testimony by Kathryn J. Rodgers, Executive Director NOW Legal Defense and Education Fund Before the Senate Judiciary Committee on the Violence Against Women Act of 1994, FED. NEWS SERV., May 15, 1996 (noting that the IIRIRA legislation contained provisions "that will defeat VAWA's goal of reducing battered immigrants' fears"). The fear and quandary that have been generated by the new law was predicted by advocates who urged a more moderate approach. See id.


159. See Mundy supra note 117, at 11. "A lot of times, I think arrests are being made when they shouldn't be" says Kenneth E. Noyes, staff attorney and coordinator of the Domestic Violence Project for the Legal Services of Northern Virginia." Id.

160. See Bracher, supra note 104, at 171-72 (discussing the City of Cincinnati's mandatory arrest policy which requires that the police arrest both individuals if they are unable to identify the "primary physical aggressor").
injury rather than actual aggression.\(^{161}\)

Actions made in self-defense are often not considered at the initial point of contact and most arrests of women fail to evaluate when the women are acting in self-defense.\(^{162}\) Furthermore, domestic violence advocates who have "treated" female perpetrators report that most of the women in programs ordered by the court were in fact acting in self-defense.\(^{163}\) Immigrant women caught in these arrests cannot avoid adverse immigration consequences unless criminal charges are dismissed. In light of the heightened treatment of domestic violence cases this is not likely. Assessing who is the victim is not always easy, and a standard that requires the woman not to retaliate in order to maintain a status of "victim" and "non-aggressor" accentuates the power of the abuser, and may jeopardize the woman's safety by closing off traditional avenues of relief.\(^{164}\)

For example, Elaine is a native of Hawaii whose first language is Tagalog and although she is not an immigrant, she shares traits of immigrants in that "she is isolated from her family and culture, unemployed, without her own car, and dependent on her husband for income."\(^{165}\) Her four-year relationship with her husband, who maintains a black belt in martial arts, produced charges and counter-charges resulting in break-

\(^{161}\) See, e.g., Wang, supra note 118, at 162-63 (describing a self-defense circumstance where the woman was charged because the husband became injured).

\(^{162}\) See Hectoor, supra note 105, at 684 ("[m]any battered women who are arrested are in effect being punished for protecting themselves in self-defense"). See also Batterer Intervention Report, supra note 152, at 5 (noting that women's violence is often in retaliation or self-defense).

\(^{163}\) See Hectoor, supra note 105, at 685 n.271 (citing to Zorza, Must We Stop, supra note 102, at 980). Tina Busey, Director of the Court-Referred Women's program at Counseling Services in Denver has identified four types of female batterers: "Self-Defending Victims," "Mutually Combatant Women," "Primary Physical Aggressor," and "Angry Victims." Batterer Intervention Report, supra note 152, at 73. She contributes the frequency of police arrest in self-defense cases to the "confusing" behaviors the women may exhibit in the presence of the police. See id. L. Kevin Hamberger and Theresa Potente concur. See id. (discussing the conclusions drawn in L. Kevin Hamberger and Theresa Potente, Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice, 9 Violence and Victims 125 (1994)). "Research with the community sample of domestically violent [women] indicated most were motivated by a need to defend themselves from their partner's assaults, or are retaliating for previous beatings." Id. (quoting Hamberger and Potente supra, at 164). The use of Battered Woman Syndrome and Battered Spouse Syndrome to expand and develop self-defense is a subject beyond the scope of this article. For a discussion of this subject see generally Holly Maguigan, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals, 140 U. PA. L. REV. 379 (1991).

\(^{164}\) See Hectoor, supra note 105, at 685-85.

\(^{165}\) Mundy, supra note 117, at 14.
Elaine was charged and convicted of assault when she took a peanut butter jar away from her husband, Jesse, and threw it at the kitchen sink. In a jurisdiction with a primary aggressor statute, the actions of the police demonstrate how the complexities of domestic violence impede even good faith efforts to assess complex situations. Factors that adversely influence female arrests include the conduct of the "victim." In situations where the victim argues with the offender in the officer's presence, there is a heightened chance that the "victim" will be arrested.

As noted above, Elaine was convicted of domestic violence as a result of this altercation. When the case came to trial, Jesse did not want to proceed with the charges, but the district attorney would not dismiss the case. The State offered Elaine a plea bargain: by which the prosecutor would have agreed to a 60-day suspended jail sentence.

In an attempt to keep the conviction off her record she went to trial, in part reasoning that "[it's] his word against mine." The judge believed Jesse, and found that her actions were assaultive. Had Elaine been an immigrant, this conviction would constitute a domestic violence conviction under section 237(a)(2)(E) of the INA. It could trigger deportation consequences and would bar her from establishing the good moral character that is required in order to obtain relief under VAWA.

In the following example, while the police did not arrest the woman,

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166. See id.
167. See id. at 13-14. Initially, the incident began when Jesse, her husband, returned home from work and Elaine wanted to talk to him about day-care problems. See id. Jesse did not want to talk and left Elaine to make a peanut-butter-and-jelly sandwich for their son. See id. Elaine says she was frustrated by Jesse's silence, and took the jar away to force him to talk to her. See id. In response, Jesse called the police. See id. When the police arrived, each accused the other of shoving. See id. There was no evidence about which party actually shoved the other, but the peanut butter jar was sufficient for the police to arrest Elaine. See id.
168. See Daniel G. Saunders, The Tendency to Arrest Victims of Domestic Violence: A Preliminary Analysis of Officer Characteristics, 10 J. OF INTERPERSONAL VIOLENCE, 150-53 (1995) (noting that in a vignette where an abused woman continues to argue with the man in the police officer's presence the likelihood of the non-argumentative victim being arrested is 1.53% and the argumentative victim being arrested is 10.58%).
169. See Mundy, supra note 117, at 25.
170. See id.
171. See id.
172. Id. at 24-25.
173. See id. at 25.
175. See Carter v. INS, 90 F.3d 14 (1st Cir. 1996) (holding conviction for a crime of moral turpitude would preclude good moral character under VAWA).
under many domestic violence laws, she could have been arrested. Paula obtained support from Lideres Campensinas, a grassroots organization of women, which educates farm workers about domestic violence.\footnote{176. See Pamela Warrick, \textit{A Life of Their Own; They Have Been the Victims of Abusive Men–Husbands, Bosses–And Have Spent Years Laboring in the Fields, But Farm Worker Women are Learning How to Fight for Their Rights}, \textit{L.A. Times}, June 7, 1996, at E1.} "After Paula's first meeting with the Campensinas, she went home and, with a baseball bat in her hands, told her abusive husband of thirty-five years to leave."\footnote{177. \textit{Id}.}

Prior to meeting with the Campensinas, she did not know about domestic violence.\footnote{178. \textit{See id}.} She says, "[g]rowing up in Mexico, I learned the man is the boss. If you don't do what he wants, then you must pay the price."\footnote{179. \textit{Id}.} Today, she is free from her abuser, although he returned three times.\footnote{180. \textit{See id}.} Each time she threatened him with "the bat and he went away."\footnote{181. \textit{Id}.} In any of these incidents, the police could charge Paula with domestic violence.

