I. Introduction

From their beginning, spouse-based immigration laws bore the legacies of the doctrine of coverture and its related doctrine, chastisement. 1 Coverture established total power and control over a wife by a husband and chastisement allowed the punishment of a wife by a husband to force obedience to that power. 2 Spouse-based immigration has been and continues to be predominately female. In the decade from 1990 to 2000, there was substantial legislation affecting spouse-based immigration. The changes were the result of a combination of factors, including vigilant

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2 1 William Blackstone, Commentaries on the Laws of England 430 (1966). "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . and her condition during her marriage is called her coverture." Id. at 430.
lobbying on the part of advocates for abused immigrant women, and the recognition by congressional representatives of the federal responsibility for violence against women in the immigration area.

In this decade, Congress confronted the notion of chastisement and enacted some avenues for relief for abused immigrant spouses. However, the basic coverture concept of spousal power and control over immigration status was not rejected. Moreover, the legislative changes assisting abused [*155] women are not secure, particularly in the post 9/11 view of immigration. The legislature did not firmly and finally reject the legal sanction and enforcement of the control of one spouse over another. Such a failure perpetuates the inequality of women and provides the basis for violence against them.

This article begins with a description of spouse-based immigration and the concept of spouse under the immigration laws. This is followed by a brief overview of the legal notions of chastisement. The congressional view of domestic violence in the United States follows. Coverture notions in the immigration law are explained and the article then describes the proposals and the changes in the law over the decade from 1990-2000. The legislative changes addressing spouse-based immigration are then assessed: first, to determine to what extent coverture notions of spousal power and control remain and second, to determine the degree to which issues underlying spouse abuse have been addressed in the context of expressed congressional goals.

This article concludes that the legacies of coverture and the resulting legal inequality of women remain. First, the power to petition, which controls the ability of a non-citizen spouse to live and work and have custody of children in the United States, is basically still the prerogative of a citizen or resident spouse. Second, the mail-order-bride business continues without significant limitation on the ability of citizens or residents to dominate and abuse their immigrant wives. Third, while some avenues of relief have been afforded to abused spouses, these changes are insecure because the legislative goal of rejecting domestic violence frequently slips from the legislative consciousness and has been sacrificed to other objectives. Coverture in spouse-based immigration has not met its demise and the law, therefore, continues to sanction the domination of husbands over wives and the underlying gender inequality that it promotes.

II. What Is Spouse-Based Immigration and Who Is a Spouse?

The immigration law's statutory scheme affords spouses of United States citizens and spouses of permanent residents eligibility to become permanent residents. [*156] A permanent resident can live and work in the United States indefinitely and, after three years, can apply to become naturalized citizen if a spouse. [*157] Spouses of citizens are "immediate relatives" and are not subjected to yearly numerical quotas. Furthermore, a fiancee of a United States citizen may obtain a special visa that allows her to enter the United States to conclude a valid

For as he husband is to answer for her [wife’s] misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement . . . and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.

Id. at 432-33. See also Norma Basch, In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York 17 (1982).


marriage with a citizen within ninety days of entry. 5 Spouses of permanent residents are subjected to yearly quotas. 6

Statistically, spouse-based immigration is a significant component of immigration into the United States. 7 The number of spouses of United States citizens legally admitted to the country from 1990 to 1999 ranged from approximately 120,000 to 170,000 per year while the number of spouses of permanent residents admitted each year ranged from approximately 30,000 to 60,000 each year. 8 Women make up the majority of immigrating spouses. For example in 1997, sixty-six percent of the total number of spouses immigrating through marriage were women. 9 Sixty-one percent of the immigrating spouses of U.S. citizens were women in 1997: 105,000 out of 170,000. A higher proportion (eighty-seven percent) of the spouses of legal permanent residents were women: 28,000 out of 32,000. 10 Women also comprised the majority of fiancees granted visas; from 1990 to 1997, the yearly average of fiancees has been 6,400, of which about seventy-nine percent were women. 11

The ability of the non-citizen spouse to immigrate and become a legal resident is controlled by the citizen or resident spouse in most circumstances. The general process for becoming a spouse-based permanent resident requires that the citizen or resident spouse file a petition, 12 (unless the alien spouse fits into an exception that allows her to [*157] self-petition.) 13 The petition is assessed to determine whether the requisite spousal relationship exists or existed. 14 If the petition is approved, then the alien spouse must demonstrate that she is not excludable from the country on a variety of grounds such as health and income status, past criminal behavior, and violation of immigration law. 15 She then becomes a legal resident either on a permanent or conditional basis. 16

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7 Overall, spouses of United States citizens comprised about twenty-five percent of all immigrants legally admitted to the United States each year during the last quarter of the twentieth century. Frank Bean, America's Newcomers 197 (2003).
8 Frank Bean, America's Newcomers 183, fig. 8.2 (2003).
10 Id.
11 Id.

If the alien demonstrates to the Attorney General that (aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and (bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien’s spouse or intended spouse.

If the marriage is less than two years, the alien spouse becomes a resident on a conditional basis. If the condition is not removed after two years, then the resident status lapses and the alien spouse is an unauthorized alien. The removal of the condition generally requires a joint petition by both spouses, but there are some exceptions as explained below.

This article addresses the notions of spouse-based immigration within the confines of the existing concept of spouse: a monogamous, not incestuous, male-female, legally sanctioned relationship. The immigration law as interpreted by the executive and judiciary has a particular view of who is a spouse. The marriage must be legally valid, and not against public policy, and not entered into for the sole purpose of obtaining immigration status.

To determine whether the marriage is legally valid, the Bureau of Citizenship and Immigration Services (BCIS) will assess whether the marriage was valid in the place it was performed. However, if the marriage was performed in a place to avoid restrictions of the place of residence, then the marriage will be recognized only to the extent the place of residence would recognize the marriage. Common law marriages, customary marriages and purely religious marriages are considered legal marriages if they are considered legal in the state or country in which they were performed.

Certain marriages, even if legal in the place performed, are not recognized for "public policy" reasons. Incestuous marriages are generally not recognized. However, since incest laws differ state to state, the Board of Immigration Appeals has recognized a marriage prohibited by the incest laws of a state when that state will give full faith and credit to a marriage performed in another state even if that marriage is in violation of the first state's incest laws. Proxy marriages are barred by statute as the basis for immigration status unless the marriage has been consummated.

16 Family based immigration is also a feature of the nonimmigrant component of the system. Non-immigrants are persons allowed to come to the United States for a variety of "temporary" purposes including work, studying, and doing business. The spouses and children of some non-immigrants are allowed to accompany the nonimmigrant in a status that is totally dependant on the non-immigrant. 2 Mailman et al., Immigration Law and Procedure § 12.03(1)(e) (2003).


20 The familiar INS, Immigration and Naturalization Service, has been disbanded and reorganized. The current most relevant agency to this topic is named USCIS, U.S. Citizenship and Immigration Services. The Homeland Security Act of 2002 abolished the INS. Pub.L. No. 107-296 § 471, 116 Stat. 2135 (2002). It initiated a mammoth governmental reorganization, transferring the majority of the INS's functions from the Department of Justice ("DOJ") to the Department of Homeland Security ("DHS"), but leaving the Executive Office of Immigration Review (including the immigration judges and BIA, Board of Immigration Appeals) under the auspices of the DOJ.

21 See In re Luna, 18 I. & N. Dec. 385 (Bd. of Immigration Appeals 1983).

22 See In re E, 4 I. & N. Dec. 239 (Bd. of Immigration Appeals 1956) (recognizing a marriage between an uncle and a niece because the state of their residence gave full faith and credit to the marriage performed in another state). But see In re G, 6 I. & N. Dec. 337 (Bd. of Immigration Appeals 1954) (finding a legal marriage between a niece and uncle that took place in Italy was not recognized because their state of residence, Pennsylvania, did not recognize the marriage).


24 Ignatius & Stickney, supra note 19, at 4-22.

Polygamous marriages have generally not been recognized. However, in 1990 the exclusion ground for persons who "practice or have even practiced" polygamy was changed to exclude only those "coming to the [*159] United States to practice polygamy." 26 The spouse who consents to her spouse being married to more than one person has been considered to be a practicing polygamist and excludable, as well as the spouse who marries more than one wife. Administratively, the polygamist's first marriage will be recognized, and the first wife will be able to obtain immigration status, but a subsequent spouse will not be recognized unless all the marriages that preceded her have been terminated. 27

Same-sex marriages were held to be against public policy in a 1983 Ninth Circuit case, and, therefore, were not considered as the basis for spouse-based immigration even if legal in the place in which the marriage was performed. 28 This has been the continuing administrative interpretation. 29 However, the issue of same-sex marriage is a developing area of the law. 30 Recent developments question whether same-sex marriages can continue to be considered against public policy, including the removal of homosexuality as a ground for exclusion in 1990, 31 the Supreme Court's decision holding unconstitutional laws that criminalize same-sex intimacy in private homes 32 and state court decisions finding prohibitions on same-sex marriage unconstitutional. 33 However, in reaction to the possibility of states recognizing same-sex marriages, Congress enacted the Defense of Marriage Act, which provides that the federal government will only recognize marriages between members of the opposite sex. 34 This seemingly would allow the Bureau of Citizenship and Immigration Services to not recognize same-sex marriages, even if legal when performed in other countries or in a state in the United States.

Even if a marriage is legal and not against public policy, it is not valid for immigration purposes if it was entered into solely for the purpose of obtaining immigration status. The burden of proof is on the petitioner to demonstrate that the principal purpose of the marriage was to make a life together, that the marriage was "in good faith." 35 However, a marriage will [*160] continue to be recognized as valid if it was valid at its inception but later is no longer viable, as long as the legal marriage continues. 36

III. Coverture and Chastisement

27 Ignatius & Stickney, supra note 19, at 4-25 to 4-26.
28 Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).
33 See Ruthann Robson, supra note 30, at 737-45.
35 Lutwak v. United States, 344 U.S. 604 (1953); Ignatius & Stickney, supra note 19, at 4-28, n.2.
36 A line of BIA, Board of Immigration Appeals, cases had held that an individual could be barred from obtaining immigration benefits where the marriage was no longer viable, although valid at its inception. See, e.g., In re Sosa, 15 I. & N. Dec. 572, 574 (Bd. of Immigration Appeals 1976). However, rulings by the federal courts rejected this position. Chan v. Bell, 464 F. Supp. 125, 130 (D.D.C.1978); See also Dabaghian v. Civiletti, 607 F.2d 868, 869-70 (9th Cir. 1979); Bark v. INS, 511 F.2d 1200, 1201-02 (9th Cir. 1975). In the early eighties, the BIA overturned its previous holdings that the nonviability of a marriage formed a valid basis for denying immigration benefits. See Matter of Mower, 17 I. & N. Dec. 613, 615 (Bd. of Immigration Appeals 1981); Austin T. Fragomen, et al., Continued Validity of the Marriage: The Viability Issue, 1 Immigr. L. & Bus. § 3:20 (2003); Judith Patterson et al., IRCA, IMFA, and SDCEA: What Does this Immigration Alphabet Soup Spell?, 39 Baylor L. Rev. 413, 456 (1987); 3 Immigration Law Service § 36:13.
Spouse-based immigration continues to be predominately female: laws that affect spouses predominately affect wives. The basic premises of the coverture and chastisement doctrines continue in the current immigration law.

