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## Battered by Law: The Political Subordination of Immigrant Women

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# Battered by Law: The Political Subordination of Immigrant Women

## **Keywords**

Identity politics; Abused wives -- Legal status, laws, etc.; United States. Violence Against Women Act of 1994; Women immigrants -- Abuse of -- United States; Subordination (Psychology); Group identity -- United States; Abused women -- Services for -- United States; Legislation drafting -- United States

## BATTERED BY LAW: THE POLITICAL SUBORDINATION OF IMMIGRANT WOMEN

MARIELA OLIVARES\*

*The Article explores the state of immigrant battered women in the United States, focusing on how their identity as a politically and culturally marginalized community impacts the measure of help that they receive. Specifically, the Article examines the 2012–2013 Violence Against Women Act (VAWA) reauthorization debate as an example of how membership in a marginalized community affects legislative successes and failures.*

*Part I briefly outlines the unique obstacles faced by the battered immigrant woman in securing help and leaving violence in the home—for example, cultural and linguistic barriers, poverty, access to justice issues, and fear of authority and of immigration repercussions. Importantly, the status of immigrant outsider in this country contributes to and exacerbates the marginalization that the battered woman already faces as a victim of domestic violence. Part II discusses the legislative successes aimed at helping the community of immigrant domestic violence victims, focusing on VAWA. Since its legislative introduction in 1994, VAWA has included provisions aimed at helping battered immigrants. Yet, the methods in which the law has provided assistance to battered immigrants has weathered varying degrees of political controversy. Part III focuses on how this controversy ultimately drives legislative advocacy, successes, and failures. This discussion elaborates on how the community of battered immigrants is affected by the current era of anti-immigrant rhetoric and immigration law and policy reform. To illustrate, this Part discusses the 2012–2013 VAWA reauthorization battle in*

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*Congress and how vehement opposition to the provisions aimed at helping immigrant women amplifies the continuing challenges that battered immigrants face. Importantly, the Article examines how the status of the immigrant outsider intended beneficiary (e.g., the immigrant victims encompassed in VAWA) affects the ways in which legislation is drafted, lobbied, and ultimately passed or rejected. Part III then ties together the immigrant outsider and battered woman identities with subordination and citizenship theories and stresses and examines how as the most vulnerable and marginalized population, battered immigrant women experience heightened and explicit subordination by the political process and, ultimately, institutionalized law and policy.*

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## INTRODUCTION

Unprecedented in the past two decades of partisan politics, legislators of both political parties are working together to fix the “broken” immigration system.<sup>1</sup> At the heart of the dispute are the parameters outlining admission and removal procedures of immigrants in the United States. From its earliest legislative iterations through the 2013 introduction of the comprehensive immigration bill,<sup>2</sup> immigration law and policy have spurred contentious debate about to whom benefits should be given. The spectrum of those potentially eligible for lawful immigration status has shifted, however, through past waves of reform—from an era of explicitly exclusionary laws based on race and national origin<sup>3</sup> to the most recent reauthorization of the Violence Against Women Act (VAWA),<sup>4</sup> which contains provisions on helping immigrant victims of domestic violence achieve lawful permanent resident (LPR) and other stable immigration statuses.<sup>5</sup> In some ways, the historical progression of immigration law provides relief to immigrants who were historically not the most revered or sought after for inclusion in our American society. Thus, through measures like VAWA, immigration law contemplates extending benefits to some of the most vulnerable of the immigrant community—battered immigrants.

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1. See, e.g., Lindsey Boerma, *Despite the Odds, Both Sides Optimistic for Immigration Reform*, CBS NEWS (July 15, 2013, 6:00 AM), <http://www.cbsnews.com/news/despite-the-odds-both-sides-optimistic-for-immigration-reform> (discussing how rising political pressures caused lawmakers from both parties to stress the importance of overhauling the immigration system); see also Graham: *Without Immigration, GOP to Fail in 2016*, ST. AUGUSTINE REC., June 17, 2013 (reporting on influential Republican Senator Lindsay Graham’s blunt observation of his party’s politically untenable stance on immigration: “We’re in a demographic death spiral as a party and the only way we can get back in good graces with the Hispanic community in my view is [to] pass comprehensive immigration reform” (internal quotation marks omitted)); Clarence Page, *Loss Spurs Republicans to Rethink Immigration Stance*, J. NEWS, Dec. 16, 2012, at A10 (noting that for the first time since the failed effort in 2007, there is a genuine immigration reform debate in the Republican Party). But see Editorial, *Savor the Bipartisan Moment*, SAN ANTONIO EXPRESS-NEWS, Apr. 22, 2013 (arguing that passage of legislation should not be assumed despite initial bipartisan efforts); Sean Sullivan, *Three Signs of Trouble for Immigration Reform in the House*, WASH. POST (June 21, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/21/three-signs-of-trouble-for-immigration-reform-in-the-house> (detailing significant obstacles to securing House Republican support for comprehensive immigration reform).

2. Border Security, Economic Opportunity and Immigration Modernization Act, S. 744, 113th Cong. (2013).

3. See *infra* Part III.A (discussing the Chinese Exclusion Act and other discriminatory immigration law measures).

4. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (to be codified in scattered sections of 42 U.S.C.).

5. See 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv) (2012) (granting immigrants who are victims of domestic violence the opportunity to petition the U.S. Attorney General for protected status); 8 C.F.R. § 204.2(c) (2014) (explaining the self-petition process).

Yet, in spite of their extreme vulnerability due to a confluence of situations and incidents largely out of their control,<sup>6</sup> immigrant victims of domestic violence remain controversial recipients of proposed governmental aid through legislative measures. The story of the battered immigrant—her and her family’s humanity, suffering, and plight—is often obscured by the vociferousness of the immigration reform political debate. As advocates and legislators on both sides of the political spectrum acknowledge the need for humanitarian immigration reform to some degree, the recent debate on VAWA reauthorization reveals just how contentious it is to provide legislatively-created benefits to immigrants, just because of the immigrant identity status.

This Article explores this intersection where immigrant identity meets political process. In particular, the Article explores the status of immigrant battered women in the United States and how their identity as a politically and culturally marginalized community impacts the measure of legislative help that they receive. To accomplish this end, the Article examines the VAWA 2013 reauthorization debate to illustrate how the status of immigrant outsider as a proposed beneficiary of legislation affects the eventual success or failure of that legislation. Part I provides a brief background on the unique obstacles battered immigrant women face in securing help and escaping violence in the home. Importantly, the status of immigrant outsider in this country contributes to and exacerbates the marginalization that the battered woman already faces as a victim of domestic violence. Part II then discusses VAWA and its history, focusing on the inclusion of the immigrant victim of domestic violence throughout the law’s life. VAWA was the first large-scale federal effort to provide assistance to domestic violence victims while incorporating immigrant victims within its purview. Part II describes the VAWA 2013 reauthorization battle and how political attempts to shut out efforts to help immigrant women illustrate the continuing challenges that battered immigrants face. Part III discusses the concept of immigrant outsider identity through the lenses of subordination and citizenship theories, stressing and examining how as a vulnerable and marginalized population, battered immigrant women experience heightened and explicit subordination by the political process and, ultimately, by institutionalized law and policy. In this discussion, critical race

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6. See *infra* Part I (describing the various barriers that isolate battered immigrants, such as manipulative abuse, poverty, language, and access to justice).

theory, gender subordination theory, and theoretical frameworks of citizenship are explored to provide a basis to analyze how the identity of battered immigrant is politically and socially marginalized. Furthermore, this Part analyzes the subordination model through the VAWA 2013 context, drawing on scholarship and history to illustrate how the status of the immigrant outsider intended beneficiary affects the ways in which legislation is drafted, lobbied, and ultimately passed or rejected. As an example of comprehensive legislation—even one aimed at the most vulnerable among us—VAWA 2013 provides a unique window into how immigrant outsider identity works against otherwise uncontroversial legislation.

#### I. REALITIES OF VULNERABILITY: THE CASE OF BATTERED IMMIGRANTS

Scholars, activists, and advocates have written and spoken about the challenges faced by victims of domestic violence.<sup>7</sup> That the problem of domestic violence is part of our popular culture<sup>8</sup> is a testament to the progress that survivors and their advocates have made to educate others about the plight of victims. Faced with physical abuse, emotional abuse, and an array of abusive tactics aimed

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7. See, e.g., Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 137–38 (2012) (discussing unforeseen consequences of new crime control strategies on domestic violence victims in poor urban neighborhoods); Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections*, VAWNET (Feb. 2002), [http://www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=384](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=384) (focusing on the challenges immigrant battered women face, such as cultural beliefs that provide rationalizations to justify domestic violence and barriers to accessing public services); Erik Stegman & Katie Wright, *Low-Income Victims of Domestic Violence Facing a Political Super Storm*, CENTER FOR AM. PROGRESS (Feb. 27, 2013), <http://www.americanprogress.org/issues/poverty/news/2013/02/27/54953/low-income-victims-of-domestic-violence-facing-a-political-super-storm> (lamenting the dual financial perils federal budget sequestration and the delayed reauthorization of the Violence Against Women Act pose to domestic violence victim support programs).