If her husband called the police and arrived to arrest Paula for using unnecessary force, her attempt to end years of violence may cause her deportation. A conviction of the charge creates grounds of deportability, and precludes her from being eligible to obtain legal permanent residency under VAWA. Paula's case demonstrates the difficulty in assessing cases where the woman is charged with abuse.

The question which must be answered is whether the woman is acting in self-defense or some other form of empowered state to terminate long-standing violence. If she is doing the latter, she should not simply be characterized as an abuser herself, with all access to immigration relief denied. As anti-domestic violence policies increase punitive acts against the perpetrators who are presumed to be male, adverse consequences attach to women who are accused as perpetrators.

In the past many of these cases were handled by placing the woman into diversion or treatment programs.\footnote{182. \textit{See Hooper, supra note 5, at 173.}} This form of relief was particularly helpful when dealing with women who are arrested "for defending themselves in the midst of a violent argument."\footnote{183. Hanna, \textit{The Paradox of Hope, supra note 130, at 1576}.} Presently, many of these programs are unavailable or require admissions in criminal court.
which can be used against the women in immigration proceedings. In these circumstances, the possibility of arrest maintains the additional adverse consequence of reducing abuse reports. Studies indicate that it is unlikely that a woman will report further battering when they fear that they will be arrested.

Given the increase in the prosecution of women, and the existence of retaliatory actions by the abuser resulting in false accusations against immigrant women, there is a need to carefully monitor the actions of police which may exacerbate the situation by arresting the woman. In order for a female perpetrator to be treated fairly, and not held to a male standard, prosecutors must be trained in evaluating whether a woman is acting in self-defense. This evaluation is complicated when the woman is an immigrant woman of color because an awareness of the limitations for relief may preclude the State from obtaining accurate information from the victim.

In a situation where the abuse is potentially, although not immediately, life-threatening (for example, when the batterer is continually making threats that she knows he is able to carry out), her act of violence may be seen as both non-feminine and if she is a woman of color, as evidence for the stereotype that

185. See Hoctor, supra note 105, at 684. According to one researcher,

[e]ven severely- abused wives may feel compelled to remain in their marriages in order to avoid deportation, which could mean permanent separation from their children and a marginal existence. The migration experience itself aggravates the plight of the battered spouse through isolation from family and friends, language barriers, and unfamiliarity with legal and social services.

Fitzpatrick, supra note 9, at 32 (footnote omitted).
186. See L.J. Stalans & A.J Lurigio, Responding to Domestic Violence Against Women, 41 CRIME & DELINQ., 387, 391-94 (1995) (noting that under mandatory arrest schemes, police retain discretion because of the ambiguity of what constitutes probable cause); see also Fedders, supra note 137, at 293. Fedders argues that

even in a mandatory-arrest regime, the police still must make probable-cause determinations about whether violence has occurred; probable cause is not a color-blind calculation. That is, police racism and classism may operate to make them more incredulous of the testimonies of women of color and low-income women than white and middle-class women.

Fedders, supra note 137, at 293 (footnotes omitted).
187. See Hooper, supra note 5, at 174.
women of color are particularly violent.\textsuperscript{188}

Although difficult, a case by case evaluation is possible and must be undertaken to protect women acting in self-defense.\textsuperscript{189}

2. Non-Existent Conduct and the Retaliatory Spouse

A second problem emerges for immigrant women who are falsely accused of criminal conduct. Abusive husbands may file false criminal charges against their spouses. In fact, some cases may be filed in retaliation for the woman leaving the abusive situation. Filing false charges against undocumented immigrants allows the abuser to show the woman that his threats to have the system work against her can be carried out. Alternatively, the husband may be the father of a mutual child with the woman. Consequently, he may use false criminal charges to obtain leverage against the woman, in child custody or support cases.\textsuperscript{190}

For example, after repeated abuse, Debbie left her husband Charlie.\textsuperscript{191} The end ultimately came when Charlie asked her to move in with him and his new girlfriend.\textsuperscript{192} Charlie, informed Debbie that he was seeing another woman, and he expected her and their children to live with him and the new woman.\textsuperscript{193} After Debbie refused, Charlie severely beat her.\textsuperscript{194} The abuse escalated until she was beaten and tied to a bed.\textsuperscript{195} After her children released her, authorities arrived and transported Debbie to the emergency room for treatment.\textsuperscript{196} Staff members photographed her wounds.\textsuperscript{197} Afterward, she obtained a restraining order against Charlie, and initiated criminal charges.\textsuperscript{198}

\textsuperscript{188} Id. at 175.
\textsuperscript{189} See id. at 174-75.
\textsuperscript{191} See Untold Stories: Cases Documenting Abuse by U.S. Citizens and Lawful Residents on Immigrant Spouses (visited Sept. 8, 1999) [hereinafter, Untold Stories]. This website contains a compilation of domestic violence incidents gathered from various sources. The names of the victims have been changed and stories are added and updated periodically. For more information contact the Family Violence Prevention Fund at (415) 252-8089.
\textsuperscript{192} See id.
\textsuperscript{193} See id.
\textsuperscript{194} See id.
\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} See Untold Stories, supra note 192.
\textsuperscript{198} See id.
When Debbie filed for child support, Charlie became angry and he and his new girlfriend accused Debbie of trying to murder them. They filed criminal charges against her, and had her arrested. At the time of her arrest, the police dropped her case against Charlie stating they could not believe her.

Subsequently, the photographs could not be located. Debbie went to court on the charges filed against her, and plead to a lowered charge of illegal possession of a firearm. Although Debbie insisted she never possessed the gun, she says she accepted the plea bargain to avoid having her children sent into the foster care system.

Another example of how tools designed to minimize abuse, become tools of oppression is demonstrated by Alicia's case. Alicia is also the victim of false charges. She received legal representation at the Center for Legal and Social Justice, at St. Mary's University School of Law. In her case, her husband's putative wife filed charges. Ultimately, the BIA approved Alicia's VAWA petition, but not without a substantial struggle that began when she left her common law husband. Initially, he denied that he was ever married to Alicia, and claimed that he was not the father of her two children. When DNA tests proved that he was the father, the court ordered him to pay child support. In retaliation, he reported Alicia to the INS which initiated deportation proceedings against her.

When her case came to the attention of the Center for Legal and Social Justice, Alicia was represented by the Human Rights Clinic. She was subject to immediate deportation, and faced permanent separation from her children, who were at the time in custody of their father.