Coverture is the legal notion that a husband and wife are one, and the one is the husband.37 Under the doctrine of coverture, the husband had ownership rights over his wife and was legally entitled to control his wife's income, property and residence. Further, the husband had a right to control his wife's behavior. She was subservient to him and owed him obedience. If she did not obey, the related notion of chastisement allowed a husband to discipline his wife, even with physical force.38 The wife's legal identity merged with that of her husband to such an extent that she was unable to file suit for damages or to enforce contracts. Moreover, under coverture, the children of the marriage were considered marital property and, therefore, were under the father's control. A mother was entitled to no power over her children.39 The law sanctioned the power and control of the husband over the wife. The legal notion of coverture thus established a legal regime that enforced the subordination of one adult human being to another.40

Historically, in the domestic law in the nineteenth and early twentieth centuries, the rhetoric of coverture and chastisement were rejected,41 but the underlying notions of spousal subordination proved to be more tenacious.42 As detailed by Reva Siegel,43 a husband's prerogatives of power and control and even punishment continued, justified under other rationales, such as familial privacy, rather than male domination. The preservation of the prerogative through transforming the rationale was not necessarily implemented through overt conspiracy or malevolence. While there were some improvements in the welfare of wives, basic subordination continued and was revitalized by being reconfigured in less socially controversial terms. One of these approaches involved cleansing the law of gender specific references: moving, for example, from "wife" to "spouse." This, however, did not remove either the prerogatives or the underlying inequalities, because in reality those subordinated continued to be women. For example, the rhetorical shift from "wife abuse" to "spouse abuse" did not change the fact that ninetyfive percent or more of those subjected to spousal violence are wives.44 Serious modern attention by courts and legislators to the problem of domestic violence began in the 1970s.45

The coverture and chastisement concepts underlying immigration law have a similar history, but at a later time period. While challenges to notions of coverture and chastisement in the domestic law started in the late nineteenth century, critical attention to these notions in the context of immigration law did not appear at all until the

37 See Calvo, supra note 1.
41 But see Robson, supra note 30, at 773-74 (explaining that even after married women were able to own property in the later half of the 19th century, vestiges of coverture continued for more than a century).
42 Calvo, supra note 1, at 598-99.
44 Id. at 2172.
45 Elizabeth Schneider, Battered Women and Feminist Lawmaking (2000).
mid-twentieth century. A major congressional attempt to address these issues did not occur until the 1990s when Congress considered various versions of the Violence Against Women Act.  

IV. The Congressional View of Chastisement

In the early 1990s, Congress spent a number of years trying to understand the societal and legal problem of domestic violence and the failure of the society and the law to adequately deal with family violence. Congressional reports inquired into the roles and responsibilities of the law and legal system, law enforcement, and public attitudes in creating and perpetuating family violence. Eventually, legislators recognized the domestic abuse dynamics in the immigration law as well as other legal areas. Therefore, understanding the congressional view of domestic violence is important to understanding the legislative responses in the immigration law and assessing the legislative effort.

In various reports, Congress recognized that "the legal system historically failed to address violence against women with appropriate seriousness, and has even accepted it as legitimate." One report noted that under English common law accepted in the United States, a man could beat his wife as long as he did not use a rod thicker than his thumb. Until the twentieth century, United States society effectively condoned family violence following the "rule of thumb" rule. This led to a reluctance of government to interfere to protect women. In nineteenth century some courts explicitly sanctioned the "salutary restraint of domestic discipline." In the congressional view, the legacy of this acceptance of family violence endured through the twentieth century.

Congressional reports recognized that the nation's law enforcement institutions carried the legacy of the law's condoning of wife abuse well into the later part of the twentieth century. Many jurisdictions refused to arrest and prosecute spouse abusers. Congress found that victims of abuse sometimes additionally were subjected to trivializing of the problem by prosecutors and judges, and gender biased attitudes about domestic violence.

Congress also found a continuing acceptance of domestic violence in the attitudes of the society. One report stated, "Violence against women reflects as much a failure of our nation's collective willingness to confront the problem as it does the failure of the Nation's laws and regulations." Both our resolve and our laws must change if women are to lead free and equal lives.

Congress found the damage wrought by family violence to individuals and the society as a whole to be profound. It found that spouse abuse is serious, chronic, and national in scope. Abuse is not located in one area, one socio-economic group or with any particular racial, ethnic or religious group. Congressional reports noted that

46 Calvo, supra note 1, at 601-03.
47 See infra Sections C, 2 and 6.
in 1991 at least 21,000 domestic crimes against women were reported to police every week, and that unreported domestic crimes were estimated to be more than three times reported crimes. Therefore, according to congressional reports three to four million women in the United States are abused by their husbands each year. The victims of domestic violence are overwhelmingly women. According to congressional reports, 95% of all domestic violence victims are women.

The nature of the violence in the family context as reported by Congress is severe. Family violence accounts for a significant number of murders: one-third of all women who are murdered die at the hands of husbands or boyfriends. One-fifth of all reported aggravated assaults involving bodily injury occurred in domestic situations. According to a United States Department of Justice report, one-third of domestic attacks are felony rapes, robberies, or aggravated assaults. Of the remaining two-thirds, which were simple assaults, almost one-half involved serious bodily injury. Sexual assaults are a major part of family violence. Estimates indicate that more than one of every six sexual assaults a week is committed by a family member. Tremendous violence occurs in homes. While abuse can take the form of an assault, such as hitting the spouse with the butt of a gun or beating her in the head with a three-inch pipe, it can also take other forms such as breaking the legs of a pet.

Along with the severity of the violence, the congressional reports explicitly recognized important differences between domestic violence and stranger violence. One report noted that, unlike other crimes, spouse abuse is chronic violence. It is characterized by persistent intimidation and repeated physical injury. Absent intervention, it is almost guaranteed “that the same woman will be assaulted again and again by the same man.” Not only is the abuse repetitive, it escalates over time. One report noted that police had been called five times previously in over half of murders of wives by husbands. Stalking behavior is also part of the chronic and repetitive nature of domestic violence. The reports recognized that the chronic nature of domestic violence led to a number of incidents that involve violence even after legal protection has been sought and obtained. For example, divorce does not always protect a spouse from abuse. Women are assaulted by ex-husbands.

63 Staff of Senate Comm. on the Judiciary, 102d Cong., Violence Against Women: A Week in the Life of America 32 (Comm. Print 1992).
66 Staff of Senate Comm. on the Judiciary, 102d Cong., Violence Against Women: A Week in the Life of America 6 (Comm. Print 1992).
67 Id.
70 Staff of Senate Comm. on the Judiciary, 102d Cong., Violence Against Women: A Week in the Life of America 7 (Comm. Print 1992).
71 Id.
72 Id. at Ill, 3, 7.
The congressional reports recognized both the terrible human cost and suffering from domestic violence and the heavy price society pays for this violence. The health care consequences and costs were particularly noted. Congressional reports recognized that for four years, Surgeons General warned that family violence posed the single largest threat of injury to adult women. One million women each year seek medical attention for injuries at hands of male partners. One study found sixty-three percent of victims beaten while pregnant.

The impact on children of domestic violence was recognized by congressional reports as a major concern. Children are the victims of direct and indirect violence. A child may be the direct victim of violence such as in a sexual assault of a child by a parent. A child may also suffer the harm of being an indirect victim of violence between parents, such as when the child is present when one spouse abuses the other, or when the child views a rape or beating of their mother by their father.

Congressional reports detailed other adverse social consequences of domestic abuse, such as homelessness and employee absenteeism and sick time. Suffering violence impairs employment opportunities. Estimates are that this society spends five to ten billion dollars a year on health care, criminal justice and other social costs of domestic violence. Congress acknowledged that prior state and federal efforts had been insufficient. A federal response was necessary to meet its goals, one that acknowledged the criminal justice priority as well as treating domestic violence as a health issue, a shelter issue and a crime victim compensation issue.

In the later stages of its inquiry, Congress recognized the immigration law as one part of a larger failure to confront the domestic violence issue. One report stated that domestic battery problems are "terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizens legal status depends on his or her marriage to the abuser." In the congressional view, the existing immigration law fostered domestic violence in such situations by placing control of alien spouse's ability to gain permanent legal status in the hands of the citizen or legal permanent resident. A battered spouse could be deterred from taking action to protect herself, such as filing for a civil protection order, filing criminal charges or calling the police, because of the threat or fear of...
Many immigrant women live trapped and isolated in violent homes afraid to turn to anyone for help. They fear continued abuse if they stay and deportation if they attempt to leave.  

V. Coverture and Chatisement in Immigration Law

The first immigration laws enacted at the turn of the twentieth century imposed categorical and numerical limitations on immigration and included a right of a husband to control his alien wife's immigration status. The relationship between a citizen wife and her alien husband was not recognized. These early laws established the husband's power to petition for a wife's immigration status and were based on the common law doctrine of coverture, which totally subjected a wife to her husband. The pre-1990 laws moved the rhetoric from "husband" control to "spouse" control but still maintained the subordination of immigrant wives. The decade from 1990 to 2000 increasingly addressed the issue of spouse abuse but not the underlying dynamic of spousal power and control.

a. pre-1990: establishment and minimal response

The power of a spouse through control over the petition was continued in the 1952 Immigration and Nationality Act, the basis for current immigration law. However, the rhetoric was changed from giving the power over immigration status to "husbands" to affording it to "spouses." The 1965 immigration law continued the spousal power to petition, while establishing the basic framework for family based immigration that exists today. Under that framework, spouses of citizens or legal permanent residents were among the categories of aliens allowed to become legal permanent residents. However, the process to become a legal resident on this basis generally must be initiated by a petition filed by the citizen or resident spouse.

In 1986 the power of the citizen or resident spouse was increased. Under amendments passed in that year, certain aliens married to citizens or residents were given permanent resident status on a conditional basis; their resident status could expire in two years even after their spouses had petitioned for them and they had met all qualifications for legal permanent resident status. To prevent the expiration of the spouse's permanent resident status after two years, both spouses had to file a joint petition.

b. 1990: some assistance for conditional residents

Congress first directly addressed the issue of spousal power and control in 1990 in the context of conditional resident status. The 1990 amendments to the immigration law modified the grounds on which a conditional resident alien spouse could obtain a waiver to the requirement that both spouses file a joint petition to prevent the termination of the conditional resident's legal status. The amendments allowed the alien spouse to self-petition without her citizen or resident spouse's cooperation in three situations: if she had entered into her marriage in good

91 Calvo, supra note 1, at 601-03.
92 Id. at 596, 601.
93 Id. at 604.
94 Id. at 605-06.
95 Id. at 606.
96 Id. at 607.
faith, but she or her child was subject to battering or extreme cruelty; if she had entered into her marriage in good
faith, but the marriage terminated; or if she would suffer extreme hardship if deported. 98

The House Judiciary Committee Report stated that the purpose of these changes was to "ensure" that neither a
spouse nor a child would be "entrapped in the abusive relationship by the threat of losing their legal resident
status." 99 Thus, the focus was not on rejecting spousal control. It was not sufficient that a spouse had entered
the marriage in good faith; she had to be divorced or abused or subject to extreme hardship before she would be
allowed to self-petition.