8. See, e.g., Maria Elena Fernandez, *50 Cent Tweet-Brags About His Domestic Violence and Vandalism Charges*, TODAY (July 5, 2013, 3:22 PM), <http://www.today.com/entertainment/50-cent-tweet-brags-about-his-domestic-violence-vandalism-charges-6C10551684> (reporting on charges brought against best-selling rapper Curtis James “50 Cent” Jackson III for his alleged domestic violence attack on his girlfriend); see also Leticia Miranda, *Love the Way You Lie: Pop Culture, Race and Domestic Violence*, MEDIA LITERACY PROJECT (May 20, 2011), <http://medialiteracyproject.org/blog/love-way-you-lie-pop-culture-race-and-domestic-violence> (asserting that performers Rihanna and Eminem’s glorification of domestic violence in the music video for their chart-topping single “Love the Way You Lie” “was a missed opportunity for both artists to help shift cultural norms towards healthier relationships” and “[i]nstead, [was] at minimum a shallow narration of a violent relationship and at worst a glorified story of abuse and romance”). As of December 2014, the National Domestic Violence Hotline’s Facebook page had received over forty thousand “likes.” *National Domestic Violence Hotline*, FACEBOOK, <https://www.facebook.com/NationalDomesticViolenceHotline> (last visited Dec. 19, 2014).

at maintaining power and control, victims of domestic violence are frequently isolated from larger communities of support systems.<sup>9</sup> This experience of isolation thus contributes to the difficulties victims face in leaving abusive relationships because they are unfamiliar with or unable to access help networks that could facilitate their freedom from their batterers. Moreover, women facing manipulative tactics to keep them in abusive relationships may not have the financial resources to care for themselves and their children<sup>10</sup> should they leave their abusers, further compounding the scarcity of their choices.

Battered immigrants frequently face additional layers of isolation. Poverty, inability to secure legal representation for access to courts, language barriers, and culturally derived limitations may operate as barriers to immigrants seeking to leave abusive relationships.<sup>11</sup> As has been recently and consistently documented by demographic and labor data, immigrants—particularly immigrant women—are among the poorest people in the United States.<sup>12</sup> Moreover, undocumented immigrants or those who do not have authorization to work lawfully

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9. See Mary B. Clark, *Falling Through the Cracks: The Impact of VAWA 2005's Unfinished Business on Immigrant Victims of Domestic Violence*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 37, 38–39 (2007) (explaining the compounded isolating effect that cultural dynamics have on battered immigrant women over whom common domestic violence means of power and control is also exerted); see also Betsy Abramson et al., *Isolation as a Domestic Violence Tactic in Later Life Cases: What Attorneys Need to Know*, 3 NAELA J. 47, 48–49 (2007) (discussing the use of isolation to exert power and control over domestic violence victims in their elder years).

10. See Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, 83 N.Y. ST. B.J. 40, 41 (2011) (noting although both genders suffer from domestic violence generally and economic abuse particularly, most of the victims are women).

11. See Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149, 154–56 (2011) [hereinafter Olivares, *A Final Obstacle*] (describing how legal assistance is often unattainable for battered immigrant women in divorce proceedings); Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 97 (2002) (identifying immigrant women's dual pressure to assimilate while maintaining the cultural traditions of their country of origin as one of many barriers to getting help when faced with domestic violence).

12. See MARY BAUER & MÓNICA RAMÍREZ, S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY 24 (2010), available at [http://www.splcenter.org/sites/default/files/downloads/publication/Injustice\\_on\\_Our\\_Plates.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf) (citing RANDY CAPPS ET AL., URBAN INST., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (2003), available at [http://www.urban.org/UploadedPDF/310880\\_lowwage\\_immig\\_wkfc.pdf](http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf)) (noting how because women generally earn less in jobs than their male counterparts, immigrant women who benefited from prior legalization programs experienced higher rates of increased income than men who were already paid at higher rates); ALEXANDRA CAWTHORNE, CTR. FOR AM. PROGRESS, THE STRAIGHT FACTS ON WOMEN IN POVERTY 1–2 (2008), available at <http://www.americanprogress.org/issues/women/report/2008/10/08/5103/the-straight-facts-on-women-in-poverty> (discussing the disparity in levels of poverty between women and men in the United States, with more women than men consistently being impoverished).

must work outside the legally prescribed means in order to provide for themselves and their families. These jobs typically pay less than authorized work and offer little or no job security.<sup>13</sup> And many immigrants are ineligible for public benefits and thus unable to access safety nets traditionally available to the poor.<sup>14</sup> Thus, with few financial resources and options for stable adequate employment, leaving an abuser—and his financial support—becomes even more difficult.

Further, lack of familiarity with the American legal and criminal justice systems provides challenges for immigrants who do not typically understand that legal assistance and relief is open for anyone, including those without financial resources<sup>15</sup> or those who are unable to speak English.<sup>16</sup> In many countries, access to divorce and custody of one's children is severely limited, and the law actually

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13. See BAUER & RAMÍREZ, *supra* note 12, at 21–23 (describing the extreme difficulties faced by immigrant women in the labor force, including discriminatory and exploitive labor practices, with a focus on women working in the agricultural industries); JEFFREY S. PASSEL ET AL., URBAN INST. IMMIGRATION STUDIES PROGRAM, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 2 (2004), *available at* [http://www.urban.org/UploadedPDF/1000587\\_undoc\\_immigrants\\_facts.pdf](http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf) (indicating that immigrant workers, especially undocumented immigrant workers, are paid considerably less than other workers).

14. See generally TANYA BRODER & JONATHAN BLAZER, NAT'L IMMIGRATION LAW CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 3 (2011), *available at* <http://www.nilc.org/overview-immeligfedprograms.html> (listing the public benefits most noncitizens do not qualify for, including Medicaid, Medicare, the Children's Health Insurance Program (CHIP), foster care, and Temporary Assistance for Needy Families (TANF)); see also Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 136 (2012) (stating that undocumented immigrants are not only excluded from most public benefits but that state laws restrict their access to in-state tuition, home rental, and drivers licenses).

15. See Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 65–66 (2003) [hereinafter Orloff et al., *Police Response*] (suggesting that although many immigrant women come from countries with corrupt or inept police forces, the immigrants begin to understand American legal and law enforcement systems the longer they are in the U.S.); Amy Gottlieb, *The Violence Against Women Act: Remedies for Immigrant Victims of Domestic Violence*, N.J. LAW., Apr. 2004, at 14 (noting that many immigrants bring their cultural perceptions of law enforcement and justice systems—derived from their experiences in their native countries—with them to the U.S., which may lead them to believe that American systems are equally corrupt).

16. Lack of English-language skills remains a formidable barrier for immigrant domestic violence victims seeking legal assistance. See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1031–32 (2000) (discussing the problems of poor women of color in securing domestic violence assistance, noting that “immigrant Latinas who do not speak English are seriously disadvantaged in the courts, in their encounters with police, and in the offices of social service agencies”); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991) (stating that language barriers can be an obstacle for women to access information about shelters and the safety they provide because shelters often lack language accommodations).

punishes a parent who leaves the home, even to escape abuse.<sup>17</sup> Not surprisingly, then, immigrant domestic violence victims are at a distinct disadvantage in their attempts to escape their abusers.

Additionally, an immigrant victim of domestic violence often must contend with the batterer's exploitation of her precarious immigration status. Faced with the batterer's threats to have her deported and/or to take her children away from her, a battered immigrant may very rationally believe that the reasonable course of action is to succumb to continued abuse.<sup>18</sup> Finally, cultural constraints and dictates, which teach obedience to one's husband and against leaving a marriage under any circumstance, may operate against a battered immigrant's attempts to escape abusive relationships.<sup>19</sup>

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17. See, e.g., Aili Mari Tripp & Ladan Affi, *Domestic Violence in a Cultural Context*, FAM. ADVOC., Fall 2004, at 34 (noting that immigrant women often fear losing their children due to threats from their husbands); UAE: *Spousal Abuse Never a 'Right'*, HUM. RTS. WATCH (Oct. 19, 2010), <http://www.hrw.org/news/2010/10/19/uae-spousal-abuse-never-right> (decrying a decision by the United Arab Emirates Federal Supreme Court "upholding a husband's right to 'chastise' his wife and children with physical abuse"). Less egregious yet still troubling examples abound in the United States. See, e.g., Sandra Park, *Shut Up or Get Out: PA City Punishes Domestic Violence Victims Who Call the Police*, ACLU (Apr. 24, 2013, 3:24 PM), <https://www.aclu.org/print/blog/womens-rights-lgbt-rights-racial-justice-criminal-law-reform/shut-or-get-out-pa-city-punishes> (reporting on a Norristown, Pennsylvania ordinance that punished victims of domestic violence for their repeated "disorderly behavior" of calling law enforcement after being victimized).

18. See Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 293 (2000) (noting that the fear of being referred to immigration authorities and the fear of deportation are the primary reasons battered immigrant women report for not leaving an abusive relationship); Orloff et al., *Police Response*, *supra* note 15, at 64–70 (reporting factors that increase the likelihood of battered immigrant women accessing police assistance, such as permanent immigration status, children witnessing the abuse, and acculturation); Michelle DeCasas, Comment, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56, 70–73 (2003) (describing how strong family values, distrust of the police, immigrant status, and cultural acceptance of domestic violence against women often hinders Latinas from seeking police assistance); see also Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 38 (2009) ("Immigrant women, particularly those who are undocumented or whose partners are undocumented, may fear that involvement in the criminal system will lead to deportation, depriving them of economic, emotional, extended family, or parenting support.").

19. See, e.g., Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99, 125 (1996) (commenting on the cultural practices that instruct women to remain with their husbands, even in the face of domestic abuse, so as to maintain the family structure and reputation); Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J.L. GENDER & SOC'Y 185, 191 (2010) ("[U]nlike U.S.-born women, many women who grew up in a foreign country and come to the United States as adults often struggle with unique cultural, language, economic, and informational challenges, which can restrict their ability to recognize and terminate abusive relationships.").

Thus, the complexities that an immigrant domestic violence victim may face make her choice whether to stay with or leave her abuser even more difficult. As a literal noncitizen of the country, the immigrant must contend with the immigration law and policy regimes in addition to the myriad other hurdles she faces when contemplating leaving. Thus, in each of these marginalized statuses, she is presented with obstacles. With an identity that encompasses an array of these intersecting subordinated characteristics,<sup>20</sup> her struggle to achieve freedom from abuse is heightened.