199. See id.
200. See id.
201. See id.
202. See id.
203. See Untold Stories, supra note 192.
204. See id.
205. Alicia is not the real name of the client.
206. The Center for Legal and Social Justice is divided into five clinics that represent low-income individuals. Alicia was ultimately assisted by the Human Rights Clinic, the Criminal Justice Clinic, and the Civil Justice Clinic. For a more thorough examination of the clinics, see Jon C. Dubin, Clinical Design for Social Justice Imperatives, 51 SMU L. REV. 1461, 1490-1498 (1998).
207. As part of the case, the Center for Legal and Social Justice established that the "wife" was not legally married to the husband since he had a valid common law marriage to our client Alicia which precluded him from entering into a valid marriage with the other woman.
208. See McKeon, supra note 190, at 459 (describing custody "blackmail" used by abus-
While she remained in detention, the husband informed her that she would never see her children again.\footnote{See id. at 459 (describing how men use the custody process to further abuse women). "Forty states currently have statutes that make domestic abuse at least one of the factors that judges must consider when determining who should have custody of the children." Hoctor, supra note 105, at 685 (stating that this result reflects another unintended consequence of a false arrest); see also V. Pualani Enos, Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children, 19 HARV. WOMEN’S L.J. 229 (1996); Rebecca D. Cornia, Essay, Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women, 8 UCLA WOMEN’S L.J. 99, 114 (1997) (noting that women in custody disputes may be required to show that they have changed and will not continue in violent relationships).}

With the INS unwilling to allow a bond due to criminal charges pending against her, it became clear that she could not have engaged in the alleged criminal conduct. Although her ex-husband's putative wife claimed that she attempted to run her down with an automobile in a parking lot, Alicia does not drive, and did not have access to a car similar to the one described.

During pretrial, the Center for Legal and Social Justice spoke with the prosecutor to determine if the State would dismiss the case. According to the Assistant District Attorney, because this charge involved an allegation of domestic abuse the State would not dismiss the charge. The statement of the prosecutor is consistent with a hard line approach to the treatment of domestic abuse, but it fails to consider the problems that an immigrant woman with a manipulative husband encounters. The prosecution acknowledged the relationship between the "victim" and Alicia's husband. Furthermore, the prosecutor conceded that Alicia had filed complaints of abuse against her husband and she had no previous record of being abusive. However, the State would not dismiss the charges because of its strict policy in domestic violence cases.

Unfortunately, Alicia's case is not unique. With diligent efforts on the part of the Center for Legal and Social Justice, the prosecutor eventually decided to let the immigration authorities decide Alicia's fate, so he dropped the criminal charges. With the charges pending, attempts to qualify Alicia for VAWA relief were futile. As a result, the abuser, through his putative wife, was able to frustrate Alicia's ability to present her VAWA case because the INS viewed the criminal charges as an adverse factor, precluding VAWA eligibility.

As these cases indicate, abusers are accustomed to seeking ways to impose power over their victims. They are successful in their attempts when the criminal justice system fails to recognize the complexity of the
power dynamics present in domestic violence cases.\textsuperscript{210} The potential for misuse is great and, therefore, the need to carefully consider collateral effects of criminal convictions is high.

3. The Woman as Aggressor and Mutual Conduct

The feminist paradigm embraced by many domestic violence advocates, ignores or denies the existence of "mutual combat and female aggression."\textsuperscript{211} This creates a schizophrenic response which has advocates arguing that women should not be arrested regardless of probable cause.\textsuperscript{212} Researchers Murray Straus and Richard Gelles argue that one-half of all spousal violence is reciprocal.\textsuperscript{213}

Programs addressing domestic violence by women acknowledge that they act in mutual combat\textsuperscript{214} and as the primary aggressor.\textsuperscript{215} In light of this evidence, it is important to recognize that the traditional treatment of women as victims fails to appropriately deal with circumstances where the woman is in fact a perpetrator of domestic violence.\textsuperscript{216} Although this category of abusers is relatively small and immigrant women compose an even smaller portion within this group, the consequences for immigrant women who abuse are severe. The complexity of the

\textsuperscript{210} Even when the petitioner has filed a petition for legal permanent residency he retains the power to adversely affect her immigration status by filing false criminal charges. In one case, the abuser filed charges alleging that his immigrant spouse had stolen money and a firearm from him. \textit{See Untold Stories, supra} note 191. She left him when he asked her to perform illegal acts and found out that in addition to the criminal charges the abuser had filed for a dissolution of their marriage, six months prior to the termination of her conditional residency. \textit{See id.} His actions were deliberate and effective methods aimed at minimizing her ability to remain in the United States. \textit{See id.}

\textsuperscript{211} Cathy Young, \textit{Domestic Violations}, \textit{REASON MAGAZINE}, Feb. 1, 1998 (citing Minneapolis Experiment) available in 1998 WL 9948298; \textit{see also} Fedders, \textit{supra} note 137, at 285-87 (arguing that traditional advocates essentialize battered women, prioritizing patriarchy and ignoring issues of "class, race, country of origin, ethnicity and individualized personality traits").

\textsuperscript{212} \textit{See Young, supra} note 211, at 28.

\textsuperscript{213} \textit{See id.; see also} Hanna, \textit{The Paradox of Hope, supra} note 130, at 1559-72 (discussing research that exemplifies the conflict between the perspective of social scientists and feminists).

\textsuperscript{214} \textit{See Batterer Intervention Report, supra} note 152, at 73. "Mutually Combatant Women. Approximately 2 to 3 percent of female defendants arrested for battering are in relationships in which both partners attempt to inflict injury equally on the other, but neither party has ever been threatened with murder or sexual abuse." \textit{Id.}

\textsuperscript{215} \textit{See id.} "Primary Physical Aggressors. Approximately 2 percent of women arrested for domestic violence are the primary physical aggressors. In these cases, there are injuries to the man and none to the woman, and the man has been threatened with injury or murder if he attempts to leave the relationship." \textit{Id.}

\textsuperscript{216} \textit{See Young, supra} note 211, at 28.
woman's situation requires an analysis and approach which weigh adverse immigration consequences against the criminal justice system's goals.

"Part of the problem is the one-size-fits-all approach to domestic violence." Susan Finkelstein recounts this circumstance when she tells how, against her wishes, her live-in boyfriend, Jim, was prosecuted after they engaged in a mutual public fight. According to her, "'I lost my temper, he lost his temper, and we got into a mutual scuffle.'" In her mind, the authorities blew the events of a minor scuffle which occurred in a public place out of proportion.

In fact, it was the "primary aggressor" provision of the state statute that kept her pleas from being heard by the police. When she tried to tell the police she was as much responsible as Jim was, because she initiated the altercation, the police stated that the primary aggressor provision required the arrest of the "larger of the two parties." Susan did not feel empowered by the actions taken on her behalf and the plea bargain entered into by Jim did not reflect the wishes of the "victim.

As a result, she says "'I was helpless,'" and "'I had no rights.'" She describes the experience as paternalistic. Unlike an immigrant woman who may be too terrified by the process to speak out, Susan asserted her rights. At one point she told the prosecutor, "'I didn't appreciate being told what was best for me by someone who didn't even know me.'" Yet despite her statements, authorities ignored her wishes.