These amendments thus failed to address the whole problem of spousal control for conditional residents. However, they further failed to address, at all, the problem of spousal control of the initial petitioning process and
the related consequence of citizens or residents using immigration law to entrap their spouses in abuse. The
immigration law continued to give the citizen or resident spouse total control over his alien spouse's ability to
initially gain legal immigrant status. The citizen or resident relative was the only person who had the legal right to
file the petition that was the first necessary step for legal resident status. By having control over immigration status,
the citizen or resident had control over whether his spouse could live and work in this country. Further, abusers
used the control over immigration status to stop their spouses from reporting or fleeing from the abuse. Abusers
did so by threatening deportation and loss of ability to work and loss of child custody because of [*168] deportation.
100 Abusive citizens used the immigration laws to perpetuate abuse against their alien relatives and to prevent
them from seeking assistance, protective orders, or the arrest and prosecution of their abusers. 101

c. post-1990 proposals: a shift from removing power and control to ameliorating abuse

In the early 1990s congressional representatives turned their attention to the power of the petition, which is the
total legal control of a citizen or resident of his spouse's immigration status through the ability to refuse to file a
petition. 102 Initial legislative proposals to address the spousal control of the initial petitioning process focused
simply on removing the power to petition from the citizen or resident spouse and allowing the immigrant spouse to
file a petition herself. The proposals then moved to additionally addressing situations of abuse. Ultimately, in the
legislation passed, removal of the coverture-like power to petition was rejected. The legislation focused only on
providing relief to the abused. To obtain immigration status, spouses could not operate from a position of
self-initiative and control; they had to show that they were abused to the extent of being "victims." Further, as Linda
Kelly has pointed out, they further had to demonstrate that they were "good victims" 103 with criteria and evidentiary
requirements that other spouses did not have to meet. [*169]

et al., Immigration Law and Procedure § 42.02-06 (perm ed., rev. vol. 2003).
100 Calvo, supra note 1. Further, the immigration service undermined the effectiveness of the waiver for abused conditional
residents by requiring that extreme cruelty could be demonstrated only through affidavits from a limited group of mental health
professionals. 8 C.F.R. § 216.5(e)(3)(iv)-(vii) (2000). For a discussion see Martha Davis & Janet M. Calvo, INS Interim Rule
Diminishes Protection for Abused Spouses and Children, 68 Interpreter Releases 665, 66570 (June 3, 1991). This requirement
was extremely burdensome because few programs for abused women have certified mental health professionals on their
staffs. The regulation appeared to be contrary to the House Report that contemplated acceptance of all types of credible
101 See, e.g., Hearing on Legal Immigration Reform Before the Subcomm. on Immigration, Refugees and Int'l Law of the
House Comm. on the Judiciary, 101st Cong., 665-68 (1989) (testimony of the Honorable Louise Slaughter, member of Congress); C. Hogeland & R. Rosen, Dreams Lost, Dreams Found; Undocumented Women in the Land of Opportunity (1990);
Calvo, supra note 1, at 593-95; Michelle J. Anderson, A License to Abuse: The Impact of Conditional Status on Female
102 See supra note 12.
103 Linda Kelly, Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through
1. Initial Proposals: Remove the Power and Control Over the Petition

a. H.R. 5693 and 782

The first legislative attempt, which focused on the petitioning process, directly removed the coverture-like spouse power from the law. In July of 1992, Congressman Mazzoli and Congresswoman Slaughter introduced H.R. 5693. It proposed to amend the immigration law to allow aliens who were the spouses of citizens or permanent residents to file a petition on their own. This proposal addressed the spousal control and power problem by removing the power to petition from all citizen and resident spouses. This was a simple solution with comprehensive consequences. It recognized that the control of one spouse over the other was inappropriate. It also did not require the escalation of power domination in the marital relationship to reach to level of physical harm or other abuse. This bill was referred to Committee but was never reported out.

The next year on February 3, 1993, H.R. 782, a modified and more limited version of the 1992 bill was introduced. This bill allowed the alien spouse of a United States citizen or a legal permanent resident to file a petition only in two circumstances. In the first situation, the alien spouse had to have been abused or subjected to extreme cruelty by the citizen or resident spouse during the marriage. Additionally, the abused alien spouse had to have lived in the United States and at sometime resided in the United States with the citizen or resident spouse and entered the marriage in good faith. In the second situation, the alien spouse had to have been married for at least three years and had to reside in the United States with a citizen or resident who had failed to file a relative petition. This bill did not treat all alien spouses equally, but it also did not require harm to the alien spouse before a self-petition could be filed. It required either abuse or a lengthy relationship. This implicitly recognized that the refusal to file a petition over a length of time was inappropriate power based behavior.

b. Safe Homes for Immigrant Women and Protection for Immigrant Women

In 1993, a proposed version of the Violence Against Women Act first contained provisions specifically addressing domestic violence against aliens. A version of the Violence Against Women Act had first been introduced in the Senate in 1990 and in the House in 1991. On February 24, 1993, a version of the Violence Against Women Act, H.R. 1133 was introduced in the House of Representatives that included the subtitle, Safe Homes for Immigrant Women.

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104 H.R. 5693, 102d Cong. § 1(a) (1992).
105 The bill also countered INS regulation by requiring that the Attorney General had to consider any credible evidence submitted in support of an application for a waiver of the joint petition requirement to remove conditional resident status “whether or not the evidence is supported by an evaluation of a licensed mental health professional.” H.R. 5693, 102d Cong. § 2(a).
106 H.R. 782, 103d Cong. (1993). H.R. 782 was sponsored by Congressman Mazzoli.
107 H.R. 782, 103d Cong. § 1(a).
108 This bill also addressed the INS regulation that limited the kind of evidence that could be submitted in support of conditional residents’ request for a battered spouse waiver. The bill proposed that any credible evidence submitted must be considered. However, it further stated that the determination of what evidence was credible and the weight to be given the evidence was within the sole discretion of the Attorney General. H.R. 782, 103d Cong. § 2(a).
111 Violence Against Women Act of 1993, H.R. 1133, 103d Cong. (1993). This bill was sponsored by Congresswoman Patricia Schroeder and had 61 original co-sponsors including Congresswoman Louise Slaughter who was a major proponent of the battered spouse waiver, Safe Homes for Immigrant Women and one of the original cosponsors of the Violence Against Women Act. Chairman Mazzoli and Representative Charles Schumer of the House Judiciary Subcommittee on International Law,
Like the 1992 bill, Safe Homes for Immigrant Women allowed self-petitioning to the alien spouse or child of a citizen or resident. Safe Homes for Immigrant Women additionally addressed the problem of the immigration law as a tool for familial abuse by recognizing abused children, and the parents of children who are abused, as well as abused spouses.

Safe Homes for Immigrant Women provided further protections for those who met the definition of abused family member. "Abused" was defined as battering and subjugation to extreme cruelty. In the case of a child, abuse also included abandonment. The definition of an "abused alien family member" included the spouse or child of a citizen or legal permanent resident who had been abused by that citizen or resident, and the spouse of a citizen or resident whose child had been abused by the citizen or resident parent. The bill thus applied to abused alien spouses, abused alien children and alien spouses trying to protect their citizen or alien children from abuse.

Safe Homes for Immigrant Women provided for protection against deportation and work authorization for abused spouses and children who were in the United States, while also guarding against fraudulent claims. An abused spouse or child was protected from deportation on certain non-serious grounds and could be granted work authorization until an immigrant visa was available and an adjustment of status application was adjudicated. The bill also made it easier for an abused spouse or child to apply for adjustment of status by deeming her to have been inspected and admitted and allowing her to apply for adjustment if she was in unlawful status or if she had worked when not authorized. As a deterrent to fraud, the proposal provided for the revocation of work authorization and the initiation of deportation proceedings against anyone who made a fraudulent claim of abuse.

Additionally, the bill allowed a divorced abused spouse to continue to be eligible for immigrant status if a relative petition was filed within two years of the divorce and she had not remarried. It addressed two situations confronting abused women. In some instances, the abuser initiated a divorce. In other situations, the abused spouse found that breaking the ties with the abuser through divorce was needed to best protect her. If an abused spouse could not file the petition because of divorce, the abuser would still have the power of control over immigration status; therefore she could use that power to prevent the abused spouse from seeking protective orders, arrest and prosecution. The bill allowed abused women to obtain a divorce as a means of avoiding further abuse.

Also under the bill, an abused alien family member would have been able to raise the abuse issue in any proceeding to exclude or deport her. Along with any other review processes, an abused alien family member

Immigration and Refugees and Representative Barney Frank of the House Judiciary Committee were also original cosponsors of the Violence Against Women Act.

112 H.R. 1133, 103d Cong. § 231 (Subtitle C of Title II is entitled Safe Homes for Immigrant Women). The Senate version of the Violence Against Women Act, S. 11, 103d Cong. (1993), introduced on January 21, 1993, did not contain a similar subtitle.

113 H.R. 1133, 103d Cong. § 231(b) (1993).

114 H.R. 1133, 103d Cong. § 231(a) (1993).

115 H.R. 1133 § 231(d).

116 H.R. 1133 § 231(d).


118 Safe Homes for Immigrant Women also made it easier for an abused spouse or child to apply for adjustment of status. Under the proposal an abused alien family member could apply for adjustment if she was in unlawful status or if she worked when not authorized. She could also be deemed to have been inspected and admitted. H.R. 1133, 103d Cong. § 231(e) (1993).

119 H.R. 1133 § 231(c). This provision was similar to the law that allowed widows of U.S. citizens to continue to be eligible for immigrant status if they apply within two years of their spouse's death. 8 U.S.C. § 1151(b)(2)(A)(i) (2000).
could have had the denial or revocation of a relative petition, an application for adjustment of status, a stay of deportation or work authorization reviewed in a deportation or exclusion proceeding.  

Safe Homes for Immigrant Women also addressed some of the problems with the implementation of the 1990 "battered spouse waiver" amendments for conditional residents. This bill made it clear that INS had to accept and consider all evidence submitted to support a battered spouse waiver. Under the bill's provisions, the conditional resident would have an opportunity at a hearing to confront any adverse evidence and present evidence to support her claim of abuse before a determination to deny her waiver application could be made.

Safe Homes for Immigrant Women thus proposed to remove the power to petition and also to address the special problems confronting abused alien women and children. Safe Homes for Immigrant Women did not survive the committee process. However, many of the proposals relating to the abused contained in this bill were the basis for legislation subsequently passed, particularly the 2000 amendments to the Violence Against Women Act.

In November 1993, the House Judiciary Committee reported out H.R. 1133, the Violence Against Women Act. This version of the bill contained the subtitle, Protection for Immigrant Women. The February 24, 1993 version of this bill was amended in the Subcommittee on Crime and Criminal Justice on November 16 and again in the Committee on the Judiciary on November 17. The amendments changed several provisions of the February bill, including those dealing with abused immigrants. Protection for Immigrant Women addressed the problem of power and control over immigration status and also the additional problem of abused aliens. However, it did so less comprehensively than the originally proposed Safe Homes for Immigrant Women.

Protection for Immigrant Women first modified the relative petition process. It allowed two categories of alien spouses to self-petition and further provided that these petitions would not be revoked based on the legal termination of the marriage upon which they were based. One category of alien spouses allowed to self-petition focused on the power to petition. It included an alien spouse who could demonstrate that she had been married to

120 H.R. 1133 § 231(g)(2).
121 See Violence Against Women Act of 1993, H.R. 1133, 103d Cong. § 231(g)(1) (1993). The INS had denied a petition filed by an abused conditional resident without giving that resident the opportunity to confront adverse evidence the INS had received. The resident's status was terminated and she automatically became an undocumented alien. In this way, the INS had allowed an abuser to achieve the termination of his spouse's legal status by making untested allegations against his spouse.
122 H.R. 1133 § 231(g)(2).
123 See H.R. 1133. It removed control over immigration status as a tool for abuse and made it possible for state law remedies against the abused to be used effectively. It attempted to address the plight of abused alien spouses and children who were left in an undocumented status by their abusive spouses or parents. Undocumented alien spouses were significantly impeded from leaving their abusers because they did not have the employment authorization necessary to support themselves and their children. Further, many abused women and children could not return to their home countries even to process a visa application because they would be in danger from their spouses or their spouse's families, especially when the law of their home countries would not protect them. Moreover, any protection orders that abused family members were able to obtain under the laws of the various states in the United States would have no affect outside the United States.
125 H.R. 1133 (Subtitle D).
128 H.R. 1133 § 241(a) (version 4).
129 H.R. 1133 § 241(c) (version 4).
and resided with a citizen or resident spouse in the United States for at least three years, that she was currently residing in the United States with the alien spouse and that the citizen or resident spouse had failed to file a petition on her behalf. A second category focused on the abused and included an alien spouse who could demonstrate that she or her child had been battered by or had been the subject of extreme cruelty perpetrated by her citizen or resident spouse during the marriage, that she had entered into the marriage in good faith, that she at one time resided in the United States with the citizen or resident spouse, and that she currently resided in the United States.

Protection for Immigrant Women also dealt with abuse by adding a new category of aliens eligible for suspension of deportation. Under this bill, an alien who was in the United States and had been battered or subjected to extreme cruelty in the United States by a United States citizen or permanent resident spouse or parent could be granted suspension if, in the opinion of the Attorney General, her deportation would result in extreme hardship to the alien or the alien’s parent or child. The abused alien also had to prove that while in the United States she had been a person of good moral character and was not deportable on the grounds of marriage fraud, criminal offenses, failure to register, or falsification of documents or security and related grounds.

Protection for Immigrant Women also confronted the problem caused by the INS implementation of the 1990 amendments for abused spouses. Protection for Immigrant Women directed the Attorney General to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty regardless of whether or not the evidence was supported by an evaluation of a licensed mental health professional. However, the Attorney General was given discretion to determine what evidence was credible and what weight should be given to that evidence.