## II. THE VIOLENCE AGAINST WOMEN ACT: A HISTORY OF FEDERAL ACTION AGAINST DOMESTIC VIOLENCE

Recognizing the particular vulnerabilities of the immigrant domestic violence victim in the United States, the first comprehensive federal effort to help victims of violence included provisions especially for immigrants.<sup>21</sup> Indeed, since the inception of VAWA in 1994, immigrant victims of domestic violence have been part of the purview of the Act. This Part discusses the legislative successes aimed at helping the community of immigrant domestic violence victims, focusing on VAWA and its history. The focus of this exploration is on how these remedies have been successful or have fallen short of their promises to battered immigrants. This discussion will be explored more in Part III through the lens of subordination theory and will comment on the VAWA 2013 reauthorization process.

### A. *The Immigration Law Focus on Marriage Influenced the History of VAWA*

VAWA's provisions aimed at helping immigrant domestic violence victims derive from a long history of the interconnection between immigration law, family law, and, specifically, the governmental responses to domestic violence. This connection is perhaps most prevalent in considering the immigration law preference for family unity through marriage.<sup>22</sup> Beginning with the 1945 War Brides Act,<sup>23</sup>

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20. See generally Crenshaw, *supra* note 16 (discussing the intersection of race and gender identity in the context of complex and often competing structural, political and representational interests that compound a woman of color's marginalization).

21. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40,701–40,703, 108 Stat. 1796, 1953–55 (codified as amended in scattered sections of 8 U.S.C.) (providing for petitioning rights and suspension of deportation in certain cases for battered immigrants).

22. See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007) (explaining that Congress uses immigration law as a means of shaping and regulating marriage). The author has also written on this particular subject. See Olivares, *A Final Obstacle*, *supra* note 11, at 167 (listing and

which allowed members of the armed forces serving abroad to marry foreign citizens and sponsor their spouses' immigration to the U.S., U.S. immigration policy has supported quick and relatively easy access to visas for the spouses of U.S. citizens<sup>24</sup> and lawful permanent residents.<sup>25</sup> This relatively liberal immigration policy tapered off with the passage of the Immigration Marriage Fraud Amendments of 1986 (IMFA),<sup>26</sup> which corresponded to the passage of the equally-restrictive comprehensive Immigration Reform and Control Act (IRCA) of 1986.<sup>27</sup> Operating on what was later deemed to be flawed data purporting to detail a high number of marriage-based visas procured through assertions of fraudulent marriages,<sup>28</sup> Congress passed the IMFA to make it more difficult for spouses to immigrate on the basis of their marriage to a U.S. citizen or LPR. For example, a hallmark provision of the IMFA required that foreign spouses sponsored for a family-based visa by their U.S. citizen or LPR spouse—deemed a joint petition—would depend on their petitioning spouse during a two-year conditional period after the initial visa approval<sup>29</sup> rather than procure immediate LPR status, as was the

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providing an overview of U.S. immigration legislation that encourages U.S. citizens to marry noncitizens).

23. Act of Dec. 28, 1945, Pub. L. No. 79-271, 59 Stat. 659 (codified as amended in scattered sections of 8 U.S.C.).

24. See Mary L. Sfasciotti & Luanne Bethke Redmond, *Marriage, Divorce, and the Immigration Laws*, 81 ILL. B.J. 644, 644 (1993) (indicating that the War Brides Act helped increase the speed with which noncitizens who married U.S. citizens were able to immigrate to the U.S.); see also Abrams, *supra* note 22, at 1637 (suggesting that Congress has valued “family unification or family reunification” in subsequent immigration legislation as evidenced by its creation of familial entry categories (internal quotation marks omitted)).

25. See Sfasciotti & Redmond, *supra* note 24, at 644 & n.2 (noting that twenty-six percent of the annual immigration quota was allocated to spouses of LPRs).

26. Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.).

27. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 and 42 U.S.C.).

28. See Sfasciotti & Redmond, *supra* note 24, at 645 (indicating that even though credible statistics were not kept or available at the time, a 1983–1984 study suggested that approximately thirty percent of marriage-based visa petitions were based on fraudulent marriages and that this information fueled congressional action to stop visa fraud, resulting in the IMFA, but noting also that the data was later found to be inaccurate); *INS Admits Fraud Survey Not Valid*, 66 INTERPRETER RELEASES 1011, 1011–12 (1989) (explaining that the INS cited to the 1984 survey when addressing Congress in 1985 even though INS officials knew the survey was flawed); see also WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 7 & n.37 (2012) [hereinafter KANDEL CRS 2012] (citing *Manwani v. INS*, 736 F. Supp. 1367 (W.D.N.C. 1990)) (noting that the percentage of fraudulent marriage applications was estimated at no more than one to two percent, which was also reported in a federal court decision); Charles Gordon, *The Marriage Fraud Act of 1986*, 4 GEO. IMMIGR. L.J. 183, 184 (1990) (citing INS admissions that marriage fraud estimates had no statistical foundation).

29. Immigration Marriage Fraud Amendments § 2(a).

previous policy. This tightening of the marriage-based sponsored visa program created a ripple effect in how immigration law and implementing policy hindered domestic violence victims from obtaining immigration relief independently from their abusive spouses, thus keeping them in abusive marriages.<sup>30</sup>

In an attempt to remedy some of these problems for immigrant domestic violence victims created by the IMFA regulations, in the Immigration Act of 1990 (the 1990 Act)<sup>31</sup> and later through VAWA, Congress amended key provisions of immigration law and policy to allow for certain types of relief, including waivers from the joint spousal petition requirement and, in VAWA 1994, a self-petitioning option to legalize immigration status.<sup>32</sup> Recognizing the difficulties, for example, placed on battered immigrant spouses with the two-year Conditional Lawful Permanent Residence petitioning process, the 1990 Act provided for a new battered spouse waiver of the joint petition requirements<sup>33</sup> so that battered immigrants did not have to depend on their abusive spouses for their lawful immigration status.<sup>34</sup> Although the implementation of the waiver requirements did not

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30. See Orloff & Kaguyutan, *supra* note 11, at 102 (asserting that the IMFA provisions were harmful against battered immigrants in reiterating the manipulative power that U.S. citizen spouses had over the victims' immigration status). The IMFA contained a waiver provision for battered immigrants. The joint LPR petition requirement could be waived under IMFA if the noncitizen spouse proved that (1) extreme hardship would result if the noncitizen were removed or (2) the noncitizen had entered into the marriage in good faith but had terminated it for good cause and was not at fault for failing to meet the joint petition requirement. Immigration Marriage Fraud Amendments § 2(a); see also KANDEL CRS 2012, *supra* note 28, at 24 (indicating that many noncitizens were unable to obtain relief under the joint petition because their abusers were unlikely to petition for them). Evidence in support of the 1990 Act provisions amending IMFA note that these waivers were difficult to obtain. KANDEL CRS 2012, *supra* note 28, at 24 (citing H.R. REP. NO. 101-723, pt. 1, at 51 (1990)).

31. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

32. See 8 U.S.C. § 1154(a)(1)(A)(iv)–(vi) (2012) (authorizing a process for alien spouses and alien children of U.S. citizens to self-petition for lawful status); 8 C.F.R. § 204.2(c) (2014) (detailing the eligibility requirements and procedures for abused spouses to petition independently for lawful status).

33. Immigration Act of 1990 § 701(a) (codified as amended at 8 U.S.C. § 1186a(c)(4)(C)). Under the waiver provisions, the immigrant spouse had to prove that s/he entered the marriage in good faith, that s/he was not at fault for not meeting the joint petition requirement, and that during the marriage, s/he was battered by or was the subject of extreme cruelty perpetuated by the U.S. citizen or LPR spouse. *Id.*

34. See H.R. REP. NO. 101-723, pt. 1, at 78 (1990) (“The purpose of this provision is to ensure that when the U.S. citizen or permanent resident spouse or parent engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status.”).

happen smoothly,<sup>35</sup> this early intervention by Congress provided that INS adjudicators should err on the side of granting battered spouse waivers and that such waivers should only be denied in “rare and exceptional circumstances such as when the foreign national poses a clear and significant detriment to the national interest.”<sup>36</sup>

*B. The History of VAWA’s Promises to Domestic Violence Victims, Including Battered Immigrants*

*1. VAWA 1994*

While reform for battered immigrants was taking place through the implementation of the 1990 Act’s provisions, Congress was crafting its most comprehensive federal legislation aimed at eradicating domestic violence. The present-day VAWA was born in the 101st Congress in the summer of 1990.<sup>37</sup> In the hearings that summer, victims of domestic violence testified on the tragic personal costs that violence and sexual assault had taken in their lives, while advocates and experts who worked with victims of violence discussed the obstacles that victims faced in leaving relationships and achieving freedom from their abusive partners.<sup>38</sup> On January 21, 1993, Senator

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35. See KANDEL CRS 2012, *supra* note 28, at 22–23 (citing Martha F. Davis & Janet M. Calvo, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES 665, 668 (1991)) (detailing the controversies surrounding the evidentiary restrictions on proving the battered spouse waiver cases, including the concerns by domestic violence advocates that the requirements to have mental health evaluations to prove “extreme cruelty” were overly burdensome for poor immigrant women). Interestingly, many of these same types of onerous requirements were proposed in VAWA 2013. Compare *id.* at 21–22 (explaining that under the Immigration Act of 1990, the foreign national spouse had to provide reports and affidavits from police, medical professionals, and other officials to demonstrate support for a waiver), with *infra* Part II.B.5 (discussing the legislative history and proposed provisions of VAWA 2013).