Cases similar to Susan's minimize and alienate women by creating a system where self-empowerment by women is not possible. This lack of empowerment is heightened for women of color. Kimberle Crenshaw notes that, [w]here systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, inter-

217. Id. at 31.
218. See id. at 25.
219. Id. at 25.
220. See id. at 31.
221. See id. at 29.
222. Young, supra note 211, at 28.
223. See id. at 31.
224. Id. at 25.
225. See id. at 31.
226. Id. at 31.
227. See id. at 26.
vention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.\textsuperscript{228}

The cultural lens that applies when evaluating the private acts which occur in a relationship also shape the jury's perceptions about what happened. The general reluctance of a juror to believe that domestic violence is a "real crime" is reinforced by the reluctance of many immigrant victims to identify the acts of oppression they suffer as a form of abuse. When the circumstances involve mutual combat and the woman does not want to prosecute, the anti-domestic violence views held by many jurors are used to minimize the domestic violence.

As one commentator pointed out, when discussing a mutual combat situation,

\begin{quote}
 often the closer we get to a true story of what happened, the more willing we are to accept the defendant's claims of mutual combat or provocation by the victim. This tendency to impute some complicity by the victim in her own abuse reflects some of the pernicious underlying societal attitudes regarding domestic violence.\textsuperscript{229}
\end{quote}

Furthermore, there is a need to address the circumstances where the woman is acting as the primary aggressor.

In these cases, it is insufficient to rely on an approach which treats the woman as a victim rather than an assailant. This class of women could be classified as engaging in undesirable conduct both under the criminal and immigration laws. Nevertheless, the significance of the underlying causes should be relevant in assessing both criminal responsibility and the question of whether the woman should remain in the United States or be denied immigration relief.

There are many factors which are relevant to determining whether they should be allowed to stay in the United States. Under the current system a blanket approach exists which classifies the women as deportable or automatically excluded from relief promulgated in the VAWA if they are convicted of domestic violence. This approach is too restrictive and should be replaced with procedures which further the goals of both

\textsuperscript{228} Crenshaw, supra note 7, at 1246.
\textsuperscript{229} Durham, supra note 128, at 645-46 (footnotes omitted).
the immigration and criminal law.

4. The Dilemma Posed by Diversion and Treatment

If the woman was in fact a perpetrator of violence, and she accepts a plea bargain or otherwise is found guilty of domestic abuse, the conviction that results creates additional hurdles which can adversely affect her eligibility for immigration relief. If the criminal justice system offers her the opportunity for diversion and counseling, the immigration consequence remains the same as if she was convicted. Because diversion programs are most often offered as part of a sentence agreement, the diversion will be considered a conviction for immigration purposes.230

The characterization of a plea entered as part of diversion as an immigration conviction is unfortunate because treatment programs for women accused of domestic violence make sense. The data indicates that women perpetrators are not likely to re-offend and, therefore, they are good candidates for alternative forms of punishment.231 For many immigrant women, treatment programs may assist them in understanding the circumstances that led to the abuse and preclude them from engaging in any future illegal acts.

Counselors of abused immigrant men find that explaining the law may be all that is necessary to eliminate inappropriate behavior.232 This opportunity should be available to immigrant women in a manner that will not adversely affect their immigration status. Current requirements for acceptance into most diversion programs in the criminal justice system, however, create a bar to VAWA relief in the immigration system because the "conviction" is a crime of moral turpitude or sometimes even an aggravated felony.233

The National Council of Juvenile and Family Judges recommends that diversion programs be allowed only in "extraordinary cases" and only after the defendant has made an "admission before a judicial offi-

231. See Schulhofer, supra note 150, at 2192 ("The danger that a first or second offender will return to crime, especially to violent crime is not the same for women as it is for men. This is not simply a false stereotype").
232. Tini Tran, California and the West Asians, Latinos Now Find Refuge from Domestic Violence Services: Over the Last 10 years, Everything from Treatment Programs to Court Services Have Been Modified to Address the Needs of Immigrants, L.A. TIMES, May 4, 1998, at A3, available in 1998 WL 2424288 (reporting that the Latino Service Center in Santa Ana California, and the Vietnamese Community of Orange County are two non profit groups that work with batterers referred by the courts). Counselors note: "[s]ometimes, the need is as basic as explaining the law to the abusive spouse." Id.
233. See supra notes 81-83 and accompanying text.
cer." These requirements may make sense when applied to the typical non-immigrant male defendant; however, under the immigration laws these requirements constitute a conviction, which may bar the defendant from qualifying for VAWA relief. Even where the plea is entered pursuant to a diversion that holds her conviction in abeyance or eliminates it altogether, it is a final conviction for immigration purposes. This consequence undermines the choices of an informed defendant.

Furthermore, anti-domestic violence advocates generally do not favor joint counseling. They assert that "joint counseling with the victim or mediation suggest that the victim played some role in precipitating the violence and that she also needs to change her behavior." In general, it is an undesirable result to hold the victim responsible but there may be an appropriate circumstance, such as mutual combat, which warrants alternative treatment including joint counseling.

In fact, some proponents argue that, "[f]or many couples in violent relationships, particularly those involved in mutual violence, joint counseling offers the best solution." In circumstances where the woman is acting out of ignorance to the laws, or mutual combat, a criminal response that includes counseling and/or diversion may be more appropriate than one which simply creates adverse criminal and immigration consequences. The unique and complex circumstances confronting immigrant women perpetrators of domestic violence highlights the tensions that are created by the intersection of criminal and immigration law.

5. Unique Issues Posed by Immigrant Communities

a. Asian Cultural Taboos and Barriers

Confronting domestic violence in immigrant communities requires an awareness of the unique cultural realities of the various communities. For instance, in the South Asian tradition, immigrant women face a double barrier since "traditionally South Asians do not speak of their family problems to the outside world and immigrants are even less willing to do so because it will break the model minority image the commu-
nity is so proud of." Furthermore, "the community ostracizes those who speak out against it."240

There is a heightened relationship between culture and identity in these communities. In Southeast Asian communities, the members of the group are not, individual-centered, and, therefore, American messages of choices and rights may contradict the woman's own view about herself.241 Furthermore, her identity is often defined by belonging to or being part of a group.242 The need for this belonging may place the woman in a circumstance that promotes the woman as a victim.243 Sensitivity to the cultural norms does not condone the use of violence, instead it requires a look at the ways in which "'fear, guilt, and shame'" are applied to keep many Asian women from seeking an end to domestic violence.244

Karin Wang argues that the following factors distinguish battered Asian American women from white women: "(1) the overwhelmingly immigrant character of Asian American communities, (2) the existence of similar cultural patterns across most Asian American communities, and (3) the existence of harmful stereotypes about Asian Americans collectively and Asian American women specifically."245

Even the support systems established for African-American and white women can pose threats to certain groups. For example, Cambodian women who faced Khmer Rouge re-education camps may find support groups uncomfortable.246 These realities make it difficult for women to document the abuse that they suffer. The lack of documentation may adversely affect determinations on their claims for VAWA relief and their attempts to seek assistance from the criminal justice sys-