While Protection for Immigrant Women was not as comprehensive as the originally proposed Safe Homes for Immigrant Women, it contained some provisions to ameliorate the power and control of a citizen or resident spouse, and it specifically addressed the problem of abused spouses and children. The amendments in Protection for Immigrant Women were included in the Violence Against Women Act passed by the House of Representatives in 1993. The version of the Violence Against Women Act passed by the Senate in 1993 did not contain any amendments to the immigration law.

2. The Violence Against Women Act of 1994: Continuation of the Power to Petition with Some Exceptions for the Abused

The Violence Against Women Act was considered in a House/Senate conference committee as part of the Violent Crime Control and Law Enforcement Act of 1994. The conference committee made changes in the immigration law provisions of the House bill by rejecting removal of the power to petition and limiting the provisions that addressed abuse. The conference committee changes were accepted by the House and Senate in 1994.

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131 H.R. 1133 § 243 (version 4).

132 H.R. 1133 § 243 (version 4).

133 H.R. 1133 § 242.


135 S. 1607, 103rd Cong. (1993).


August of 1994 and became law when the President signed the Violent Crime Control and Law Enforcement Act of 1994 in September.\textsuperscript{139}

The Violence Against Women Act of 1994\textsuperscript{140} amended several provisions of the immigration law: those that applied to petitions to classify aliens as relatives eligible to apply for permanent resident status, those that suspended deportation and the evidence necessary to make these applications, and those that addressed battered spouse waiver of the joint petition required to continue the permanent status of conditional residents.\textsuperscript{142} These changes focused on ameliorating abuse, but not on doing away with the power and control that underlies abuse.

Under these amendments, three groups of the abused could file relative petitions for classification of themselves, and in certain cases their children, as immediate relatives or preference immigrants, thus beginning the process to become a permanent resident. The first group included alien spouses of United States citizens or legal permanent residents who were either battered or subjected to extreme cruelty by their spouses. The second group included alien spouses whose citizen or alien children were battered or subjected to extreme cruelty by the aliens' United States citizen or legal permanent resident spouses. The third group consisted of alien children who had been battered or subjected to extreme cruelty by their United States citizen or legal permanent resident parents.\textsuperscript{143} However, being abused was the basic criteria. No provision was made for spouses even in long-term good faith marriages. The changes in this law, made in the conference committee, had rejected self-petitioning for those who could not demonstrate abuse. For the abused, the most major change in the self-petitioning scheme was the addition of the requirement that the abused person had to show extreme hardship before the petition would be accepted. Children also had to demonstrate that their deportation would result in extreme hardship to themselves. Spouses had to demonstrate that their deportation would result in extreme hardship to themselves or their children.\textsuperscript{144} The extreme hardship requirement was a large hurdle to overcome.\textsuperscript{145}

In addition to abuse and extreme hardship, these alien spouses and children had to show the following: they were persons of good moral character, they were otherwise eligible for immediate relative or preference classification, they were residing in the United States and at some time they resided with the abusive United States citizen or legal permanent resident spouse or parent in the United States.\textsuperscript{146} A spouse had to show that the abuse of the spouse or spouse's child happened sometime during the marriage. A child had to show that the abuse happened sometime while the child and parent resided together.\textsuperscript{147} A spouse additionally had to demonstrate that she entered into the marriage in good faith.\textsuperscript{148}

The suspension of deportation law was also amended to add a new category of abused aliens eligible to suspend deportation and change their status to legal permanent residents. The amendments covered three basic groups

\begin{itemize}
\item[\textsuperscript{138}] 140 Cong. Rec. S13,047 (1994).
\item[\textsuperscript{139}] 140 Cong. Rec. H9,155 (1994).
\item[\textsuperscript{142}] Violence Against Women Act of 1994 § § 4070140702.
\item[\textsuperscript{147}] § § 1154(a)(1)(A)(iii)(II), 1154(a)(1)(B).
\item[\textsuperscript{148}] § § 1154(a)(1)(A)(iii)(II), 1154(a)(1)(B).
\end{itemize}
of the abused. The first included aliens who were battered or subjected to extreme cruelty by United States citizen or legal permanent resident spouses. The second group consisted of aliens who were battered or subjected to extreme cruelty by United States citizen or legal permanent resident parents. The third group consisted of aliens who were the parents of children who were battered or subjected to extreme cruelty by the United States citizen or legal permanent resident parents. 149

In addition to demonstrating that she fit into a recognized group of abused, the alien seeking suspension had to meet the following criteria. She had to show the abuse took place in the United States, she had been physically present in the United States for a continuous period of at least three years immediately preceding her application for suspension, she was a person of good moral character and had been for the three year period preceding her application, and she was a deportable alien, but not deportable on certain grounds (marriage fraud, criminal offenses, falsification of documents or security and related grounds). 150 Most significantly she had to prove that she was a person whose deportation would result in extreme hardship to herself or her parent, or child. 151

Thus, while the Violence Against Women Act of 1994 contained some assistance for abused spouses who could meet the statute’s various criteria and evidentiary standards, these criteria and standards left out a [*177] number of abused spouses. 152 Significantly, the law as passed did not contain any provision for non-citizen spouses whose citizen resident spouses maintained power and control by refusing to petition, but whose behavior could not be proven to meet the heightened criteria of battering or extreme cruelty.

3. Attempts to Prevent General Changes in Immigration Law from Undermining Protections for the Abused: 1996

In 1996, just two years after the Violence Against Women Act of 1994 (VAWA 1994), major changes were made in immigration laws and laws related to public assistance eligibility for non citizens that threatened the changes that had been made in 1994 to protect abused immigrant spouses and children. 153 This occurred despite extensive congressional condemnation of domestic violence. 154 The response by advocates for the abused was to lobby to

153 Additionally, in 1996 a new controversial provision making abusers deportable was enacted. See discussion infra Section V.C.4.
154 See supra Section IV.
carve out exceptions for the abused from the harsh affects of the new legislation. However, several impediments for abused immigrant spouses remained.  

The 1996 Illegal Immigration and Immigrant Responsibility Act (IIRAIRA) made changes to immigration law that expedited the removal of deportable aliens and limited their ability to obtain discretionary relief from deportation. Under this law applicants for admission to the United States have a three-year or ten year bar to entry if they have previously resided unlawfully in the United States depending on the time of unlawful presence. However, these provisions are waived for certain abused spouses and children who were beneficiaries of provisions of the Violence Against Women Act. The abused must demonstrate a "substantial connection" between the unlawful entry or overstay and the domestic violence unless they entered the United States prior to April 1, 1997, IIRAIRAs effective date.

Further, under this statute deportation and exclusion proceedings became removal proceedings and suspension of deportation was replaced by "cancellation of removal." However, for battered women and children the criteria for cancellation stayed the same as that for suspension: three years physical presence, extreme hardship, and good moral character. Moreover, IIRAIRA contained some additional provisions that assist the abused. The statute prohibited INS officers from making adverse determinations based solely on information gained from the abuser and prohibited the unauthorized release of information about battered women and children. 

Additionally, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) was passed in 1996. It eliminated access to federally and state-funded public benefits for many immigrant non-citizens. IIRIRA however, addressed the issue of benefit access for some battered immigrants. These included VAWA self-petitioners and VAWA cancellation and suspension applicants, battered immigrants who were the beneficiaries of family-based visa applications filed by abusive United States citizens or lawful permanent resident spouses or parents and battered immigrant conditional or lawful permanent residents who had previously been barred from access to public benefits because of sponsor deeming. However, battered spouses must demonstrate a

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165 IIRIRA § 501 sets forth categories of aliens eligible for public benefits. IIRIRA § 552 provides exceptions regarding previously obtained monetary support for abused aliens. For a detailed explanation of the provisions see Leslye E. Orloff &
substantial connection between the abuse and the need for the benefit. Further, battered immigrants who entered the United States after August 22, 1996 are barred for five years from federal means tested benefits such as TANF, non-emergency Medicaid Supplemental Security Income (SSI) and food stamps.

4. Domestic Violence Becomes a Deportable Offense

In 1996, legislation also made certain offenses connected with domestic abuse grounds for deportation. The statute makes deportable any alien who "is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." Moreover, the statute goes further and makes violation of a civil or criminal order of protection a deportable offense.

While on the surface this may seem to assist the abused, it has caused great difficulty for many. The first problem for the spouses of legal permanent residents was that if the resident spouse was deported and lost status, the abused spouse had no basis to self-petition. The Violence Against Women Act addressed this in 2000 by providing that a spouse could self-petition within two years of the abusive spouse's loss of status. However, serious remaining difficulties result from the failure to address how these provisions operate within the complexities of state civil and criminal justice systems. Unfortunately, as explained below, the women who are abused may become deportable through these provisions. Further, the looming deportation of an abuser dissuades, rather than encourages, many abused women from seeking orders of protection or the arrest and prosecution of their abusers.

5. Mail-Order Brides: An Ineffective and Unimplemented Response

In the 1990s the already growing mail order bride business burgeoned. These businesses promote the arrangements of marriages between United States citizen or resident men and women from predominately developing or financially strapped countries, most often, the Philippines and Russia. The use of the Internet in the 1990s increased these businesses. In the 1980s, the women predominantly came from the Pacific Rim countries. The 1992 breakdown of the former Soviet Union led to an increase in mail-order brides from that area.


166 8 U.S.C. § 1641(c) (2000) (IIRIRA § 501). For an explanation of situations that have been determined to demonstrate "substantial connection" between battery and the need for public benefits, see Guidance on Standards and Methods for Determining Whether a Substantial Connection Exists Between Battery or Extreme Cruelty and Need for Specific Benefits, 62 Fed. Reg. 65,285, 65,285-87 (Dep't of Justice Dec. 11, 1997). For more details on battered immigrants welfare eligibility see Orloff, supra note 165, at 620.


170 Seeinfra note 199.


172 See infra notes 299-306.


174 Markee, supra note 173.
A number of incidents, particularly murder of mail-order brides by their American husbands, drew public attention to domestic violence by U.S. spouses against their mail-order brides.\(^{175}\) In 1996, Congress [*181] specifically addressed the issue through legislation in section 652 of the Immigrant Responsibility Act of 1996.\(^{176}\) Previously the mail-order marriage industry had been mentioned in the legislative history of the Marriage Fraud Act. There the focus had been on the fraud possibilities of these arrangements, i.e., the notion of foreign women entering into a marriage with a U.S. male only for immigration purposes.\(^{177}\) The 1996 law added concerns about spouse abuse to concerns about fraud.\(^{178}\) Missing [*182] from congressional concern, however, was the coverture notion of spousal domination and control.

\(^{175}\) Susana Blackwell, a Filipina mail-order bride, made news headlines in 1995 when her husband, afraid that she was filing for a divorce, shot and killed her in a Seattle courthouse. The controversy surrounding the Susana Blackwell murder triggered scrutiny of the immigration policies in place at the time and ultimately led to Congressional amendments as well as to the implementation of laws that purported to afford additional protections to mail-order brides.


In 1996 Jack Reeves, a retired U.S. Army sergeant, was convicted of murdering his fourth wife, Emelita Reeves, a mail-order bride from the Philippines. Only months earlier, he was convicted of killing his second wife; his third wife, a mail-order bride from Korea, drowned under mysterious circumstances in 1986. All of the women died after informing Reeves that they wanted a divorce.


Another mail-order bride made headlines when her decomposed body was found in a shallow grave in Marysville, Washington. Anastasia Solovieva King, a twenty-year old Russian mail-order bride, came to the United States by marrying an American nineteen years her senior. Her husband was arrested . . . for allegedly strangling her to death.


\(^{177}\) Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong. 9 (1985); Lisa C. Ikemoto, Male Fraud, 3 J. Gender Race & Just. 511 (2001); INS Reveals Basis for Fraud Claims, 65 Interpreter Releases 26-27 (1988).

\(^{178}\) 8 U.S.C. § 1375(a) (2000). The Congress finds as follows:

(1) There is a substantial "mail-order bride" business in the United States. With approximately 200 companies in the United States, an estimated 2,000 to 3,500 men in the United States find wives through mail-order bride catalogs each year. However, there are no official statistics available on the number of mail-order brides entering the United States each year.