36. KANDEL CRS 2012, *supra* note 28, at 22 (quoting H.R. REP. NO. 101-723, pt. 1, at 78–79). The 1990 Act provided other mechanisms to protect battered immigrant spouses, including confidentiality provisions and clarifications on what constitutes “good cause” for terminating the marriage requirements. See *id.*

37. See generally *Women and Violence: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. (1990).

38. See *id.* In the 102nd Congress, then-Senator Joseph Biden introduced VAWA as S. 15 and then-Representative Barbara Boxer introduced VAWA as H.R. 1502. Violence Against Women Act of 1991, H.R. 1502, 102d Cong. (1991); Violence Against Women Act of 1991, S. 15, 102d Cong. (1991). The Senate Committee on the Judiciary held hearings on the bill on April 9, 1991 and examined the bill’s civil rights remedy for gender-motivated crimes. *Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. 1–2 (1991) (statement of Joseph R. Biden, Chairman, Comm. on the Judiciary) (explaining that the bill was designed to “comprehensively address violent crimes against women”). The Senate Judiciary Committee reported S. 15 favorably on October 29, 1991. S. REP. NO. 102-197, pt. II.A., at 35 (1991). In the House, the Subcommittee on Crime and Criminal Justice held a hearing on H.R. 1502 on February 6, 1992 and reported it

Joseph Biden (D-Delaware) introduced VAWA in the Senate with sixty-four bipartisan co-sponsors.<sup>39</sup> A House version of VAWA was introduced on February 24, 1993,<sup>40</sup> and the proposed bills were debated over the next year.<sup>41</sup>

In efforts to continue the work of the 1990 Act to remedy the immigration law difficulties faced by battered immigrants, early versions of the proposed VAWA 1994 legislation expanded on the provisions aimed at helping immigrant domestic violence victims. In one Congressional debate, for example, Representative Louise Slaughter (D-New York) voiced her approval for the “Safe Homes for Immigrant Women” provisions because, she noted, “For too long, immigrant women have been forced to remain in destructive marriages with husbands who beat and abuse them—because they are entirely dependent on that abusive spouse for their legal status. This legislation will give abused immigrant wives the right to self-petition for legal status.”<sup>42</sup>

On November 16, 1993, the House Subcommittee on Crime and Criminal Justice considered H.R. 1133, focusing on provisions regarding the treatment of battered women.<sup>43</sup> As one example, the

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favorably to the House Committee on the Judiciary. *Violence Against Women: Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 102d Cong. (1992).

39. Violence Against Women Act of 1993, S. 11, 103d Cong. (1993).

40. 139 CONG. REC. 3641 (1993) (statement of Rep. Patricia Schroeder) (introducing H.R. 1133).

41. From this earliest introduction of VAWA 1994, politicians from both the Republican and Democratic parties supported the legislation. *See, e.g.*, 140 CONG. REC. 23,635 (1994) (statement of Sen. Diane Feinstein) (“What I saw and heard, Mr. President, was a new kind of bipartisanship.”). Legislators expressed concern and commitment to finally working to eradicate the scourge of domestic violence, agreeing with the bill’s author, Senator Biden, who, when he introduced the bill in the Senate, stated, “We have waited in my view too long, already, to recognize the horror and the sweep of this violence. . . . We now face a problem that has become doubly dangerous, as invisible to policymakers as it is terrifying to its victims. Our blindness costs us dearly.” 139 CONG. REC. 739 (1993) (statement of Sen. Joseph Biden).

42. 139 CONG. REC. 31,301 (1993) (statement of Rep. Louise Slaughter). The House Committee on the Judiciary demonstrated an appreciation of the hurdles battered immigrants face in a report on the Violence Against Women Act of 1993 wherein the Committee acknowledged that then-current law “foster[ed] domestic violence” by giving the abusive citizen or resident spouse total control of the immigrant spouse’s ability to gain legal status. H.R. REP. NO. 103-395, at 26 (1993). “By including VAWA within this larger crime package, Senator Biden hoped to facilitate funding for the bill and to avoid separate debates on some of the controversial provisions of the legislation.” MARY HAWKESWORTH ET AL., CTR. FOR AM. WOMEN & POLITICS, LEGISLATING BY AND FOR WOMEN: A COMPARISON OF THE 103RD AND 104TH CONGRESSES 18 (2011), *available at* <http://www.cawp.rutgers.edu/research/topics/documents/CongReport103-104.pdf>.

43. *Crimes of Violence Motivated by Gender: Hearing Before the S. Comm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 1 (1993) (statement of Don Edwards, Chairman, H. Comm. on the Judiciary).

1993 legislation targeted the provision in the 1990 Act that required battered immigrants who filed a battered spouse waiver of the joint petitioning requirements on the basis of extreme cruelty to have a mental health evaluation from a licensed mental health professional as too onerous of a requirement.<sup>44</sup>

Congress eventually passed VAWA as part of the Violent Crime Control and Law Enforcement Act of 1994,<sup>45</sup> and President Bill Clinton signed the VAWA into law on September 13, 1994.<sup>46</sup> VAWA represented the first major comprehensive federal action aimed at eradicating domestic violence in a multi-tiered approach, providing billions of dollars of government aid while creating agencies and provisions to help victims and families.<sup>47</sup>

VAWA 1994 provided much needed remedies for battered immigrants seeking to regularize their immigration status without the assistance of their U.S. citizen or LPR batterer spouse. First, VAWA 1994 allowed battered immigrants to self-petition for LPR status or to waive the joint petition requirement<sup>48</sup> if the immigrant victim was the initial beneficiary of a family-based immigration petition.<sup>49</sup> Second, the 1994 Act lowered the evidentiary standard needed from the requirement that the petition have an evaluation from a licensed mental health professional to “any credible evidence” to demonstrate that the petitioning battered immigrant suffered extreme cruelty.<sup>50</sup>

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44. See 8 C.F.R. § 216.5(e)(3)(iv) (2014) (interpreting section 216.5 of the Immigration and Nationality Act and stating that all cases of waiver due to extreme cruelty must be supported by a professional evaluation because “[t]he Service is not in a position to evaluate testimony regarding a claim of extreme mental cruelty provided by unlicensed or untrained individuals . . . all waiver applications based upon claims of extreme mental cruelty must be supported by the evaluation of a professional recognized by the Service as an expert in the field”). The recognized professional expert fields are “[l]icensed clinical social workers, psychologists, and psychiatrists.” *Id.* § 216.5(e)(3)(vii).

45. Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902 (codified as amended in scattered sections of 28 and 42 U.S.C.).

46. Lynn Rosenthal, *18th Anniversary of the Violence Against Women Act*, WHITE HOUSE (Sept. 17, 2012, 2:18 PM), <http://www.whitehouse.gov/blog/2012/09/17/18th-anniversary-violence-against-women-act>.

47. VAWA did not, however, represent the first measure of governmental assistance for victims of domestic violence. The 1984 Family Violence Prevention and Services Act, passed as part of the Child Abuse Prevention and Treatment Act, is the precursor to the 1994 VAWA. See Pub. L. No. 98-457, tit. III, 98 Stat. 1749, 1757 (1984) (codified in scattered sections of 42 U.S.C.).

48. Violent Crime Control and Law Enforcement Act of 1994 § 40,701.

49. See 8 U.S.C. § 1154(a)(1)(A)(i) (2012) (providing that any citizen with a qualified relationship to an immigrant may petition for status).

50. Violent Crime Control and Law Enforcement Act of 1994 § 40,702(a) (internal quotation marks omitted). The lowering of the evidentiary burden was in response to the difficulties that victims had in securing the mental health evaluation from a licensed professional. See, e.g., James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 689–90

Lastly, VAWA 1994 provided that certain battered immigrants would qualify for suspension of deportation relief.<sup>51</sup>

The self-petition program provided enormous benefits to immigrant domestic violence victims. Prior to the self-petition program, a foreign spouse who could not satisfy the requirements of the 1990 Act battered spouse waiver provision was dependent on her LPR or U.S. citizen spouse to sponsor her immigration petition. VAWA finally provided a mechanism to escape that dependency and, essentially, to escape the abusive relationship.<sup>52</sup>

Moreover, the provisions relaxing the evidentiary standard ensured that VAWA self-petitioners could satisfy the application's proof requirements<sup>53</sup> by providing credible evidence of the battery or extreme mental cruelty, rather than the more onerous standards present in the 1990 Act provisions.<sup>54</sup> Such evidence may include police reports, reports to other service providers, medical records, and the petitioner's own affidavit.<sup>55</sup>

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(1997) (alleging that the former evidentiary requirements barred many battered immigrant women from accessing the waiver); *see also* KANDEL CRS 2012, *supra* note 28, at 25 (noting that while some read this language as a repudiation of INS's licensed professional requirement, the statute also granted the Attorney General sole discretion to determine credibility).

51. Violent Crime Control and Law Enforcement Act of 1994 § 40,703. Suspension of deportation relief allowed the victim to assert certain exigent circumstances in support of a petition for agency discretion to allow her not to be deported, even though she was technically deportable. 8 U.S.C. § 1254(a); *see also* KANDEL CRS 2012, *supra* note 28, at 25 (explaining that VAWA only required applicants for suspension of deportation to live in the United States for three years whereas seven years had previously been required).

52. *See supra* text accompanying note 29 (describing IMFA's effect of creating the Conditional Lawful Permanent Residence status for immigrant spouses who had been married for less than two years to their U.S. citizen or LPR petitioning spouses). With the new VAWA self-petition process, the foreign spouse no longer had to rely on the petitioning spouse for the successful completion of her immigration petition. Instead, the immigrant victim of domestic violence can apply independently of her spouse.

53. In a successful application, the self-petitioner must prove that s/he (1) entered into the marriage in good faith, (2) suffered battery or extreme cruelty at the hands of his/her spouse, (3) is a person of good moral character, and (4) lived with her abuser spouse. *See* 8 U.S.C. § 1154(a)(1)(A).

54. *See supra* note 33 (discussing the 1990 Act battered spouse waiver).

55. *See* Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and its "Any Credible Evidence" Rules—A Call for Consistency*, 11 GEO. J. GENDER & LAW 619, 630–31 (2010) (noting the types of evidence that victims must include in their petitions as evidence of each requirement and suggesting that requiring some of this evidence may force a victim to return to the location where her abuser works or lives). As advocates for domestic violence victims have countered, however, such pieces of evidence can be difficult to compile because victims may be fearful to go to the police or doctors due to various factors, including a deep lack of trust in law enforcement. *See id.* at 630; *see also* Coker, *supra* note 16, at 1031 (discussing how political repression in their home countries leads some immigrant Latina women in the United States to distrust government and law enforcement authorities);

To be sure, VAWA did not represent a solution for all battered immigrants as it is limited to those otherwise eligible immigrants who are or were married to their abusers and whose abusers are U.S. citizens or LPRs,<sup>56</sup> thereby excluding unmarried victims and those married to abusers who hold other types of immigration status. Yet despite any shortcomings, the bipartisan political commitment in VAWA 1994 was a watershed moment in the domestic violence advocacy movement generally and specifically helped to highlight the plight of immigrant domestic violence victims.