240. Id.; see also Nilda Rimonte, A Question of Culture: Cultural Approval of Violence against Women in the Pacific-Asian Community and the Cultural Defense, 43 STAN. L. REV. 1311, 1323-24, (1991) (noting that "taking a stand against the traditional, patriarchal values" risks marginalization within the community).
241. See Rimonte, supra note 240, at 1322; see also Wang, supra note 118, at 167-68 (describing commonalities among Asian subgroups).
242. See Rimonte, supra note 240, at 1322.
243. See id. at 1324 (describing abuse as consistent with the values of the culture).
244. Id. at 1315, 1325. Rimonte, notes that: "In the name of culture, abusive Pacific-Asian men justify their violence against women; and in the name of culture, women are pressured to accept their lot and to exhort their children to suffer the same." Id. at 1317.
245. Wang, supra note 118, at 161.
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b. Latinas and Domestic Violence

In 1991, the Immigrant Women's Task Force of the Coalition for Immigrant and Refugee Rights and Services conducted a survey of four thousand undocumented women in the San Francisco Bay area. Thirty-five percent of the Latina participants had experienced some form of domestic abuse. In 2002, AYUDA, Inc., conducted another survey in the Washington, D.C. area, and the preliminary information yielded a 60% rate of abuse among Latina's.

These statistics demonstrate the prevalence of domestic violence in the Latino community.

Cultural norms contribute to this abuse. The patriarchal structures of the Latino community limit the roles of women and promote a focus on the preservation of the family at all costs. In addition, Latinas often encounter economic obstacles. "[L]abor statistics... show that Latinas are more concentrated in low paying, semi-skilled occupations than the overall work force." They have a lower level of education and often lack job skills which combine to make them vulnerable to domestic violence. Culturally Latinas are often taught to be subservient to the needs of the man or the family. In these ways, Latina women have cultural roots which can undermine self-esteem and increase the likelihood that male control can be exercised against them.

Survivors of the abuse also face barriers in the receipt of services

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247. See Untold Stories, supra note 191.
249. See Kelly, Stories from the Front, supra note 9, at 681.
250. See Jenny Rivera, Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, 14 B.C. THIRD WORLD L.J. 231, 238 (noting overrepresentation of Latinas in the lowest-paying jobs) [hereinafter, Rivera, An Analysis of Race]. The tenuous immigration status of some Latinas force them into the underground labor market. See id. at 237.
252. See id.; see also Jenny Rivera, Preliminary Report: Availability of Domestic Violence Services for Latina Survivors in New York State, 16 IN PUB. INTEREST 1, 5-6 (1997-98) (noting that women with "incomes less than $10,000 were more likely to report domestic violence incidents") [hereinafter, Rivera Preliminary Report].
253. See Rivera, An Analysis of Race, supra note 250, at 241.
254. See id. at 241.
which can free them from the cycles of violence.\textsuperscript{255} One of the most prominent limitations emerges as a result of linguistic barriers because there is shortage of safe shelters which can accommodate non English-speaking clients.\textsuperscript{256} Feelings of isolation often emerge as a result when clients are transferred to distant locations in order to obtain shelter.\textsuperscript{257}

c. Non-African-American Black Immigrants

Black immigrant women of color are often disadvantaged by the stereotypes that exist for African-American women.\textsuperscript{258} Studies regarding the failure of the battered women's syndrome to assist African-American women demonstrate the problem.\textsuperscript{259} The research has uncovered an unwillingness of jurors to apply the "learned helplessness theory" to African-American women.\textsuperscript{260}

The perceptions of jurors about the strength of black women undermine claims that she was acting because of the battered women's syndrome.\textsuperscript{261} When black immigrant women are labeled in the same way, relevant factors regarding their pre-immigrant history are ignored. For example, Jamaican Blacks demonstrate the difficulty of having a dual identity of Black and immigrant.\textsuperscript{262} Because Black immigrant women have multiple identities and face unique challenges it is important not to essentialize these women.\textsuperscript{263} The multiple impacts of race, gender, class, and language often coalesce for Black immigrants in ways which create new experiences with race and gender.\textsuperscript{264}

\textsuperscript{255} See Rivera, Preliminary Report, supra note 252, at 3 (noting needs which emerge due to linguistic and cultural needs of the Latina community).

\textsuperscript{256} See id. at 14-15 (noting a shortage of trained bilingual staff).

\textsuperscript{257} See id. at 17 (finding that the placements also put the women in communities that are "racist xenophobic or anti-immigrant").

\textsuperscript{258} See Ruttenberg, supra note 97, at 179. "Proponents of mandatory arrest policy, who are also gender essentialists, do not fully acknowledge that white women can indeed be the oppressors of Black men and women in their alliance with the state." Id.


\textsuperscript{260} Id. at 1070-73.

\textsuperscript{261} See id. at 1077-78. "[T]he typical images of black women may be a barrier to seeing the defendant as not culpable (either because of her strength of character, or her suspect character) for the violent encounter(s)." Id. at 1078.


\textsuperscript{263} See id. at 575 (arguing against overlooking the specifics of their lives by treating them as universal).

\textsuperscript{264} See id. at 619.
ence and current political relationship with the immigrants native country impacts upon the treatment of the immigrant. Women from Haiti, Cuba, Brazil, and Jamaica all encounter domestic violence and immigration issues both differently and the same.265

Their prior experiences shape their responses in the United States, and as a result they are suspicious of interactions with official government agencies and may fail to provide sufficient evidence of current acts of domestic violence. In addition to all of the specific cultural barriers, which work against the prosecution of male abusers, immigrant women of color face other barriers that compound their fear about engaging the criminal justice system.266 Adverse immigration consequences that may attach as a result of criminal action impede the woman's ability to turn to the criminal justice system for help. As demonstrated below, the economic, personal, and legal loss, that may occur, prevent some immigrants from seeking any assistance.

B. Problems Caused by the Arrest of the Male Immigrant

1. Economic Ruin

Economic dependence on their abusers is one reason battered women do not leave their abusers. The nature of the dominance exercised against a battered woman often leads to isolation and lack of job skills.267 For immigrant women, this is heightened by the absence of work authorization and ineligibility for public assistance.268

Women who attempt to flee often are forced back to their abusers because of economic necessity.269 Even VAWA applicants whose peti-

265. See id. at 625.
266. See Davis & Erez, supra note 118 (finding that recent immigrants fail to report crimes and that domestic violence is the most under reported crime); Wang, supra note 118 at 172, nn.129-134 (describing reasons for the lack of reporting in the Asian community). In addition, even if immigrant women do report incidents of abuse, victims enter the criminal justice system unprepared for the number of court appearances and other requirements. See Corsilles, supra note 93, at 870.
268. See id. at 1627, 1630-31. Although battered aliens are "qualified" aliens, see 8 U.S.C. § 1641(c) (Supp. III 1997) under the welfare reform laws, they only receive assistance if the state has affirmatively extended them benefits. See 8 U.S.C. § 1612(b)(1) (Supp. III 1997).
269. See H.R. REP. No. 103-395, at 26-27 (1993); Yadav, supra note 240 at 35; but see Wang, supra note 113, at 171 (noting that many Asian women find jobs to supplement the family income but nonetheless this adds to a displacement of the male's role as sole breadwinner).
tions are approved might not be granted work authorization. An applicant married to a non-United States citizen is not eligible for adjustment of status, and is therefore not statutorily eligible for work authorization. If the applicant is or was married to a legal permanent resident, they may only obtain work authorization after their VAWA application is approved and they are granted deferred action status. Women who do not have petitions filed cannot obtain relief.