(2) The companies engaged in the mail-order bride business earn substantial profits.

(3) Although many of these mail-order marriages work out, in many other cases, anecdotal evidence suggests that mail-order brides find themselves in abusive relationships. There is also evidence to suggest that a substantial number of mail-order marriages are fraudulent under United States law.

(4) Many mail-order brides come to the United States unaware or ignorant of United States immigration law. Mail-order brides who are battered often think that if they flee an abusive marriage, they will be deported. Often the citizen spouse threatens to have them deported if they report the abuse.

(5) The Immigration and Naturalization Service estimates that the rate of marriage fraud between foreign nationals and United States citizens or aliens lawfully admitted for permanent residence is 8 percent. It is unclear what percentage of these marriage fraud cases originated as mail-order marriages.

§ 1375(a).
The 1996 statute states that Congress has determined that there is a large and unregulated "mail order bride" industry in the United States in which the participants earn substantial profits. Further, there is evidence to suggest that these "international matchmaking organizations" facilitate abusive and fraudulent marriages. Congress further noted that many "mail order brides come to the United States unaware or ignorant of United States immigration law." Specifically, Congress has determined that many "mail order brides" who find themselves in abusive relationships think that if they flee an abusive marriage, they will be deported from the United States. This belief is often the result of threats by the abusive spouse to have the victim deported if the abuse is reported to law enforcement authorities.

In response to these findings, Congress mandated two things: dissemination of information by the businesses to the women they recruit and a report detailing the results of a study on mail-order marriages. Under the statute every international matchmaking organization doing business in the United States must disseminate information to those recruited. The Immigration and Naturalization Service (now BCIS) was authorized to decide in detail what information is appropriate. However, the statute does mandate that the information be disseminated in the recruit's native language, and include information regarding conditional permanent residence status, the battered spouse waiver, permanent resident status, marriage fraud penalties, the unregulated nature of the business engaged in by such organizations, and the results of the required study. The statutory penalty for failure to comply is a civil fine of not more than twenty thousand dollars for each offense.

The report mandated by the statute was supposed to address the number of mail-order marriages, the extent of fraud and domestic abuse in such marriage, the utilization of suspension of deportation or selfpetitioning on the basis of being abused, and the need for further regulation and education. The report was not issued by the INS until 1999, and as explained below did not meet the congressional mandate. The INS failed to promulgate

179 8 U.S.C. § 1375(A)(2) (IIRIRA § 652(a)(2)).
180 8 U.S.C. § 1375(A)(4) (IIRIRA § 652(a)(4)).
181 Id.

The Attorney General, in consultation with the Commissioner of Immigration and Naturalization and the Director of the Violence Against Women Initiative of the Department of Justice, shall conduct a study of mail-order marriages to determine, among other things-

(1) the number of such marriages;
(2) the extent of marriage fraud in such marriages, including an estimate of the extent of marriage fraud arising from the services provided by international matchmaking organizations;
(3) the extent to which mail-order spouses utilize section 1254(a)(3) of this title (providing for suspension of deportation in certain cases involving abuse), or section 1154(a)(1)(A)(iii) of this title (providing for certain aliens who have been abused to file a classification petition on their own behalf);
(4) the extent of domestic abuse in mail-order marriages; and
(5) the need for continued or expanded regulation and education to implement the objectives of the Violence Against Women Act of 1994 and the Immigration Marriage Fraud Amendments of 1986 with respect to mail-order marriages.

Id.
186 INS Reports to Congress on Mail-Order Brides, 76 No. 12 Interpreter Releases 495 (1999).
187 See infra note 254.
final implementing regulations for this statute and the issue is now on the regulatory agenda of the INS successor, the Bureau of Citizenship and Immigration Services (BCIS).

6. The Violence Against Women Act of 2000: Changes to Protect the Abused but Continuation of the Power to Petition

The 1994 VAWA law assisted a number of battered spouses, but both the limitations of that law and subsequent changes to the immigration and welfare laws undermined the capacity of abused immigrants to escape abuse.\(^{188}\) Advocates for domestic violence survivors persisted\(^{189}\) and in 2000, the Battered Immigrant Women Protection Act of 2000 was signed into law as part of the Victims of Trafficking and Violence Protection Act of 2000, VAWA 2000.\(^{190}\) This law removed many of the obstacles to self-petitioning for the abused and expanded the categories of those who could be eligible. It also established a nonimmigrant U visa for non-citizens who suffer criminal activity related abuse, including victims of domestic violence who are not eligible for VAWA cancellation or self-petitioning.\(^{191}\)

Congressional intent behind the 2000 provisions was expressed as follows:\(^{192}\)

The Battered Immigrant Women Protection Act of 2000 . . . continues the work of the Violence Against Women Act of 1994 (VAWA) in removing obstacles . . . that may hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers by allowing an abusive citizen or lawful permanent resident spouse to blackmail the abused spouse through threats related to the abused spouse's immigration status.\(^{193}\)

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After VAWA 2000, the spouse of a citizen or legal permanent resident who has been abused or whose child has been abused by the citizen or resident spouse during a marriage or an intended marriage\(^{194}\) can self-petition if she

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\(^{191}\) For an in-depth analysis of all changes in the 2000 law, see Orloff & Kaguyutan, supra note 165, at app. A.


VAWA 2000 addresses the residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of 1996 changes to immigration law.


demonstrates the following: the marriage was entered into in good faith, 195 she at some time lived with the abusive spouse, 196 and she is a resident of the United States and a person of good moral character. 197 She no longer has to show extreme hardship. She can be divorced from the spouse if she self-petitions within two years of divorce and the marriage termination is connected to the abuse. 198 She can also self-petition within two years of the loss of citizenship or permanent resident status of an abusive spouse due to an incident of domestic violence. 199 If the spouse was a citizen, she can self-petition within two years of his death. 200

Further, the law protects an intended spouse. The law recognizes customary and common law marriages if recognized in the country or state where they were celebrated and bigamous marriages that are the fault of the abusive spouse. 201 The recognition of bigamous marriages, not the fault of the immigrant spouse, also assists the abused who were not in bigamous marriages, since proving the termination of an abuser’s prior marriage proved difficult for many abused spouses. 202

The law further expanded eligibility to self-petition beyond those living in and subjected to abuse in the United States. The abused who are currently residing abroad, but who had been subjected to abuse by a citizen or resident spouse or parent in the United States are now included. 203 Also included are spouses living outside the country who are abused by their citizen or resident spouses employed by the United States government or members of the U.S. uniformed services. 204 The law additionally extended [*186] relief to certain children who were battered themselves or who were the children of battered immigrants. 205

The 2000 law also removed some impediments to legal status for the abused that had been caused by changes in the general immigration laws. Battered spouses and children of legal permanent residents, as well as battered spouses and children of citizens, can now adjust their status to legal permanent residents without leaving the United States. 206 Battered immigrants who received benefits made available under IIRIRA cannot be barred from becoming legal residents because of the receipt of those benefits. 207 The 1996 law had made persons involved in domestic violence deportable. Women who were abused found themselves subject to that provision because of the functioning of the criminal justice system. 208 The 2000 law allows the INS and immigration judges

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205 This included children of battered immigrants and battered children who had previously been barred because they turned twenty-one before their applications could be processed, 8 U.S.C. § 1154(a)(1)(D) (2000), and humanitarian parole for the children of the abused granted cancellation of removal, 8 U.S.C. § 1229b(b)(4) (2000).
208 See supra Part V.C.4 and infra notes 301-03.
to waive this ground for deportation if the abused immigrant was not the primary perpetrator of abuse and her crime did not result in serious bodily injury. 209

Self-petitioning for the abused was also extended by the 2000 law to persons eligible under the Nicaraguan Adjustment and Central American Relief Act of 1997 and the Haitian Refugee Immigration Fairness Act of 1998. Abused spouses and children of persons eligible for protections under these acts can now self-petition. 210

The 2000 law also continued, and in some instances made easier, cancellation of deportation for abused spouses of citizens or residents and for parents of children abused by their other citizen or resident parents. 211 However, the difficult to meet extreme hardship criteria still remains. 212

Further, the 2000 statute created a status for victims of crimes who have suffered substantial physical or mental abuse and who cooperate with the investigation and prosecution of the crimes. 213 Those who can benefit from the law include victims of domestic violence, victims of trafficking, and victims of abuse in the workplace if they meet the cooperation criteria. 214 To be eligible, a person must be a victim of crime and possess information about the crime, 215 as well as have a certification from an official in the criminal justice system that verifies her assistance in the investigation or prosecution of criminal activity. 216 The U status is a non-immigrant status but it can be the basis for adjustment to lawful permanent residency for those who continue to remain in the United States for three years and whose continued presence is justified by humanitarian or public interest grounds. 217 This status is therefore available to some women who are abused, but who are not spouses of citizens or permanent residents, such as spouses of nonimmigrant visa holders and undocumented immigrants. 218

VI. The Remaining Legacies of Coverture


Under both NACARA and HRIFA, an alien who qualifies for relief may file a petition to include a spouse or child to attain legal immigration status as well. Orloff, supra note 165, at 151. The problem quickly emerged, however, that abusive parents and spouses would not choose to include their spouses or children in their applications for relief under the Acts. Id. at 152. The abused spouses and children continued to be undocumented without any option for recourse. Id. VAWA 2000 provided dependent spouses and children who were qualified immigrants under NACARA and HRIFA and who met additional specific requirements to self-petition under NACARA or HRIFA, in order to receive the relief the acts provided. Id.

a. spousal control still remains

The attempt to remove coverture based power and control from the petitioning process was lost in the conference committee of VAWA 1994. From that time on the focus shifted from removing power and control to dealing with spouse abuse. The power to petition controls immigration status and this control results in a control over living and working in this country. The power to petition is a legacy of coverture because it gives one spouse control over where the other spouse can live, whether that spouse can work, and whether that spouse can live with and have custody of her children. The coverture based power to petition is still a feature of the conditional resident and initial petitioning law for spouses.

Coverture-like control still remains in the conditional resident scheme. A spouse who is still married must demonstrate abuse, while a spouse who has terminated the marriage need only show she entered the marriage in good faith. There is no ability for a spouse who continues in a marital relationship to simply demonstrate that she entered into the marriage in good faith. If the marriage is intact, the alien spouse must be a victim of abuse and a person of good moral character in addition. 219

Similarly, the initial petitioning process does not provide an opportunity for a spouse to take the initiative to regularize her immigration status by demonstrating that she entered into a good faith marriage. She can self-petition only if she can demonstrate she or her child was battered or subjected to extreme cruelty.

An argument can be made that utilizing control over immigration status is a form of abuse and, therefore, appropriate interpretation of the statutory term "extreme cruelty" would allow for self-petitioning by women whose husbands will not file petitions. In the opinion of the Family Violence Prevention Fund of San Francisco abuse includes: failing to file papers to legalize immigration status, withdrawing or threatening to withdraw papers filed for residency, threatening to report to INS to get a spouse deported, and, threatening to withdraw the petition to legalize immigration status. 220 However, neither the executive nor the judiciary has interpreted the statute so broadly.

The applicable INS, now BCIS, regulation states in relevant part: [*189]

For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse . . . shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. 221

This regulation may support an argument that extreme cruelty could be found in a refusal to file a petition in the context of threats or behavior that can be otherwise characterized as psychological abuse or as part of a pattern that includes violence. It would not support the argument that mere failure to file without other behavior is extreme cruelty.

Recently, the Ninth Circuit in Hernandez v. Ashcroft interpreted the term "extreme cruelty." 222 In this case, over INS objection, the court found that a spouse's contrite behavior in attempting to lure his wife back was extreme cruelty because it was part of a pattern of abuse, which included a cycle of violence and contrition. The court noted that the law protects a woman against manipulative tactics aimed at ensuring the batterer's dominance and

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219  See supra note 98.