## 2. *Anti-immigrant legislation in 1996*

Soon after VAWA's successes and as the range of relief expanded for immigrant domestic violence victims, changes to the INA through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>57</sup> brought new challenges to immigrant communities.

IIRIRA came at a time of heightened anxiety and suspicion of immigrants and other marginalized communities, including the poor. IIRIRA was one of various new federal efforts aimed at decreasing undocumented immigrants' access to public benefits, which, in turn, sought to decrease the number of undocumented immigrants in the United States while also clearing the path to deporting other immigrants already in the country.<sup>58</sup> As one example

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Crenshaw, *supra* note 16, at 1257 (asserting that people of color, generally, and women of color, specifically, are hesitant to invite police intervention into their lives and thereby infrequently call police when they are subjected to domestic violence). Similarly, there is a critical scarcity of low-cost, culturally competent legal service and social service providers available to help immigrant victims of domestic violence. See Olivares, *A Final Obstacle*, *supra* note 11, at 183 (commenting on how the shortage of legal service providers is just one of the many problems confronting battered immigrants); see also Coker, *supra* note 16, at 1018 (suggesting that immigrant victims of domestic violence may not see the legal system as the most effective way to secure the help that they need).

56. See 8 U.S.C. § 1154(a)(1) (providing a detailed outline of eligibility requirements needed to receive VAWA benefits); see also KANDEL CRS 2012, *supra* note 28, at 24 (noting that the VAWA required the self-petitioner to be married to the abuser and could not have been divorced); Olivares, *A Final Obstacle*, *supra* note 11, at 174 (describing factual circumstances that could place a noncitizen's eligibility in jeopardy, such as divorce during the conditional period). The eligibility requirements were changed such that a petitioner can now be divorced from the abuser, but the divorce must have occurred within two years of the application and must have been related to the abuse. See 146 CONG. REC. 22,074 (Oct. 11, 2000) (summarizing the 2000 amendments to VAWA's eligibility requirements). VAWA relief is also now available to the parent or child of an abusive U.S. citizen or an LPR. See *id.*; 8 C.F.R. § 204.2(f) (2014) (outlining the procedural requirements for a petition for a parent).

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

58. See, e.g., H.R. REP. NO. 104-725, at 163 (1996) (Conf. Rep.) (limiting federal public benefits available to noncitizens except in certain circumstances); H.R. REP.

relevant to the battered immigrant community, IIRIRA replaced the suspension of deportation process with “[c]ancellation of removal,”<sup>59</sup> including for battered immigrants seeking this relief under VAWA. Pursuant to a new cap on the number of people eligible for cancellation of removal relief, not all VAWA petitioners would qualify for relief<sup>60</sup> though there were some exceptions to the cap for certain VAWA self-petitioners.<sup>61</sup>

That same year, Congress also passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”),<sup>62</sup> which prohibited most immigrants from receiving most types of federally funded public aid benefits.<sup>63</sup> Although PRWORA contained the Family Violence Option (“FVO”), a provision to accommodate the particular needs of victims of domestic violence,<sup>64</sup> the FVO did not solve the issues concerning the tight restrictions against the provision of federal aid to most immigrant victims of domestic violence.<sup>65</sup>

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No. 104-651, at 6 (1996) (referring to welfare as an “immigration magnet” during a report on welfare and Medicaid reform); *see also* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33809, NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW AND TRENDS 2 (2012) (noting the negative impact of the 1996 welfare reform law, known as the Personal Responsibility and Work Opportunity Reconciliation Act, on noncitizens’ eligibility for public assistance). *See generally* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1512–18 (1995) [hereinafter Johnson, *Public Benefits and Immigration*] (highlighting the tense immigration politics in the 1990s that blamed undocumented immigrants for “sapping public benefits and bankrupting state and local governments”).

59. 8 U.S.C. § 1229b(b)(1); *see* KANDEL CRS 2012, *supra* note 28, at 26 (distinguishing between the self-petitioning and cancellation of removal procedures by noting that cancellation of removal applications are allowed only during removal proceedings before an immigration judge and that children cannot be included in a battered parent’s petition for cancellation of removal).

60. Under the pre-IIRIRA suspension section, the Attorney General was limited to cancelling the removal and adjusting the status or suspending deportation and adjusting the status of no more than 4,000 noncitizens each fiscal year. 8 U.S.C. 1229b(e)(1).

61. *See* KANDEL CRS 2012, *supra* note 28, at 26 n.142 (clarifying that the cap of 4,000 noncitizens did not apply to certain noncitizens, such as petitioners for suspension of deportation under VAWA).

62. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 26 and 42 U.S.C.).

63. *Id.* § 401. *See generally* BRODER & BLAZER, *supra* note 14 (providing an overview of the impact of 1996 welfare laws, which barred even LPRs from receiving assistance under major federal benefits programs).

64. Personal Responsibility and Work Opportunity Reconciliation Act § 103(a) (codified at 42 U.S.C. § 602(a)(7)); *see also* Orloff & Kaguyutan, *supra* note 11, at 125 (explaining that the FVO “encourage[s] states to screen Temporary Assistance to Needy Families (“TANF”) applicants for domestic abuse” to determine if the applicants qualify for benefits).

65. *See* Orloff & Kaguyutan, *supra* note 11, at 125–26 (noting that, although IIRIRA somewhat expanded the eligibility for federally-funded public benefits by including certain abused undocumented immigrant women and children who could

These new laws, along with other challenges to immigrants in an anti-immigrant political and social environment,<sup>66</sup> made securing immigration relief more difficult for battered immigrants. Such efforts eroded the gains VAWA 1994 made for the community of battered immigrants and jeopardized the safety of their families.

### 3. VAWA 2000

In response to advocacy surrounding the immigration problems of the 1996 legislation,<sup>67</sup> Congress reauthorized a revamped VAWA in 2000 (“VAWA 2000”)<sup>68</sup> as part of the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”).<sup>69</sup> VAWA 2000 contained an important, groundbreaking piece of federal legislation aimed at helping battered immigrants: the Battered Immigrant Women Protection Act of 2000 (“BIWPA”).<sup>70</sup> The BIWPA provided critical immigration law provisions intending to assist immigrant victims of domestic violence,<sup>71</sup> including the establishment of the U visa for immigrant victims of crimes.<sup>72</sup>

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now acquire benefits on their own behalf, other limitations in the public benefits guidelines for certain immigrants continued to limit the usefulness of government aid for these victims).

66. See, e.g., Johnson, *Public Benefits and Immigration*, *supra* note 58, at 1562 (detailing the requirements of a State of California ballot proposition requiring social service agencies that provide counseling to battered women to report any suspected unlawful immigration status to the INS, the State Director of Social Services, and the California Attorney General).

67. See Orloff & Kaguyutan, *supra* note 11, at 143–44 (acknowledging that laws passed after VAWA 1994 “effectively barred access to VAWA protection for many immigrants”); see also KANDEL CRS 2012, *supra* note 28, at 26 (stating that 1996 IIRIRA imposed barriers for battered spouses seeking to remain in the U.S.).

68. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (codified as amended in scattered sections of 18 and 42 U.S.C.).

69. Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 42 U.S.C.).

70. Pub. L. No. 106-386, tit. V, 114 Stat. 1518 (codified as amended in scattered sections of 8 U.S.C.).

71. See, e.g., 8 U.S.C. § 1154(a)(1)(B)(v)(II) (2012) (adjustment of status); *id.* § 1227(a)(7)(A) (waivers for cancellation of removal and suspension of deportation); *id.* § 1229a(c)(7)(C)(iv) (motions to reopen removal proceedings); see also KANDEL CRS 2012, *supra* note 28, at 26 (stating that the BIWPA created exceptions to the rules related to cancellation of removal, suspension of deportation, time limitations on the motions to reopen removal proceedings, and adjustment of status); Orloff & Kaguyutan, *supra* note 11, at 145 (noting that the VAWA 2000 amendments removed barriers for abused noncitizens to access VAWA protection).

72. Battered Immigrant Women Protection Act § 1513 (establishing the purposes and requirements of the then-new U visa). Congress created the U visa in 2000 with the passage of the Victims of Trafficking and Violence Prevention Act. The interim rule establishing the new visa finally became effective on October 17, 2007. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299). The U visa protects noncitizen victims who report crimes to law enforcement, including domestic violence and sexual assault, and assists in ensuing investigations and prosecutions. 8 U.S.C. § 1101(a)(15)(U). U.S. Citizenship and

Representative Janice D. Schakowsky (D-Illinois) introduced the BIWPA of 1999 as H.R. 3083.<sup>73</sup> The bill had 112 co-sponsors.<sup>74</sup> In introducing the bill, Representative Schakowsky pushed for quick movement on the legislation, highlighting the importance of increased protections for battered immigrant women in light of the detrimental effects of IIRIRA:

For immigrant women, who often have no family support and whose immigration status is tied to the abusers, it is even more difficult. In more ways than one, they are held hostage by their abusers. . . . We must act now . . . . [I]t is wrong to stand idly by as battered women and their children are forced to choose between a black eye and broken arm or a one-way ticket out of the country.<sup>75</sup>

VAWA 2000 passed with broad bipartisan support and with apparently little controversy over the provisions aimed at immigrant communities. The House passed the legislation with a 371-1 vote, and the Act received a unanimous positive vote in the Senate.<sup>76</sup>

Perhaps most importantly for immigrant victims of domestic violence, the U visa is for victims of crime who cooperate with law enforcement in the investigation of the crime and the prosecution of the perpetrator.<sup>77</sup> An eligible immigrant with any type of immigration

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Immigration Services (USCIS) may issue no more 10,000 U-1 visas per year. 8 C.F.R. § 214.14(d)(1) (2014). Once the 10,000 cap is met, USCIS places applicants on a waitlist and issues them a “deferred action,” a form of interim relief that allows employment authorization and deferred action status to their eligible derivative family members. *Id.* § 214.14(d)(2).