For women in these positions the economic ruin that they face is a substantial barrier to seeking outside assistance. Those who do leave their abusers and survive economically are often forced into menial labor because they do not have work authorization or they may jeopardize their relief by working with false documents. For those who survive economically, the pursuit of criminal sanctions against the abuser may lead to adverse consequences on their eligibility for relief.

2. Termination of the Abuser's Status and the Victim's Relief

Because deportation may result from a conviction of an aggravated felony or domestic violence charge, immigrant victims who derive a status from their legal permanent resident batterers must choose between immigration relief and criminal prosecution. Taking criminal action against the batterer may result in termination of his or her legal permanent resident status. This termination, in turn, extinguishes the victim's ability to self-petition for status as an immigrant under the

270. See Virtue, Supplemental Guidance, supra note 24, at 3.
272. See Virtue, Supplemental Guidance, supra note 24, at 3 (authorizing this status and work authorization in the discretion of the INS).
273. Anita has fled an extremely abusive situation, and her difficulties are compounded by her inability to secure steady work because she is not authorized to work in the United States. See Untold Stories, supra note 191. As a result she works in underground jobs that do not pay well. See id.
The result of the new law is elimination of VAWA eligibility because the self-petitioning relief is tied to the status of the abuser during a valid marriage.

The regulations implementing the VAWA require the spouse of a victim to be a legal permanent resident both at the time the application is filed and when it is approved. Thus, a prompt conviction in a domestic violence case, followed by an expedited immigration hearing that terminates the batterer's legal immigrant status, devastates the victim's ability to qualify for VAWA relief. The VAWA does not allow the woman to escape from the abuse without jeopardizing her ability to seek relief. Termination of the abuser's immigration status thus becomes a barrier to seeking relief rather than an empowerment strategy.

When Congress tied the self-petitioning provisions to an existing marriage, it decreased the ability of many women to move from the position of a victim to that of an empowered survivor. Informed immigrant women who may be ready to move out of abusive situations recognize that the institution of criminal proceedings may lead to deportation of the abuser, and if they are aware of the adverse consequences on the abuser's status and their own relief, they do not seek intervention in the domestic violence.

The impact of the criminal action is heightened if the individual is charged as an aggravated felon. The defendant is placed in expedited immigration proceedings, and is ineligible for bail, and must remain in custody throughout the immigration process. The Immigration Service must make every effort to complete immigration removal proceed-

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277. See id.
279. See Kelly, Domestic Violence Survivors, supra note 16, at 309.
281. See INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B) (Supp. III 1997) (requiring the Attorney General to take into custody any alien who is deportable as an aggravated felon). The ability to effectuate this requirement is limited by established practices of the INS in monitoring jails and prisons. However, the INS is required to create an effective system to identify criminal aliens. See INA § 236(d), 8 U.S.C. § 1226(d) (Supp. III 1997).
ings while the aggravated felon is in jail or prison.\footnote{See INA § 238(a)(3), 8 U.S.C. § 1228(a)(3) (Supp. III 1997).} If the immigration proceeding is not complete before release on the criminal charges, the INS is required to take the immigrant into custody.\footnote{See INA § 236(c)(1)(C), 8 U.S.C. § 1226(c)(1)(C) (Supp. III 1997).} The INA also precludes a legal permanent resident from applying for a waiver of an aggravated felony conviction.\footnote{See INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (Supp. III 1997) (codifying IIRIRA, Pub. L. No. 104-208, § 348, 110 Stat. 3009 (1996)). The act eliminated deportation and exclusion proceedings and replaced them with a uniform removal proceeding. See INA § 240, 8 U.S.C. § 1229a (Supp. III 1997).} Thus, a determination that the individual is an aggravated felon eliminates the abuser's immigration status and the victim's eligibility for VAWA relief.

Many immigrant women who would welcome outside intervention will not do so if the result is deportation of their spouse.\footnote{See Kelly, supra note 16, at 316-17 (noting that the reasons that survivors stay with abusers are complicated); Kelly, supra note 9, at 678.} Thus, immigrant victims of domestic violence are further alienated from domestic violence relief as they will not seek protection or prosecution when they know the effect is deportation of the perpetrator.\footnote{Id. (quoting Det. Don Rimer of the Virginia Beach domestic violence unit).} Mandatory prosecution creates a system where "some victims who fear or pity their aggressors aren't reporting assaults that could send repeat offenders to prison."\footnote{See 8 C.F.R. § 204.2(c)(1)(iii) (1999).} Immigrant women are among those who do not report abuse. One factor that contributes to this under-reporting is the self-petitioning relief that was promulgated in VAWA, which requires a valid marriage to a legal permanent resident or United States citizen at the time of application.\footnote{Cultural norms exist which preclude many immigrants from seeking assistance. Asian women are often unwilling to report abuse due to being ostracized by the community. See Cheryl L. Tan, D.C. Domestic Violence Group Targets Asian, Pacific Island Immigrants, WASHINGTON POST, Aug. 25, 1996, at B5. Latina's often face immense pressure to keep the family together. See Tini Tran, California and the West Asians, Latinos Now Find Refuge from Domestic Violence Services: Over the Last 10 years, Everything from Treatment Programs to Court Services Have Been Modified to Address the Needs of Immigrants, L.A. TIMES, May 4, 1998, at A3, available in 1998 WL 2424288.}

All of these factors work against the relief contemplated in the VAWA. Women aware of these limitations are less likely to seek assistance from the criminal justice system. In addition to the structural concerns about their own relief, many women simply do not want to terminate the relationship.\footnote{Id. (quoting Det. Don Rimer of the Virginia Beach domestic violence unit).} Furthermore, the institution of proceedings

\footnote{See Kelly, supra note 16, at 309 (noting that emotional attachment to the abuser works against seeking deportation).}
heightens the financial difficulties of immigrant women. Often the men have work authorization and provide the sole source of income. The VAWA applicant cannot apply for work authorization until the VAWA application is approved. Even at that point she may not be eligible for public assistance.

The efforts to bring the problems into the public fora are severely undermined by the potential of adverse immigration consequences. The VAWA's intent of immigration provisions was to eliminate the power of the abuser in an attempt to empower victims of domestic violence. The reality is that many victims are re-victimized by the actions designed to free them from their batterers. In these circumstances the promise of relief has returned to the nightmare of traversing a landmine in order to avoid personal victimization by the criminal justice system or denial of relief by the immigration system.

3. Delay or Denial of Citizenship

An additional impediment to seeking protection from the criminal justice system exists where the abuser is a legal permanent resident who has filed for immigrant status on behalf of a woman. An approved visa submitted by a legal permanent resident on behalf of a spouse does not convey immediate entrance into the United States. INA legal permanent residents who obtain citizenship, however, can convert a second preference visa into an immediate family visa.