222  345 F.3d 824 (9th Cir. 2003).
control. However, the court also said "every insult or unhealthy interaction in a relationship does not rise to the level of domestic violence." Therefore, there may be some possibility that extreme cruelty can be shown through a husband's refusal to file a petition combined with his insistence that his wife submit to his will through threats such as to divorce her, report her to immigration authorities, or take her children away. However, it seems that there is no possible recourse for the spouse subjected to power and control through her spouse's negligence or refusal to file a petition. Legislative action was and is needed to make it clear that the law will not sanction this type of spousal power, control, and resulting subordination.

There was no legislative explanation about the rejection of proposals to remove the power to petition from all spousal relationships (or at least from longer term relationships, three years, as proposed). This, along with the approach toward mail-order brides described below reflects an ambiguity about finally rejecting the spousal power and control underlying coverture.

The notion that the husband should be in charge and the wife should be obedient still remains. A concept of marriage as a relationship between two equal adults, each with the right to make choices about living, work, and children, has not been fully accepted in this context. The shift to a focus on battered women evidences some consensus that the law should not be used as a tool for abuse. However, there does not seem to be the same consensus that the law should not be used as a means of control.

Generally, condemning domestic violence has been less controversial than confronting gender roles in marriage. Law reform related to domestic violence was initially based in the broader problem of gender inequality, but it became unmoored from that approach. Equality of gender roles in a family has been seen as threatening or unrealistic. For some, this reflects a reaction to challenging "traditional" values of a wife as focused on home and motherhood. For others, it reflects concern that surface equality masks the need of women for special protection because of their societal roles.

In the spouse-based immigration context neither of these concerns is valid. Allowing a spouse to take the initiative to petition to regularize her immigration status does not undermine the personal choice about family structure. It enhances the protection of women, rather than removing it. It would remove the power and control vestige of coverture and make it clear that the law should not enforce, reinforce, or permit subordination of one person to another. Further, as explained more fully below, since domestic violence is an extension of the notion of the coercive nature of marriage, violence is promoted by lack of a clear policy that the law will not enforce coercion of one spouse by another.

Some may argue that the legislative choice to continue the spousal power over the petition reflects other concerns. These include policy objectives of family unity and fraud protection. The family unity objective was expressed by one senator this way:

The only real purpose in giving the substantial immigration benefit our laws provide to an alien spouse is to keep the family together... if the marriage just simply doesn't work--for whatever reason--even when the alien spouse is not at fault, there is no longer a family to "keep together." Further, the immigration benefit which is lost to the alien spouse if the marriage fails, for whatever reason, was made available to that person only because of the marriage

223 Id.
226 Symposium, Battered Women & Feminist Lawmaking: Author Meets Readers Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renee Romkens, & Marianne Wesson, 10 J.L. & Pol'y 313, 322 (2002).
227 See Bartlett, supra note 40, at 498. See also Martha Albertson Fineman, Fatherhood, Feminism and Family Law, 32 McGeorge L. Rev. 1031 (2001).
to an American citizen or resident. When that marriage no longer exists, there is no reasonable justification for the special immigration benefit to continue. 228

The INS had also taken the position that a factually dead, but legally alive marriage could not form the basis for immigration status for an alien spouse. 229 However, as explained above, this is not the current view of the Board of Immigration Appeals or the courts. If a marriage is not a sham or fraudulent from its inception, it is valid for immigration purposes, despite a contention that the marriage is "factually dead." 230

Moreover, this view, that the only appropriate policy objective is the family reunification benefit to a citizen or resident, is analogous to the coverture notion that the objective of a marriage was to promote a husband's well being. Behind the family unity language lies the concept that the marital relationship needs to serve the life choices of one spouse at another's expense and that the law will enforce the spousal control underlying those choices. It is reminiscent of other attempts to justify wife subordination in the guise of other rationales. 231

Further, the immigration law recognizes other situations in which recognition of family relationship, not family unity, is the objective. Amerasian children were allowed to petition to become permanent residents without the participation of their American fathers. 232 Widows, [*192] and now the divorced and separated abused, are afforded legal immigration status. 233 Allowing spouses in intact marriages to selfpetition even has the potential of promoting family unity by removing a source of tension in the relationship.

Another concern is prevention of marriage fraud in the immigration system. 234 Yet representations about the degree of fraud do not have an empirical base. In 1996, Congress stated that "the Immigration and Naturalization Service estimates that the rate of marriage fraud between foreign nationals and United States citizens or aliens lawfully admitted for permanent residence is 8 percent." 235 However, in a 1999 report, the INS stated, "Section 652 of IIRIRA attributed to INS an estimate that the rate of marriage fraud is 8 percent; the source and accuracy of this estimate has sic not been established." 236 In this report the INS attempted to assess the degree of fraud by looking at the number of cases denied under the conditional resident scheme of the Marriage Fraud Act. It found that in 1994, the last year for which detailed data were maintained, INS reviewed 96,033 applications for removal of conditional status and removed the conditions on 90,243, or 94 percent.

"This means that 94 percent of the cases were judged to be valid marriages. Most of the cases denied were for failure to pursue the application to remove conditions. Only 717 of the 5,790 denied or closed cases (twelve percent) were denied for cause." 237 Therefore the fraud rate was twelve percent of the six percent denied, or under one percent (.7%).

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229 See, e.g., Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979).
230 See supra note 36.
234 Ignatius, supra note 19, at § 4:26-4:32.
236 International Matchmaking, supra note 9. The assertions about marriage fraud used to support the Marriage Fraud Act of 1986 also proved not to have a valid empirical base. Calvo, supra note 1.
237 International Matchmaking, supra note 9.
Thus, the concern about marriage fraud in the immigration system does not have a history of strong empirical support. Despite this, there is a common belief that has entered our popular culture that some people marry solely to gain immigration status.\footnote{Depiction of marriage fraud in the immigration system is apparent in today’s popular culture. Hollywood movies and television shows depict that people marry solely to afford immigration status. For example, in the 1990 movie Green Card, a romantic comedy about a marriage of convenience, Gerard Depardieu stars as an immigrant trying to obtain a green card, aside Andie MacDowell, a single woman looking for a roommate. Depardieu, a Frenchman, has just been offered the job of his dreams in New York City, but cannot accept the offer until he obtains a work permit or a green card. MacDowell has just found the apartment of her dreams in New York City. The plot unfolds where a marriage of convenience would solve both of their problems. A mutual friend sets them up and Depardieu and MacDowell move in together in order to convince immigration officers that they married for love. DigiGuide, Green Card (Film), at \url{http://library.digiguide.com/lib/programme/8635}. The couple’s silly efforts to convince officials of their love for each other eventually leads to their truly falling in love. Desson Howe, Green Card, at \url{http://www.washingtonpost.com/wpsrv/style/longterm/movies/videos/greencardpg-13howe_a0b2d3.htm} (last visited Jan. 18, 2004). Another example of marrying for the sake of obtaining immigration status is depicted in an episode of the television series, Friends. The episode begins with the surprise that Phoebe had married her friend Duncan, a gay Canadian ice dancer, to help him get his green card. TV Tome, The One with Phoebe’s Husband at \url{http://www.tvtome.com/tvtome/servlet/GuidePageServlet/showid71/epid-372} (last visited Jan. 18, 2004). The episode picks up six years later, when Duncan is back in touch with Phoebe because he wants a divorce. It turns out that Duncan is not gay, and is getting married to someone else. Darcy Partridge, The One with Phoebe’s Husband at \url{http://www.friends-tv.org/zz204.html} (last visited Jan. 18, 2004).} Even accepting this concern, however, does not lead to the conclusion that the power to petition has to continue. \footnote{8 U.S.C. § 1325(c) (2000); see also Maria Isabel Medina, The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud, 5 Geo. Mason L. Rev. 669 (1997). Congress has imposed criminal sanctions as well as deportation on undocumented aliens who have committed marriage fraud. See 8 U.S.C. § 1325(c) (2000). Criminal sanctions imposed on those aliens who commit fraud include terms of imprisonment, fines, and forfeiture of property. See 8 U.S.C. § 1324c (2000). Where spouses of United States citizens and permanent resident aliens are given priority in gaining entry as a permanent resident alien (8 U.S.C. §§ 1151(a), (b)(2)(A)(i), 1152(a)(4), 1153(a), 1154(a) (2000)), the intent and “good faith” of the parties must be evident at the time their marriage occurred, Medina, supra, at 697, or both spouses will be subject to criminal prosecution for marriage fraud. See 8 U.S.C. § 1325(c) (2000). Congress imposed sanctions against marriage fraud through the Immigration Fraud Amendments of 1986, Medina, supra, at 703, which were codified as “any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.” 8 U.S.C. § 1325(c) (2000). It is more common today, however, that those parties engaged in fraudulent marriages are deported or denied an entry visa. Medina, supra, at 704.}

The requirement that a citizen or permanent resident petition does not especially prevent fraud. The citizen or resident could be the one participating in fraud. Further, the law has dealt with the potential for fraud more appropriately by making it a criminal offense or imposing evidentiary requirements. Marriage fraud in the immigration context is already a serious criminal offense, a felony punishable by five years in jail.\footnote{8 U.S.C. § 1154(a)(2)(A)(i) (2000).} In other instances, the immigration law has dealt with special concerns about marriage fraud by imposing evidentiary requirements.

For example, there has been a concern about an alien marrying solely to achieve permanent resident status, divorcing, and then marrying another for whom he then seeks legal permanent resident status. The concern that the first marriage was solely for immigration purposes is addressed by requiring that the petitioning spouse has been a permanent resident for five years\footnote{8 U.S.C. § 1154(a)(2)(A)(ii) (2000).} or clear and convincing evidence that demonstrates the good faith nature of the first marriage.\footnote{8 U.S.C. § 1154(a)(2)(A)(ii) (2000).} The suggested evidence includes birth certificates of children, evidence of joint ownership of property or a joint lease for an apartment and affidavits from persons having knowledge of the nature...
of the relationship and who are willing to personally appear before immigration authorities if called. The evidence suggested to demonstrate that an abused immigrant entered into a good faith marriage is similar. Any concern with potential fraud with self-petitioning by a spouse could be dealt with by imposing a length of marriage requirement or a standard of proof requirement regarding the good faith nature of the marriage.

So, in sum, it appears that the initial legislative proposals in this area took the right approach. Even the modification to not allow self-petitioning until the marriage is three years old reflected an understanding that the underlying spousal power over immigration status had to be removed. The failure to petition for a spouse evidences an inappropriate use of legally sanctioned power, whether the failure is on purpose, out of passive aggression, negligence or mere disorganization. Allowing the spouse to take the initiative that affects her right to live and work and be with her children in this country would remove the coverture-like power and control that was initially established and continues to be sanctioned by law.

b. mail-order brides: an industry thrives on spousal control

As reported by INS, the mail-order bride business is growing rapidly. Many of the ads for these businesses promote women as compliant, subservient, and non-feminist in contrast to "liberated" American women. A number of commentators have noted the racial and gender stereotyping of the foreign women, particularly Asian women, as subservient and sexually compliant. Some have viewed the business as a form of sexual exploitation that resembles international trafficking of women, prostitution, and involuntary servitude, and the marketing of foreign women through the transformation of people into commodities. Others argue that the matchmaking aspect of the business fosters personal private choice. Whatever the view, it must be noted that these businesses operate in the context of the current spouse-based immigration laws which still allow coverture-like power and control.