73. Battered Immigrant Women Protection Act of 1999, H.R. 3083, 106th Cong. (1999); see 145 CONG. REC. 26,577 (1999) (statement of Rep. Janice D. Schakowsky) (justifying the need for the BIWPA based on the unique dangers that battered immigrant women face, such as the threat of deportation).

74. H.R. 3083.

75. 145 CONG. REC. 26,577 (1999) (statement of Rep. Janice D. Schakowsky); see also 146 CONG. REC. 22,070 (2000) (statement of Sen. Orrin Hatch) (stating that BIWPA effectively removed any immigration barriers for abused noncitizens when seeking to flee an abusive citizen or LPR).

76. LISA A. SEGHELLI & JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 9 n.48 (2012); see also H.R. 3244 (106th): *Victims of Trafficking and Violence Protection Act of 2000*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/106-2000/h518> (last visited Dec. 19, 2014) (listing Representative Mark Sanford of South Carolina as the only member of Congress to vote against VAWA 2000).

77. Memorandum from William R. Yates, Assoc. Dir. of Operations, Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec., to Dir., Vt. Serv. Ctr. (Oct. 8, 2003). Qualifying crimes for a U visa include abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, genital mutilation, felonious assault, being held hostage, prostitution, rape, sexual assault, sexual exploitation, slave trading, torture, trafficking, and other related crimes. Battered Immigrant Women Protection Act § 1513(b)(3). VAWA 2013 expanded the list of eligible crimes for the U visa to include stalking. See *infra* text accompanying note 106.

status can petition for the U visa.<sup>78</sup> As prescribed in VAWA 2000, there is an annual cap of 10,000 U visas for primary victims of crime in any fiscal year.<sup>79</sup> The U visa is an important route to lawful immigration status for victims who are not married to their abusers or whose spouses are not U.S. citizens or have LPR status.<sup>80</sup> The U visa is a nonimmigrant visa, which allows the crime victim applicant to remain lawfully in the United States in that status for up to four years<sup>81</sup> and authorizes the U visa holder to work lawfully.<sup>82</sup> To qualify, the U visa applicant must cooperate with law enforcement in the investigation of the crime and/or the prosecution of the alleged perpetrator of the crime.<sup>83</sup> To demonstrate this requirement, the U visa application must contain a certification letter from a law enforcement official, attesting to the U visa applicant's cooperation.<sup>84</sup> This condition was incorporated into the new visa process to prevent fraudulent applications for the visa,<sup>85</sup> and the certification letter thus stands as a proxy for the genuineness of the applicant's status as a victim. But this certification requirement proves too burdensome for many immigrant victims because of their fears and distrust of the police and court system.<sup>86</sup> More practically, for some victims,

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78. The statutory eligibility requirements provide that the victim must (1) have suffered substantial physical or mental abuse as a result of having been a victim of one or more of the criminal activities listed in the statute, (2) possess information concerning the criminal activity, (3) be helpful, have been helpful, or be likely to be helpful to a federal, state, or local investigation or prosecution of a form of listed criminal activity, and (4) obtain law enforcement certification from an official, as described in the statute, and the criminal activity must have violated the laws of the United States or have occurred in the United States or one of its possessions or territories. *See* Battered Immigrant Women Protection Act § 1513(b)–(c).

79. *Id.* § 1513(c). Importantly, the statute did not establish a cap on the number of U visas for the derivative spouses, children, or parents of the primary U visa applicant. *Id.*

80. *See* Amy M. Wax, *Relief Under The Violence Against Women Act*, in IMMIGRATION PRACTICE MANUAL § 9, § 9.6.1 (Michael D. Greenberg ed., 2012) (explaining that U visas provide noncitizens options to VAWA relief that otherwise would be unavailable). Moreover, the U visa contains a more flexible method for calculating continuous physical presence, a necessary qualification to establish certain immigration remedies, and waives the continuous physical presence requirements for certain applicants. *See id.* § 9.6.9. These are just some of the welcome inclusions and amendments to the INA focused on assistance to battered immigrants.

81. *Id.* § 9.6.1.

82. Battered Immigrant Women Protection Act § 1513(c) (codified at 8 U.S.C. § 1184(p)(3)(B) (2012)).

83. *Id.* § 1513(b) (codified at 8 U.S.C. § 1184(p)(1)).

84. *Id.* § 1513(c) (codified at 8 U.S.C. § 1184(p)(3)(A)).

85. U.S. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 15 (2011), available at [http://www.dhs.gov/xlibrary/assets/dhs\\_u\\_visa\\_certification\\_guide.pdf](http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf) [hereinafter DHS U VISA RESOURCE GUIDE].

86. *See* Orloff et al., *Police Response*, *supra* note 15, at 68 (highlighting that many immigrant victims of domestic violence are deterred from seeking legal or social service assistance for fear of immigration consequences).

procuring the law enforcement certification letter can be administratively or geographically prohibitive.<sup>87</sup>

Like the VAWA self-petition process and related avenues of relief,<sup>88</sup> the U visa holder is eligible to adjust to LPR status after meeting certain conditions<sup>89</sup> and thus is potentially on a path to U.S. citizenship.<sup>90</sup> Unlike the VAWA remedies,<sup>91</sup> however, the U visa offers a path to immigration status stability without the need to be married to or divorced from a U.S. citizen or LPR spouse. Thus, the U visa was a welcome and necessary benefit for many battered immigrants.<sup>92</sup> Yet, as the U visa became an important tool to help more battered immigrants, the annual cap of 10,000 U visas quickly proved to be insufficient to meet the need. Thus, and as discussed below, the increase in the number of U visas available each year became an important advocacy point for immigrant activists in the VAWA 2013 reauthorization debate.<sup>93</sup>

#### 4. VAWA 2005

VAWA was again up for Congressional reauthorization in 2005. In VAWA 2005, the provisions aimed at immigrant victims of domestic violence continued to be a part of the proposed legislation. Various

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87. See KANDEL CRS 2012, *supra* note 28, at 14 n.80 (noting that those who live in areas with few immigrants or areas sparsely populated face difficulties in obtaining a certified letter). Critics of the certification letter process note that the defendant in the underlying criminal prosecution is able to attack the victim's testimony by asserting that the victim is motivated to provide false testimony in exchange for the U visa immigration relief. See, e.g., *State v. Valle*, 298 P.3d 1237, 1240 (Or. Ct. App. 2013) (en banc) (holding that evidence pertaining to whether a party applied for a U visa on the basis of the alleged abuse currently under consideration in prosecution proceedings was relevant impeachment evidence).

88. See *supra* notes 48–51 and accompanying text (describing the VAWA self-petition, cancellation of removal, and battered spouse waivers).

89. People with U visas can adjust to LPR status if they have (1) lived in the United States for at least three continuous years since the grant of the U visa, (2) agreed to continue to assist law enforcement, and (3) demonstrated that family unity or the public interest justifies their continued presence in the United States. Battered Immigrant Women Protection Act § 1513(f); see also KANDEL CRS 2012, *supra* note 28, at 33 (outlining the adjustment of status requirements for U visa holders).

90. See Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 595 (2011) (indicating that the U visa created a second category of nonimmigrant visas available to noncitizens that allow victims of violent crimes to stay in the United States as long as the noncitizen cooperates with the investigation and prosecution of the offender).

91. See 8 U.S.C. § 1154(a)(1)(A)(i) (2012) (providing immigrant status to those who may self-petition, which includes only those who are married to a U.S. citizen or LPR).

92. See KANDEL CRS 2012, *supra* note 28, at 33 (noting that USCIS approved 25,986 U visas for victims between fiscal years 2009 and 2011 and an additional 19,755 visas for the qualifying family members of U visa holders during that same time period).

93. See *infra* notes 119–23 and accompanying text.

versions of the reauthorizing legislation were introduced in the House and Senate, each containing provisions for immigrant victims.<sup>94</sup> Members of Congress again spoke passionately about the need for VAWA to embrace the particular needs of immigrant victims of violence.<sup>95</sup>

VAWA 2005 passed Congress and became Public Law 109-162 on January 5, 2006. As in previous versions of VAWA, VAWA 2005 garnered broad bipartisan support. It passed the House with a 415-4 vote, and the Senate again unanimously passed the bill.<sup>96</sup> Particularly relevant to immigrant victims of domestic violence, VAWA 2005 exempted VAWA self-petitioners from (1) penalties imposed for overstaying grants of voluntary departure if the overstay was due to abuse<sup>97</sup> and (2) numerical limits on motions to reopen relief applications for cancellation of removal or suspension of

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94. Representative Mark Green (R-Wisconsin) introduced H.R. 2876, the Violence Against Women Reauthorization Act of 2005, on June 14, 2005 with fifteen cosponsors. H.R. 2876, 109th Cong. (2005). Similarly, Representative Zoe Lofgren (D-California) introduced H.R. 3171, the VAWA 2005 Reauthorization Act, on June 30, 2005 with 112 cosponsors. H.R. 3171, 109th Cong. (2005). These proposals eventually became part of section 224 of H.R. 3402, the Violence Against Women and Department of Justice Reauthorization Act of 2005, which was introduced by Representative James Sensenbrenner (R-Wisconsin) on July 22, 2005 with six cosponsors of its own. H.R. 3402, 109th Cong. (2005). Senator Joseph Biden (D-Delaware) introduced S. 1197, the Violence Against Women Act of 2005, in the Senate on June 8, 2005 with eleven cosponsors. S. 1197, 109th Cong. (2005). On December 16, 2005, H.R. 3402 passed the Senate. 151 CONG. REC. 28,867 (2005). On December 17, 2005, the House agreed to Senate amendments of H.R. 3402, and the bill passed the House. 151 CONG. REC. 29,337 (2005). The Act became Public Law 109-162 on January 5, 2006. Violence Against Women Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 42 U.S.C.). Senator Arlen Specter (R-Pennsylvania) introduced S. 3693, a bill to make technical corrections to the Violence Against Women and Department of Justice Reauthorization Act of 2005, on July 19, 2006. S. 3693, 109th Cong. (2005). This became Public Law 109-271. Act of Aug. 12, 2006, Pub. L. No. 109-271, 120 Stat. 750 (codified as amended in scattered sections of 20 and 42 U.S.C.).