To make this conversion, the resident abuser must be eligible to ap-

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290. See Aleinikoff, supra note 24, at 5; Virtue, supra note 24, at 3.
292. See Tan, supra note 289, at B5 (reporting that one mechanism of power and control that has been used by the abuser is a threat to have the woman deported if she calls the police). As one advocate describes what she has been told, "There is a reluctance to call the police because people feel, 'I'm illegal; my husband has always told me if I called the police I would be deported.'" Id.
293. See Fedders, supra note 137, at 292 (discussing that as one advocate notes, "[s]he may engage in a careful cost-benefit analysis and determine that, while police presence would be useful, an arrest would not. A woman may be dependent on the income of her batterer, for example, or she may not want their children to witness their father's arrest").
To qualify for citizenship, the resident abuser must have good moral character for five years. An abused immigrant who files charges against the legal permanent resident may jeopardize her ability to move ahead in the immigration queue because a conviction for domestic violence would eliminate the abuser's ability to demonstrate good moral character which is required for citizenship. This factor significantly affects women abused by legal permanent residents. The enactment of the new ground of deportation and the heightened treatment of many "crimes of violence" as aggravated felonies undermines the ability to seek criminal relief without jeopardizing immigration relief for the woman.

An immigrant may be permanently barred from proving good moral character if they are convicted of an aggravated felony. Thus, even if the INS does not institute removal proceedings, the convicted legal permanent resident seeking citizenship may be precluded from obtaining citizenship. In a case when the marriage has survived the abuse, this may have adverse consequences for an undocumented woman. If the abusive spouse is applying for citizenship, this adverse effect may further diminish incentives to report abuse. If the woman has a priority date that can be significantly advanced by the abusive spouse becoming a United States citizen, they have a reason not to report abuse in order to maximize immigration relief.


296. See INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (Supp. III 1997) (providing "during all periods referred to in this subsection [the applicant] has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States").

297. It is unclear at this time whether the aggravated felony will act as a permanent bar to proving good moral character. See INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (1994 & Supp. III 1997). This section states:

For purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . one who at any time has been convicted of an aggravated felony [as defined in subsection (a)(43)].

INA §101(f)(8).

298. See Matter of A-A, 20 I. & N. Dec. 492 (BIA 1992) (holding that it is unclear whether INA § 101(f)(8), applies retroactively to crimes which now meet the definition of aggravated felony but which were not considered aggravated felonies at the time). For example, crimes of violence prior to 1990 were not aggravated felonies, therefore, they should not create a permanent bar to a finding of moral character.
V. POSSIBLE SOLUTIONS TO THE PROBLEM

A. Elimination of Good Moral Character Requirement

The VAWA adopted procedures to allow immigrant victims of domestic abuse to terminate conditional residency status or self-petition for legal permanent residence status. In order to qualify for this relief, the victim must be a person with good moral character.\(^2\) A plea to either a crime of violence with a sentence of more than one year or a charge of domestic violence precludes a good moral character finding and adversely affects a prospective VAWA applicant.\(^3\)

This was an unforeseen consequence which has become a reality due to the intersections of competing provisions of the criminal and immigration law. To remedy this adverse consequence Congress should eliminate the good moral character requirement in the self-petitioning statute.\(^4\)

The absence of this requirement in self-petitioning cases will place the battered woman in the same position as any other visa holder.

An applicant under the traditional petitioning requirements need not affirmatively establish good moral character as a prerequisite to approval of the visa petition. Requiring good moral character of domestic violence victims is unreasonable and needlessly sets a barrier to relief. In advancing this amelioration, the removal of the requirement in cancellation cases is not promoted, as good moral character in cancellation cases serves a legitimate immigration control function. It does not, however, serve a legitimate function when applied to self-petitioning.

Some advocates argue that simply eliminating the new ground of deportability that was adopted in IIRIRA can resolve the good moral character problem. Even if the statute was amended to adopt this remedy, it would not provide sufficient relief. In light of the expanded aggravated felony definitions and the aggressive attitude of prosecutors of domestic violence cases the elimination of the domestic violence deportation ground is of little value. Undocumented women with spouses that use the system to lodge false complaints, and those whose conduct is not within the domestic violence provision remain unprotected.

The inequities that exist for self petitioners arise because they are not placed in the same footing they would have been if their abusive

\(^2\) See INA § 249A(b)(2)(C).
\(^3\) See supra notes 55-60 and accompanying text.
\(^4\) See Kelly, Stories from the Front, supra note 9, at 687, 704.
spouses had not used immigration as an additional weapon of abuse. The elimination of the good moral character requirement places the self-petitioner on equal footing with other visa applicants. This remedy advances the goals set forth by Congress when it passed VAWA and ameliorates the adverse consequences to battered immigrant women.

B. Addressing Criminal Justice and Immigration Goals

For cases in suspension or cancellation of removal a different approach is required. The law should not perpetuate adverse consequences caused by the categorical approach. Instead immigration and criminal law goals should be evaluated and reconciled to promote protections for immigrant women who are victims of domestic violence. One manner of achieving this goal is to adopt a case by case analysis and allow criminal and immigration courts to grant judicial recommendations against deportation.

1. Adoption of a Judicial Recommendation Against Deportation

To facilitate the goals of both immigration and criminal law a new form of judicial recommendation against deportation should be adopted. The adoption of this relief would allow the greatest compliance with the goals of both the criminal justice and immigration systems vis-a-vis immigrants accused of domestic violence. It would allow the goals of the criminal justice system to be met by promoting additional incentives for abusers to terminate their abusive conduct and allowing immigrant women caught in the criminal justice system to end the process and move forward. Under this scheme all immigrants convicted of domestic violence and related crimes could have the facts of the case evaluated to determine whether deportation should occur. By allowing the criminal judge and the immigration judge to evaluate the cases each immigrant could present facts relevant to the request for leniency. In turn, balancing the cultural claims of batterers and their victims would benefit the immigration and criminal law systems. Because the most effective reduction in domestic violence happens with swift punishment and counseling of the abuser, the immigration laws should not act in a

302. See Maguigan, supra note 156, at 42 (recognizing the flexibility of the criminal justice system to accommodate competing interests if the focus remains on addressing root causes of domestic violence).

303. See Cahn & Meier, supra note 246, at 359 (noting that evaluation of the cultural issues in the immigration context may take into account the cultural realities of both the perpetrator and the victim, because a failure to do so condemns "perpetrators" who are in reality victims).
way to preclude this type of relief. Under the current scheme offenders
cannot take part in diversion programs because the offenses are then
categorized as deportable.304

This change is also consistent with the underlying family unity provi-
sions of the immigration law.305 By allowing victims and abusers to ob-
tain treatment as a mechanism to diminish domestic violence this solu-
tion maximizes relief and minimizes harm to victims of domestic
violence.