The 1996 statute required a study and report that addressed the number of mail-order marriages, the extent of fraud and domestic abuse in these marriages, the utilization of suspension of deportation or self-petitioning on the basis of being abused, and the need for further regulation and education. On July 16, 1997, the INS published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register with the stated objective of

\[8 \text{C.F.R. } \S 204.2(a)(1)(i)(B) \text{ (2000).}\]
\[8 \text{C.F.R. } \S 204.2(a)(1)(iii)(B) \text{ (2000).}\]
\[8 \text{C.F.R. } \S 204.2(c)(2)(vii) \text{ (2000).}\]
\[8 \text{C.F.R. } \S 204.2(c)(2)(vii) \text{ (2000).}\]
\[8 \text{U.S.C. } \S 1375 \text{ (2000).}\]

244 The empirical basis for asserting marriage fraud does not exist, so basic self-petitioning would be most appropriate. However, the notion that marriage fraud exists has so entered our legal and popular culture that this is offered as an alternative. Requiring either a certain length of marriage or a requirement of proof of the good faith nature of the marriage would meet concerns about fraud.
245 International Matchmaking, supra note 9.
246 Lee, supra note 173, at 145-46.
248 Lee, supra note 173, at 140.
249 See Chun, supra note 247; Kate O'Rourke, To Have And To Hold: A Postmodern Feminist Response To The Mail-order Bride Industry, 30 Deny. J. Int'l L. & Pol'y 476 (2002). One reported comment was that "bride futures could be one of the commodities able to hold its value' even where gold, real property, and timber were deemed likely to fail that year." Kathryn A. Lloyd, Wives For Sale: The Modern International Mail-Order Bride Industry, 20 Nw. J. Int'l L. & Bus. 341, 343 (2000).
gathering as much information as possible from divergent sources. Some of the information gathered was included in the INS report issued in 1999. The resulting 1999 report left many issues unanswered based on the assertion that the INS did not keep statistics in a manner that could specifically address the congressional concerns. However, the INS did make some conclusions based on some gathered information, a commissioned study, and some prior studies.

The report stated that the estimated number of mail-order marriages is in the range of 4,000 to 6,000 yearly as of 1998 and that "the number of businesses engaged in some aspect of the international matchmaking industry is growing rapidly, potentially facilitated by the growth of the Internet." The report noted that there were polarized views of the marriages that resulted from use of international matchmaking organizations. One view asserts that the mail-order bride business is merely a service used by consenting adults. The other view associates the business with the trafficking of women. Overall, however, the report concludes that, unlike dating services or personal ads, the mail-order bride transaction is "one where the consumer-husband holds all the cards."

Comments received in response to the notice of rulemaking ranged from individuals reporting positive and negative personal experiences, to critiques of the industry as inherently abusive, to defenses by those involved in matchmaking organizations. One comment in defense is particularly telling about the perceived underlying social conflicts.

The overwhelming majority of the men who use such services are sincerely wanting to find a woman with old fashioned values to love and cherish . . . . The proposed regulations are obviously a ploy of the feminists to ["197]

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The Attorney General, in consultation with the Commissioner of Immigration and Naturalization and the Director of the Violence Against Women Initiative of the Department of Justice, shall conduct a study of mail-order marriages to determine, among other things-

(1) the number of such marriages;

(2) the extent of marriage fraud in such marriages, including an estimate of the extent of marriage fraud arising from the services provided by international matchmaking organizations;

(3) the extent to which mail-order spouses utilize section 1254a(a)(3) of this title (providing for suspension of deportation in certain cases involving abuse), or section 1154(a)(1)(A)(iii) of this title (providing for certain aliens who have been abused to file a classification petition on their own behalf);

(4) the extent of domestic abuse in mail-order marriages; and

(5) the need for continued or expanded regulation and education to implement the objectives of the Violence Against Women Act of 1994 and the Immigration Marriage Fraud Amendments of 1986 with respect to mail-order marriages.

Id.


253 International Matchmaking, supra note 9.

254 INS Reports to Congress on Mail-Order Brides, 76 Interpreter Releases 495 (March 29, 1999).

255 International Matchmaking, supra note 9.

256 Id. "At one end of the spectrum is the view that the mail-order bride business is an international personal ad service used by 'consenting adults and competent people.' " Id.

257 Id. "The other end of the spectrum challenges the inequities of these transactions and identifies the mail-order bride phenomenon as an international industry that often traffics women from developing countries to industrialized Western countries." Id.

258 Id.
eventually abolish such services. The feminists do not want to see men happy. The INS should not be the puppet to the feminists' strings (sic). 259

However, despite the range of comments, the report clearly found that in these relationships there was an inherent power imbalance that carried potential for abuse. 260 Further, the commissioned academic study attached as an Appendix reviewed the literature in the area and found that the previous studies concluded that, "American men seeking mail-order brides have control in mind more than a loving, enduring relationship . . . . It is apparent that power and control are critical for the men." 261

The mail-order bride business issue has not yet been resolved and needs further legislative and administrative action. Commentators have found that the choice of the specific type of action warranted is somewhat difficult in this area for several reasons. The first is a practical one. Internet based businesses can easily operate offshore and are therefore difficult to regulate. 262 The second concern is based in a respect for individual private choice, both in the context of privacy in marital relationships and in the context of respect for choice made by those who have been subordinated in neo-colonial systems. 263 The respect recognizes that some make a "choice" some others would not make. One commentator has raised the idea that within the notions of modern marriage, marriage for immigration purposes may not only be an understandable choice, but an acceptable one as well. 264 A third concern is that restrictions will be imposed that will only make the difficulties of the foreign brides more problematic. [*198]

Most commentators agree that the proposed information distribution about immigration law to the women recruits would be somewhat helpful. 265 Others believe that screening of the U.S. men for prior criminal behavior, multiple mail-order marriages, or drug or alcohol addiction should be required. 266 Other suggestions are broader, such as United States cooperation with countries like the Philippines that have attempted to regulate the industry, 267

259 International Matchmaking, supra note 9.

260 Id.

With the burgeoning number of unregulated international matchmaking organizations and clients using their services, the potential for abuse in mail-order marriages is considerable . . . . These are relationships fostered by for-profit enterprises, where the balance of power between the two individuals is skewed to empower the male client who may be seen as "purchasing" a bride and a woman who has everything to gain from entering into this arrangement and staying in it, no matter what the circumstances.

Id.

261 Id. at app. A (citing Robert J. Scholes).


263 Chon, supra note 262; see generally Kelly, supra note 262.

264 See generally Kelly, supra note 262.

265 Chun, supra note 247, at 1206; Lloyd, supra note 249, at 366; Markee, supra note 173, at 294-95; Kelly, supra note 262.

266 Chun, supra note 247; Kelly, supra note 262.

267 Chun, supra note 247. Another suggestion has been that the United States, like Australia, put a limit on the number of marriage related visas a U.S. citizen or resident may request. Another proposal would require that all those receiving fiancee visas must have a return ticket so that they can choose not to go through with a marriage and return home.
international regulatory approaches, 268 subjecting the mail-order bride industry to RICO enforcement 269 and the ultimate, finding a way to diminish the economic disparity between have and have not countries. 270

Another attempt to address the mail-order bride business is pending in Congress: the proposed International Marriage Broker Regulation Act of 2003. 271 This proposal has several provisions. It would prevent a U.S. 272 citizen or resident from filing for more than one fiancee visa in any one year time period. It requires that international marriage brokers collect information about their U.S. clients and make that information available to the prospective foreign spouses. The information includes: any arrest, charge, or conviction record for homicide, rape, assault, sexual assault, kidnap, or child abuse or neglect, any court ordered restriction on physical contact with another person, including any temporary or permanent restraining order or civil protection order; marital history, including if the person is currently married, if the person has previously been married and how many times, how previous marriages were terminated and the date of termination, and if the person has previously sponsored an alien to whom the person has been engaged or married and the ages of any and all children under the age of 18. The proposal requires that prospective foreign spouses be given information about U.S. immigration law, particularly those provisions that provide options for abused spouses. The proposal would also require that U.S. citizens or residents requesting fiancee visas undergo criminal background screening and that the information be provided to consular officials who would have the statutory obligation to reveal to the prospective foreign fiancee any conviction or civil order for a crime of violence, act of domestic violence, or child abuse or neglect of the U.S. intended spouse. 272

As valuable as some of the pending proposals may be, the congressional concerns, the resulting administrative concern, and suggestions for change miss an essential part of the issue. While the INS in its report could not ascertain either the precise degree of abuse or fraud in mail-order marriages, the power and control dynamics underlying the relationships were clear. Removing the coverture-like spousal domination and control from the spouse-based immigration system would undermine the underlying basis for the difficulties without imposing on true personal choice. Whatever the nature of relationships that individuals might choose, the immigration law should not be the enforcement mechanism for an arrangement based on submissiveness on one side and domination on the other. If all spouses could self-petition and all conditional residents could demonstrate their

268 See generally Lloyd, supra note 249; Chun, supra note 247, at 1208; O'Rourke, supra note 249.
269 Lee, supra note 173, at 140.
270 O'Rourke, supra note 249, at 497.
271 International Marriage Broker Regulation Act of 2003, H.R. 2949, 108th Cong. (2003). The findings expressed in this proposal are:

(1) There is a substantial international marriage broker business worldwide. A 1999 study by the Immigration and Naturalization Service estimated that in 1999 there were at least 200 such companies operating in the United States, and that as many as 4,000 to 6,000 persons in the United States, almost all male, find foreign spouses through for-profit international marriage brokers each year.

(2) Aliens seeking to enter the United States to marry citizens of the United States currently lack the ability to access and fully verify personal history information about their prospective American spouses.

(3) Persons applying for fiancee visas to enter the United States are required to undergo a criminal background information investigation prior to the issuance of a visa. However, no corresponding requirement exists to inform those seeking fiance(e) visas of any history of violence by the prospective United States spouse.

(4) Many individuals entering the United States on fiance(e) visas for the purpose of marrying a person in the United States are unaware of United States laws regarding domestic violence, including protections for immigrant victims of domestic violence, prohibitions on involuntary servitude, protections from automatic deportation, and the role of police and the courts in providing assistance to victims of domestic violence.

Id.
272 Id.
good faith in marriage, the legal imprimatur for domination would cease. The legacy of coverture is not only spousal domination that leads to abuse; it is the legal enforcement of the domination itself. [*200]

c. the insecure diminishing of chastisement

The focus on the abused in the context of immigration law over the last decade has resulted in substantial changes in access to legal immigration status and public assistance for the abused. The focus on the issue of domestic violence resulted in legislation that dealt with child abuse as well as spouse abuse. It has also resulted in a broadening of the concern from abuse of the spouses of citizens and legal permanent residents to abuse of spouses in derivative immigration statuses, as well as the abused who are undocumented. Further, this focus has resulted in reforms that deal with the practical realities of an abused spouse's life such as authorization to work and the need for access to programs for battered women. 273

However, there is a lingering concern about the legislative discontent between abuse and underlying coercive spouse control, whether or not it results in the extremes of physical abuse or extreme cruelty. First, there are doubts that domestic violence can be removed without removing its underlying basis of wife subordination. Chastisement is a notion developed out of coverture, the idea that the husband could enforce his control prerogatives. Legacies of chastisement can not be removed without removing the power and control legacies of coverture, whether or not they result in provable violence or cruelty. 274

Second, there are concerns that a legislative focus on abuse without addressing the underlying power and control issue allows promotion of other agendas. In the nineteenth century, campaigns against abuse of women were directed at "lower" class families (with some condescension). They reflected the objective to "domesticate" the new immigrant populations and not a concern with the subordination of wives. 275

In this century, there has been a public recognition of the problem of domestic abuse 276 and to a degree, an acceptance of legal and social responsibility for it. However, there have also been concerns about the impact of current approaches to domestic violence on minority and [*201] culturally diverse populations. 277 For example, some have expressed concerns that the criminalization of battering has promoted the increased surveillance and incarceration of men (and women) of color. 278 Further, the programs instituted and protections afforded have not

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273 See Orloff, supra note 165; Orloff & Kaguyutan, supra note 165.

274 See Elizabeth Schneider, Battered Women and Feminist Lawmaking (2000) (reaffirming the vision of violence and gender equality that originally underlay advocacy for battered women); see also Elizabeth Schneider, et. al., Battered Women & Feminist Lawmaking: Author Meets Readers, 10 J. L. & Pol'y 313 (2002).


been as accessible to women of color and women with cultural or language differences. Moreover, paradoxically, the well intentioned focus on assisting the abused has raised concerns about characterizing women as victims, thereby allowing the notion that women deserve protection only if they are victims and, moreover, what society views as good victims.