95. See, e.g., 151 CONG. REC. 21,489 (2005) (statement of Rep. Hilda Solis) (noting that public education efforts regarding domestic violence should discuss root issues such as cultural differences, linguistic differences, and immigration issues); 151 CONG. REC. 15,353 (2005) (statement of Rep. Janice D. Schakowsky) ("If we are to stop violence against women, all victims need protection and assistance without regard to their immigration status. Escaping domestic violence can be especially difficult for immigrant women and their children. The threat of deportation, cultural and language barriers, lack of a work permit and limited access to legal and social services may make immigrant victims of domestic violence more dependent on their abusive spouses."); see also 152 CONG. REC. E2607 (daily ed. Dec. 18, 2005) (statement of Rep. John Conyers, Jr.) (emphasizing the strong history of protections for victims of domestic violence since 1994, which repeatedly have ensured that victims are accorded the opportunity to file VAWA-related immigration relief before an immigration judge).

96. SEGHETTI & BJELOPERA, *supra* note 76, at 9 n.48.

97. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825, 119 Stat. 2960, 3064 (codified as amended at 8 U.S.C. § 1229a(c)(7)); KANDEL CRS 2012, *supra* note 28, at 30.

deportation.<sup>98</sup> Moreover, VAWA 2005 incorporated employment authorization benefits for certain victims of domestic violence, including the spouses of people in the country temporarily for employment purposes.<sup>99</sup> In a nod to perceptions of fraud through the VAWA self-petitioning process, VAWA 2005 also included provisions aimed at reducing immigration fraud by prohibiting a VAWA self-petitioner or a U visa holder from petitioning for immigration status for the abuser.<sup>100</sup> Importantly, and as evidence of the broad support for the general plight of racial and ethnic minority victims, including immigrant victims, VAWA 2005 survived proposed amendments that would have stripped the law of its focus on such marginalized populations.<sup>101</sup> VAWA 2005 specified that benefits should especially serve “Underserved Populations,” a definition that includes “populations underserved because of geographic location, underserved racial and ethnic populations, populations underserved because of special needs (such as language barriers, disabilities, alienage status, or age), and any other population determined to be underserved by the Attorney General or by the Secretary of Health and Human Services, as appropriate.”<sup>102</sup> Thus, the VAWA provisions aimed at helping immigrant victims of violence remained strong.

##### 5. VAWA 2013

In sum, since the original 1994 version and through its subsequent successful reauthorizations in 2000 and 2005, VAWA has contained provisions that benefited immigrant victims of domestic violence. What made the struggle for VAWA reauthorization in 2012–2013 unique was the vociferousness of the debate surrounding new proposals that expanded benefits for immigrants and other victims of domestic violence who are members of marginalized communities, including lesbian, gay, bisexual, and transgender (LGBT) individuals

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98. Violence Against Women and Department of Justice Reauthorization Act of 2005 § 825.

99. See *id.* § 814(c); see also Julie E. Dinnerstein, *Options for Immigrant Victims of Domestic Violence*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 482, 506 (Richard J. Link et al. eds., 2007) (explaining that there are employment authorization benefits specifically designated for abused spouses).

100. Violence Against Women and Department of Justice Reauthorization Act of 2005 § 814(e); KANDEL CRS 2012, *supra* note 28, at 30.

101. See 151 CONG. REC. 21,489 (2005) (statement of Rep. Hilda Solis) (“Just this morning, I learned that the manager’s amendment to today’s VAWA reauthorization bill strikes the language ‘racial and ethnic minorities’ from the definition of underserved communities. After all the bipartisan work that we have been conducting . . . , I am outraged that at the last minute, Republican leadership is shortchanging women of color who are victims of domestic violence.”).

102. Violence Against Women and Department of Justice Reauthorization Act of 2005 § 3.

and Native Americans living on tribal lands. The aggressive fight against benefits for these communities marked the VAWA 2013 battle as particularly politically volatile.<sup>103</sup>

To be sure, VAWA 2013 began its legislative journey just like its previous iterations. On November 30, 2011, Senators Patrick Leahy (D-Vermont) and Mike Crapo (R-Idaho) introduced VAWA as S. 1925, with Leahy declaring that “[t]he Violence Against Women Act has been successful because it has consistently had strong bipartisan support for nearly two decades. Today, we build on that foundation.”<sup>104</sup> Relevant to the immigrant community,<sup>105</sup> this version of the bill included *new* provisions that provided additional protections, such as (1) requiring additional background checks of U.S. citizens and LPRs petitioning for their foreign national fiancées or fiancés to flag potentially abusive relationships, (2) expanding eligibility for “VAWA coverage to derivative children whose self-petitioning parent died during the [immigration] petition process,” (3) exempting self-petitioners, U visa petitioners, and other battered foreign nationals from being classified as inadmissible for immigration status despite potential public charge findings, (4) adding stalking to the list of crimes for U visa eligibility, and (5) increasing the U visa cap from 10,000 annually to 15,000.<sup>106</sup>

In the House, Representative Sandy Adams (R-Florida) introduced a companion version of VAWA, H.R. 4970, on April 27, 2012<sup>107</sup> without a Democratic co-sponsor. H.R. 4970 contained many of the

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103. See Erika Eichelberger, *Blocking VAWA, the GOP Keeps Up the War on Women*, THE NATION (Jan. 2, 2013), <http://www.thenation.com/article/171977/gop-blocks-va-wa> (noting that while VAWA had been renewed with new protections without much opposition every five years since it was first introduced in 1994, the House and Senate “squabble[ed]” in 2013 over provisions related to immigrants, members of the LGBT community, and Native Americans).

104. 157 CONG. REC. S8071 (2011) (daily ed. Nov. 30, 2011) (statement of Sen. Patrick J. Leahy).

105. The bill contained numerous other new provisions focused on federal grant programs, criminal penalties, terminology revisions, and other marginalized communities. See SEGHETTI & BJELOPERA, *supra* note 76, at 11–12.

106. KANDEL CRS 2012, *supra* note 28, at 12. The provisions also prohibited international marriage brokers from marketing about any potential spouse under the age of eighteen, allowed U visa petitioners under the age of twenty-one and the derivative children of adult U visa petitioners from aging out of U visa eligibility if they reached the age of twenty-one after beginning the petitioning process, and allowed conditional LPRs married to U.S. citizens or LPRs who qualified for U visas to obtain hardship waivers to remove their conditional status. *Id.*

107. See SEGHETTI & BJELOPERA, *supra* note 76, at 10 (outlining the other versions of the bill and amendments that were introduced throughout the VAWA 2013 legislative journey).

same helpful provisions of S. 1925<sup>108</sup> but also included provisions that would have been harmful to immigrant victims of domestic violence if enacted. In particular, H.R. 4970 contained provisions that, *inter alia*, would have (1) allowed the alleged abuser to submit “credible evidence” to rebut a petition, (2) raised the burden of proof for a petitioner from “any credible evidence” to “clear and convincing evidence,” (3) eliminated the provision that allows U visa recipients to be eligible for LPR status after three years in U visa status, and (4) changed the grant of the U visa to a temporary status valid only during the period when the related crime is under active investigation or prosecution.<sup>109</sup>

Importantly, and relevant to this discussion of marginalized identities in the political process, both versions of the 2012 Senate and House bills included provisions that focused on benefitting—or further marginalizing—other vulnerable communities, in particular LGBT and Native American people. Indeed, one of the issues that drew the most controversy was the proposal in S. 1925 that afforded tribal courts jurisdiction over domestic violence claims made by tribal members against non-Native Americans on tribal land.<sup>110</sup> The proposal also extended the power of a tribal court to issue and to enforce protection orders in domestic violence proceedings occurring on tribal land.<sup>111</sup> Previous versions of VAWA gave only the federal government authority to prosecute non-Native American defendants accused of committing acts of domestic violence against tribal members.<sup>112</sup> In response to the federal government’s continued disinclination to prosecute such cases, however, advocates for tribal victims of domestic violence pushed for prosecutorial authority to be placed with tribal courts.<sup>113</sup>

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108. H.R. 4970 included the first seven of the provisions listed in the text describing the immigrant-relevant provisions of S. 1925. Violence Against Women Reauthorization Act of 2012, H.R. 4970, 112th Cong. (2012).

109. AM. IMMIGRATION LAWYERS ASS’N, TALKING POINTS FOR H.R. 4970 (2012); *see also* KANDEL CRS 2012, *supra* note 28, at 15–16 (outlining H.R. 4970’s major elements). During a later markup of the bill in committee, H.R. 4970 was amended to (1) remove the requirement that U visa applicants report the related crime within sixty days of the offense and (2) remove a provision that the statute of limitations for prosecuting the related crime had not lapsed by the time that law enforcement certified the U visa applicant’s cooperation in the investigation or prosecution. H.R. REP. NO. 112-480, pt. 1, at 244 (2012).

110. S. 1925, 112th Cong. § 904 (2012).

111. *Id.* § 905.

112. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901(6), 119 Stat. 2960, 3078 (2006) (recognizing the federal government’s special trust responsibility toward tribal governments).