The proposal would also facilitate the family unity provisions inher-
ent in the immigration system.306 The research indicates that those bat-
terers with criminal records pose a greater risk than those who do not
have a criminal record.307 This approach in the domestic violence con-
text would accommodate the rehabilitative functions of the criminal jus-
tice system and still act as punishment to those offenders who do not
comport with an accepted non-violent behavior.308

2. Effectuating Justice: Encouraging Treatment and Deferral

Notwithstanding the adoption of mandatory arrest policies the deci-
sions about which cases should proceed in the criminal justice system
are left with the prosecution.309 The question that has not been fully ex-
amined is how that decision should be made. The adoption of a judicial
recommendation against deportation would allow for an evaluation of
those factors unique and relevant to battered immigrant women.

The centralization of domestic violence from the social realm to the
criminal justice system requires an analysis of the underlying purpose
behind the criminal sanction. It also requires an analysis of the social
constructs which must be considered in implementing strategies to deal
with domestic abuse. The deterrence theory of punishment has been

304. See supra notes 50-55 and accompanying text.
305. See Janet M. Calvo, Spouse-Based Immigration Laws: The Legacies of Coverture, 28
SAN DIEGO L. REV. 593, 605 (1991). 1965 legislation changed the immigration system to rec-
ognize family unity and labor needs. See id. (citing Act of October 3, 1965, Pub. L. No. 236,
79 Stat. 911).
306. See id. at 605.
307. See Michael Steinman, Lowering Recidivism Among Men Who Batter Women, 17 J.
308. This approach also avoids the adoption of a "cultural defense." For a good article
on the difficulties in adopting a cultural defense, see Doriane Lambelet Coleman, Individu-
alizing Justice through Multiculturalism: The Liberals' dilemma, 96 COLUM. L. REV. 1093
(1996). See also Alice J. Gallin, Note, The Cultural Defense: Undermining the Policies Against
309. See Hanna, No Right to Choose, supra note 94, at 1873.
advanced with recognition that it is extremely limited in its application. Advocates assert that the deterrence need not be specific, and that mandatory arrest may have a general deterrent effect by informing other men that violence will not be tolerated and will result in an arrest.\textsuperscript{310} The rehabilitative purposes that can be accomplished through convictions of perpetrators of violence are uncertain. Nevertheless, studies indicate that swift punishment followed by counseling surpasses simple mandatory arrest and prosecution.\textsuperscript{311}

Opponents and skeptics of the propriety of using resources to help perpetrators often do not positively acknowledge the decrease in types of violence that accompanies counseling. Instead, they cite to the presence of some form of abuse notwithstanding the counseling.\textsuperscript{312} Recognizing that a counseling model that terminates the cycle of abuse would produce the benefit of diminishing violence against women, some advocates acknowledge that continued exploration of the effectiveness of batterers counseling is reasonable.\textsuperscript{313} In most jurisdictions, this is handled by the extension of probation.

Under the new definition of conviction in the immigration law,\textsuperscript{314} this extension of the time of probation may adversely impact the defendant and cause her to reject a plea in the criminal case. This prolongs the criminal process and undermines the effectiveness of criminal intervention. The longer the time period between arrest and conviction the less likely it is that the perpetrator will cease the abusive behavior.

In this way, domestic violence is similar to many other types of crimes. Evidence also indicates that a swift punishment close to the time of the incident increases the likelihood that the offender will not repeat the criminal activity.\textsuperscript{315} Researchers acknowledge that very little has been done to further this in cases involving domestic violence.

In the criminal justice system, there is a need to train prosecutors about the adverse immigration consequences that exist under the current laws. Once education occurs, a method of evaluating the compet-

\textsuperscript{310} See Fedders, supra note 137, at 278.

\textsuperscript{311} See Bracher, supra note 104, at 155; see also supra note 107 (noting that in a replication study in Dade County arrest followed by counseling from trained professionals was a more effective strategy in dealing with domestic violence than a mere arrest); Cahn & Meier, supra note 246, at 176 (noting that court mandated counseling reduces recidivism).

\textsuperscript{312} See supra note 107. (summarizing statistics with a negative slant).

\textsuperscript{313} See id.

\textsuperscript{314} See supra note 86, and accompanying text.

\textsuperscript{315} See Durham, supra note 128, at 649 (arguing that "[w]hen the criminal justice process of capture, conviction and punishment is working properly, the certainty of an appropriately severe punishment creates a disincentive to commit crime").
ing interests between immigration and the criminal justice system can be adopted. Recognizing that there are two conflicting objectives, a fundamental requirement should be the prioritization of the wishes of the women.

In immigration law, the family unity and the desire to put the women at the place they would have been but for abuse is an important VAWA objective. In the criminal justice and immigration systems, punishing abusers is important. When these objectives cause conflict, the systems should act in ways which empower the women and support them in their individual journeys toward survivorship.

Under the empowerment model, this allows the women to have a legitimate role in ascertaining their own needs. It also recognizes that the unique wishes of immigrants of color may not coincide with the anti-domestic violence proponents. This approach is also justified since the criminal justice system's goals include a desire to rehabilitate the offender and to provide specific deterrence. These are admirable goals that should not be undermined by a mandatory arrest and prosecution policy or by deportation that will preclude the offender from participating in the rehabilitating treatment program.

The short term result of sending the abuser away has devastating consequences to the victim in the United States and precludes the opportunity of terminating the cycle of violence. Such a result may violate international treaties which discourage the displacement of problems. Furthermore, in recognizing that many of the abusers learned the behavior while in the United States, it is inappropriate for the U.S. to ship the abuser to another country where the violence will continue.

To allow advocates for immigrant defendants to present evidence that will assist prosecutors and INS trial attorneys in evaluating the circumstances of the immigrants, a new definition of what should constitute undesirable conduct must be established. Where cases involve both allegations and counter-allegations, an in depth evaluation of whether the immigrant is a "victim" of abuse rather than a perpetrator of abuse should be made. That evaluation is meaningless under the current system which applies a narrow view of good moral character. In fact because the termination of the abusive relationship is often the factor which triggers the affirmative actions on the part of the abused woman, the current system is wholly inadequate.

The adverse impact on an abused immigrant spouse goes beyond the typical consequences for entering a plea or pursuing mandatory prosecution policies. Immigrant victims who are charged, and enter pleas to domestic violence or assault, may not only trigger grounds of deportation but may also be precluding options for immigration relief under VAWA. This type of a result, without an opportunity to evaluate the specific facts of the case, is unfortunate and contrary to the desired goals of VAWA and the criminal justice system.

VI. CONCLUSION

Although VAWA provides some relief for battered women, it has also created a structure which re-victimizes many immigrant women. The intersection of immigration control measures and the criminal justice system leads to contradictory and unsatisfactory relief for the women subject to the myriad of laws. By trapping the women within the criminal justice response, the efforts aimed at providing protection for them become tools to use against them. Instead of freedom from abuse, they become trapped in the abuse. To ameliorate these harms the good moral character requirement should be eliminated for VAWA self petitioners and a new judicial recommendation against deportation should be implemented to address those cases where a criminal conviction could harm an otherwise eligible battered immigrant.