These concerns resonate in the context of abused immigrants. The law that makes violation of an order of protection or conviction of crimes related to domestic violence a basis for deportation results in threats of deportation for the victims of abuse as well as abusers, and holds potential for disparate impact in non-majoritarian communities. Further, the lack of services and shelters for women with language or culture differences particularly impacts on immigrant women. Moreover, gaining exemption to the law's mandate of control over immigration status by spouses requires a showing of victimhood. Abused immigrant spouses must meet numerous criteria. They have to prove their "worth" through substantial application processes and produce often difficult to obtain evidence about cruelty and battering. Proving the good faith nature of a marriage, even by a higher evidentiary standard would, for most, be an easier task.

Tenacious advocates concerned about domestic violence fought for changes made over the last decade. The advocates achieved great success in a politically difficult context. However, despite the effort and the substantial changes, the law is not totally free of the legacies of chastisement. At the very least, immigration amendments focused on the abused should be evaluated in the context of the expressed congressional goals in addressing domestic violence.

In the history of the Violence Against Women Act, Congress expressed goals that reflected its perception of the problem of domestic violence. Congress wanted to effectively respond to the widespread and growing national problem of domestic violence by making a clear statement that domestic abuse against women was wrong, and by eliminating those parts of the legal system that sanctioned abuse by promoting the arrest, prosecution and punishment of perpetrators of crimes in the domestic context and by providing assistance to those who were the survivors of domestic abuse. One way in which Congress sought to achieve these goals was "by permitting battered immigrant women to leave their batterers without fearing deportation."

Congress expressed the view that the country needed a "national consensus that our society will not tolerate violence against women" and the terror that it spawns. In the congressional view, "Americans needed to

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281 See infra notes 299-306.

282 Dutton, supra note 277.


284 H.R. Rep. No. 103-395, at 25 (1993); see also id. at 38 (showing that Congress was also concerned about the impact of the immigration law on child abuse. It recognized that an abuser's control of the immigration status of the parent of an abused child would inhibit the reporting of child abuse and the removal of the child from the abuser).


brand these attacks as brutal and wrong.” 287 Both the public 287 and those within the justice system needed education. 288 Congress sought to rectify a legal system that sanctioned spouse abuse. 289

Congress also had the goal of punishing violent crimes against women. 290 It wanted to offer women the support and assurance that their attackers will be prosecuted. 291 The underlying attitude that this violence is somehow less serious than other crimes had to be changed and the nation had to recognize that these crimes must be taken as seriously as any other assault. 292 In the congressional view, stopping chronic violence required taking domestic violence seriously and treating it like any other criminal assault, thereby requiring arrest and prosecution. 293

Congress further wanted to stop blaming and punishing the victims of violence and provide aid and assistance for the abused. It wanted to “concentrate on the conduct of the attacker rather than conduct of the victim” 294 and reject the archaic prejudices that blame women for the beatings they suffer. 295 Further, Congress wanted to deter violent crimes against women. 296

Does the current law related to immigrant spouses proclaim that abuse is wrong and will not be legally sanctioned? The current law contains options for those non-citizen women who are abused by citizen or resident spouses or whose children are abused by citizen or resident parents. Those abused by spouses in non-immigrant or undocumented status do not have recourse other than the limited U visa. Moreover, success for spouses of citizens or residents requires a detailed application process and the ability to prove that the legal criteria are met. 297 Most abused women need assistance, often a lawyer, to complete the application. 298

Does the law assure the prosecution of abusers and provide aid for the abused? By allowing the abused to control their immigration status, the law does remove an impediment to seeking police assistance and pursuing prosecution. However, ironically, the provision of the law making abusers deportable has been a double-edged sword for the abused. Women who have been victimized by their spouses sometimes get arrested when police decide to arrest both parties and uninformed attorneys advise the abused to accept a plea. Also, women who are

289 Id. at 36.
293 Id. at 38.
295 Id.
298 Preparing an application for an abused spouse requires legal expertise. There are several organizations that train lawyers, paralegals, and other advocates to assist abused immigrants. For example, inMotion, an organization in New York (www.inmoitiononline. org) has prepared an Immigration Self Petition Manual that it uses for training. The manual (on file with the author) consists of about 200 pages. See also Gail Pelandelton & Ann Block, Applications for Immigration Status Under the Violence Against Women Act, Immigration & Nationality Law Handbook (2001-02 ed) (explaining the application process and noting that preparing these applications requires expertise in domestic violence as well as law). The USCIS website has information in a relatively easy to use format and provides information about and copies of the applicable forms. See http://www.uscis.gov/graphics; Margulies, supra note 279.
victimized by abusive spouses and are thereby unable to protect children from abuse wind up being deportable because of convictions for child abuse or neglect. 299

State court judges in the family law area faced with immense dockets often issue restraining orders to both spouses without making a determination of which spouse was the abuser. In the mode of "you stay away from her and she will stay away from you," judges often encourage spouses to accept concurrent restraining orders. However, an abused alien spouse who does so puts herself in jeopardy of deportation. She can be found in violation of a restraining order, even if she did not initiate contact with her abuser. 300

Further, the criminal justice system also has realities and complexities that cause concern that the abused spouse will wind up being arrested and convicted within the terms of the immigration statute. Numerous states have mandatory arrest policies that require arrest if there is any evidence of an assault in a domestic violence situation. This approach, which was initially intended to force officials to take domestic violence seriously, is now controversial. 301

There has been an increase of dual arrests in many jurisdictions. Even when there are directives to arrest primary aggressors, abused women have been arrested because distinctions are not made based on abused women acting out of self-defense. This is exacerbated by mandatory prosecution [*205] policies that limit a prosecutor's discretion to drop cases. These policies put abused immigrant women in jeopardy for several reasons. First, an immigrant woman with English language difficulties and unfamiliar with U.S. systems may not be able to effectively communicate her position to police officers while her American spouse will be seen as more credible. Second, many immigrant women are members of minority communities that have difficult relationships with police officers. Third, the arrest possibilities can be used as a threat by the abuser, i.e. "if you call the police against me, they will arrest you and you will be deported." 302 The potential for arrest and conviction under immigration terms is exacerbated by the immigration definition of conviction, which can even include acceptance of participation in a diversion program. 303

Further, the possibility of deportation of an abusive spouse often inhibits an abused immigrant woman from seeking assistance. For an abused spouse, particularly an abused immigrant spouse, there are personal and cultural impediments to seeking assistance that threatens her abuser with deportation. Personal concerns include those relating to children, economic welfare, and fear for safety. Reporting an abuser and enabling his deportation means depriving the family of the spouse's economic contribution, being the source of the deportation of your children's father or antagonizing an already violence prone person to retributive behavior. 304 Further, as one commentator has pointed out, abused spouses have shared an intimate relationship with their abusers; love and emotional attachment underlie these types of relationships; the abused often don't want to harm the abuser; they just want the abuse to stop, and they harbor hope that the abuser can reform. 305 Cultural prohibitions are also complicated. An abused woman may feel responsible for her marriage, her family and her community in a way that


302 Espenoza, supra note 155, at 182-91.

303 Id. at 180-81.


makes exposing domestic violence and prompting her spouse's deportation an unthinkable disloyal and humiliating act that can subject her to being ostracized in her extended family, her neighborhood, and her community.  

Further, in the post 9/11 world, there is additional difficulty for immigrant women who are abused in the context of their relationship with law enforcement. Local law enforcement is under increasing pressure to participate in enforcing immigration laws despite local resistance. Many local law enforcement offices and some cities had policies not to inquire into the citizenship status of those who had been a crime victim or witness. States and localities supported and implemented a community policing approach that sought to gain the trust of immigrant residents and encourage them to report crimes and serve as witnesses. Post 9/11 anti-immigration rhetoric and action undermined the community policing objectives. Some localities are still attempting to walk a narrow line between complying with federal law prohibiting local restrictions on dissemination of information to


308 See City of New York v. United States, 179 F.3d 29, 37 (2d Cir. 1999) (challenging, unsuccessfully, the constitutionality of federal statutes that preempted a city executive order restricting the dissemination of information about aliens immigration status).

309 See the revised New York City policy, in relevant part, entitled New York City Mayor Blumberg's Executive Order 41, September 17, 2003, City-Wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access To City Services:

Section 2. No City officer or employee shall disclose confidential information, unless

(d) in the case of confidential information other than information relating to immigration status, such disclosure is necessary to fulfill the purpose or achieve the mission of any City agency; or

(e) in the case of information relating to immigration status, (i) the individual to whom such information pertains is suspected by such officer or employee or such officer's or employee's agency of engaging in illegal activity, other than mere status as an undocumented alien or (ii) the dissemination of such information is necessary to apprehend a person suspected of engaging in illegal activity, other than mere status as an undocumented alien or (iii) such disclosure is necessary in furtherance of an investigation of potential terrorist activity . . . .

Section 3. Information respecting aliens.

a. A City officer or employee, other than law enforcement officers, shall not inquire about a person's immigration status unless:

(1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of City services; or

(2) Such officer or employee is required by law to inquire about such person's immigration status.

Section 4. Law Enforcement Officers.

a. Law enforcement officers shall not inquire about a person's immigration status unless investigating illegal activity other than mere status as an undocumented alien.

b. Police officers and peace officers, including members of the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity.

c. It shall be the policy of the Police Department not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.


311 Id. at 373.
Proposed federal legislation, however, declares the authority of state and local law enforcement to enforce civil federal immigration laws and penalizes states and localities whose police do not enforce these laws or collect and report information about immigration violators. This proposal, HR 2671, the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act) as of this writing has 116 legislative supporters.

This proposed federal legislation illustrates the lack of congressional recognition of and commitment to addressing the crime of spouse abuse. One of the main purposes behind the Violence Against Women Acts in 1994 and 2000 was to make it possible for women and children who were victims of crimes to be able to report these crimes to law enforcement. Abusers often told their victims they would be deported and never see their children again if they reported the abuse to the police. Studies showed that the fear of deportation prevented high percentages of battered immigrants from contacting law enforcement about the abuse.

In the current climate, there is no mention in the proposed legislation or the statements in support of the proposals of the relatively recently passed provisions of Violence Against Women Act. There is not even a sense that legislators have considered the recent laws that had the purpose of promoting reporting and prosecution of crimes, and after consideration determined that these goals had to be sacrificed for other more important public objectives. The arrest and prosecution objectives in the context of spouse abuse are completely ignored.

The proposed CLEAR Act illustrates that the removal of chastisement does not have a strong legislative commitment. As one advocate has stated, "If Congress passes this law, it may as well repeal the VAWA immigration provisions (self-petitioning and VAWA cancellation) and the U and T visas." The hard fought for legislative changes that addressed spouse abuse against non-citizen women in 2000 are extremely vulnerable. This is reminiscent of the legislative activity after the Violence Against Women Act of 1994. Legislation enacted two years later in 1996 with immigration control and budgetary objectives undermined the 1994 provisions. This was despite an extensive legislative consideration over a number of years of the detriments of spouse abuse to its victims, children, law enforcement, health care and society as a whole. New legislation had to be passed in 2000 to address the problems created. Current attempts to use local law enforcement for immigration control purposes undermine the legislation that was just passed three years ago and has yet to be fully implemented. It is clear that rejecting the notions of chastisement is not firmly in the legislative consciousness. Thus, the law continues to condone violence and the underlying gender inequality.

VII. Conclusion

Despite more than a decade of legislative advocacy and action, spouse-based immigration still carries the underpinnings of coverture and chastisement. There has not been a legislative rejection of the notion of spousal


\[313\] See New York City policy supra note 309.


\[317\] Telephone interview with Sally Kinoshita, Staff Attorney, Immigrant Legal Resource Center.

control that underlies coverture. Further, rejection of the concept of chastisement is not firm; it slips in and out of the legislative consciousness and gets sacrificed to other objectives. While there have been significant legislative changes that address the plight of some battered immigrant spouses, these changes are extremely vulnerable. Succeeding legislative proposals threaten to seriously undermine the changes made. The rejection of chastisement is not a firm legislative priority and, even worse, easily disappears from the legislative agenda. This undermines the extensively stated legislative goals of recognizing that domestic violence is [*209] wrong and finally ridding the legal system of the sanctioning of spouse abuse. Legacies of coverture still remain. The law thereby continues to perpetuate women's inequality by enforcing the exercise of power control and domination by a spouse.

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