113. *See* NAT’L CONG. FOR AM. INDIANS, THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT—S.1925: TITLE IX: SAFETY FOR INDIAN WOMEN 1 (2012), *available at* [http://www.ncai.org/attachments/PolicyPaper\\_aOaNWvmbuDVHyJLuX](http://www.ncai.org/attachments/PolicyPaper_aOaNWvmbuDVHyJLuX)

Although a deep review of the reach of these provisions is beyond the scope of this Article, the inclusion and emphasis on increased protections for these similarly subordinated victims of domestic violence further burdened the legislative success of VAWA 2013 beyond the renewed and increased emphasis on the immigrant-specific provisions.<sup>114</sup> As Representative Sandy Adams summarized in voicing her opposition to the inclusion of provisions aimed at protecting immigrant, Native American, and LGBT victims, “[w]e’re still in the drafting phase, but I will tell you we are not going to be looking at the controversial issues that will detract from what is actually VAWA.”<sup>115</sup> The Senate Democrats remained steadfast in their support for the expansive provisions in S. 1925, with Senator Patty Murray (D-Washington) even espousing, “I’m not willing to pass a Violence Against Women bill into law by throwing out the provisions and throwing under the bus Native American women and LGBT members and immigrants who have stood up and fought hard . . . .”<sup>116</sup>

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jpgMFbPZRINiRXkixCAraUNsEsbjzhSwJSL\_Tribal%20VAWA\_Backgrounder.pdf (noting that many cases go uninvestigated and, therefore, arguing that local governments should be provided jurisdiction to ensure that perpetrators do not go unpunished and violence does not escalate).

114. See, e.g., Elizabeth Newman, *Reflections on VAWA’s Strange Bedfellows: The Partnership Between the Battered Immigrant Women’s Movement and Law Enforcement*, 42 U. BALT. L. REV. 229, 255 (2013) (stating that VAWA 2013 did not enjoy the bipartisan support characteristic of prior versions of VAWA because of the VAWA 2013 provisions focusing on LGBT, tribal, and undocumented immigrant victims); Jessica Reynolds, *GOP Hearts Women? Not Exactly*, CHI. TRIB. (Mar. 6, 2013) [http://articles.chicagotribune.com/2013-03-06/opinion/ct-perspec-0306-women-20130306\\_1\\_transgender-victims-house-republicans-violence-against-women-act](http://articles.chicagotribune.com/2013-03-06/opinion/ct-perspec-0306-women-20130306_1_transgender-victims-house-republicans-violence-against-women-act) (acknowledging that the new tribal provisions were among the most contentious and created a divide); Amanda Terkel, *Violence Against Women Act Becomes Partisan Issue*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/02/14/violence-against-women-act\\_n\\_1273097.html](http://www.huffingtonpost.com/2012/02/14/violence-against-women-act_n_1273097.html) (last updated Feb. 16, 2012, 5:33 PM) (reporting that VAWA 2013 passed out of the Senate Judiciary Committee on a party-line vote—“the first time VAWA legislation did not receive bipartisan backing”—because some conservative organizations had objected to the VAWA 2013 provisions designed to specifically protect LGBT individuals, undocumented noncitizens, and Native Americans).

115. Molly K. Hooper, *House GOP to Move Less ‘Controversial’ Version of Violence Against Women Act*, THE HILL (Apr. 25, 2012, 7:21 PM), <http://thehill.com/homenews/house/223719-house-gop-to-keep-controversial-issues-out-of-their-violence-against-women-act> (internal quotation marks omitted).

116. See Laura Bassett, *Patty Murray: I’d Prefer No VAWA Bill to House Version*, HUFFINGTON POST, [www.huffingtonpost.com/2012/06/26/patty-murray-vaawa\\_n\\_1627906.html](http://www.huffingtonpost.com/2012/06/26/patty-murray-vaawa_n_1627906.html) (last updated June 26, 2012, 4:42 PM). Democratic leaders and supporters of VAWA railed against Republican members’ stalling of VAWA due, ostensibly, to the bill’s proposal that would allow Native American tribes to prosecute non-Native American people accused of committing acts of domestic violence on tribal lands. House Leader Eric Cantor defended the delays, saying, “We want to protect the women who are subject to abuse on tribal lands. . . . Unfortunately there are issues that don’t directly bear on that that have come up, that have complicated it.” Lauren Smith, *Cantor Pledges Domestic Violence Law Is an Early House Priority*, ROLL CALL POL’Y (Feb. 6, 2013, 2:56 PM) (internal quotation marks omitted). Members

Moreover, during these legislative debates, critics of the proposed VAWA commented about how the proposed additions to VAWA contravened the history of VAWA bipartisan support. In a debate on S. 1925, Senator John McCain (R-Arizona) noted that “[s]ince its original enactment in 1994, the Violence Against Women Act has been reauthorized twice by unanimous consent, under both Democratic and Republican leadership,” while also opining that Republican disapproval of the proposed bill does not amount to a “war on women”<sup>117</sup> as VAWA proponents argued.<sup>118</sup> Indeed, by early 2012, VAWA advocates began to understand the extent of the controversy over the inclusion of provisions benefiting marginalized and vulnerable communities in the proposed VAWA.<sup>119</sup> Such fears were informed by legislative debates and public comments, in which some legislators cautioned that the expansion of VAWA provisions benefiting marginalized populations was too far-reaching. For example, Senator Charles Grassley (R-Iowa), who led the Republican fight against VAWA reauthorization in 2012–2013, remarked that Democrats were playing political games by including provisions in the bill that they knew would not garner Republican support—a move, he argued, that would eventually halt VAWA’s reauthorization.<sup>120</sup> Senator Grassley argued that the immigrant-friendly provisions of S. 1925 were bad policy and amounted to fiscal irresponsibility.<sup>121</sup> In

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called out these tactics as attempts to stymie VAWA due to its expanded benefits for marginalized populations. *See, e.g.*, 159 CONG. REC. S482 (daily ed. Feb. 7, 2013) (statement of Sen. Patricia Murray) (“They can either appease those on the far right of their caucus, who would turn battered women away from care, or they can stand with Democrats, moderate Republicans, and the many millions of Americans who believe that who a person loves, where they live, or their immigration status, should not determine whether they are protected from violence in this country. . . . Too many women have been left vulnerable while House Republican Leaders have played politics.”); 159 CONG. REC. S479 (daily ed. Feb. 7, 2013) (statement of Sen. Harry Reid) (“Despite overwhelming evidence that this legislation saves lives, House Republican leaders used procedural gimmicks and stalling tactics to block its reauthorization. I would remind Leader Cantor and his Republican colleagues of the seriousness of the delay.”).

117. 158 CONG. REC. S2750 (daily ed. Apr. 26, 2012) (statement of Sen. John McCain).

118. *See, e.g.*, Eichelberger, *supra* note 103 (demonstrating that Republican changes to the Senate version of VAWA harm immigrant women in many ways).

119. *See, e.g.*, Adam Serwer, *Republicans Are Blocking the Violence Against Women Act: Here’s Why*, MOTHER JONES (Mar. 20, 2012, 6:00 AM) (acknowledging some Republicans’ reasons for attempting to block VAWA reauthorization were that the proposed bill included provisions to protect LGBT persons, immigrants, and Native Americans).

120. *See* 158 CONG. REC. S2762 (daily ed. Apr. 26, 2012) (statement of Sen. Charles Grassley) (noting that the new provisions were not discussed during the Senate Judiciary Committee hearing).

121. *See id.* at S2763 (asserting that the new bill will increase the national deficit by one hundred million dollars).

particular, Senator Grassley rallied against the increase of the cap of available U visas, as proposed in S. 1925, stating:

We have caps for a reason. The U.S. can't take everybody who comes to our shores, as much as many would like to. Caps are a way to control the flow of people. . . . Moreover, increasing the cap on U visas will likely increase the costs to taxpayers. I'd be interested to know how much the increase in the numerical cap would cost the government and the American people.<sup>122</sup>

Securing an increase in the U visa cap was of great importance for immigrant advocates in this VAWA reauthorization due to procedural and administrative problems that had had severe effects on the effectiveness of the visa. VAWA 2000 created the U visa, but the implementing regulations governing the U visa application and procedures were not issued until 2007, and the government did not start granting actual visas until December 2008.<sup>123</sup> This delay created a large buildup of U visa applications, which would have been alleviated with the process contemplated in S. 1925. In particular, S. 1925 would have raised the annual U visa cap from 10,000 to 15,000 only if there were unused visas from the 2006–2011 allotments that could be “recapture[d]” and provided to those U visa applicants still waiting for an available visa due to the previous backlog.<sup>124</sup>

Despite this “sunset” provision for the increase in the number of available U visas, VAWA reauthorization opponents fought to block the increase in the cap due to supposed rampant immigration fraud. Senator Grassley argued that caps are “a stop-gap measure against fraud.”<sup>125</sup> Indeed, legislators had evinced concern over the

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122. Press Release, Prepared Statement of Senator Chuck Grassley, Judiciary Committee Executive Business Meeting: Violence Against Women Act, Nominations (Feb. 2, 2012), available at <http://www.grassley.senate.gov/print/news/news-releases/judiciary-committee-executive-business-meeting> [hereinafter Press Release, Senator Grassley on VAWA].

123. *Immigration Provisions of S. 1925: Myths v. Facts*, NAT'L TASK F. TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN, <http://4vawa.org/4vawa/immigration-provisions-of-s-1925-myths-v-fact> (last visited Dec. 19, 2014).

124. *Id.* As the Congressional Research Service noted in a May 15, 2012 report on the VAWA immigration provisions:

The additional visas, if required, would be recaptured from the balance of unused U visas not issued to *victims* between 2006 and 2011 . . . . Because regulations to implement the U visa were not issued until late 2008, U visas were not issued between 2006 and 2008, creating an unused balance of 30,000 U visas for those years. Between 2009 and 2011, 25,986 U visas were issued, leaving an additional unused balance of 4,014 for those three years. The total unused balance of 34,014 (30,000 plus 4,014), divided by 5,000 additional visas per year mandated by S. 1925, suggests that the increased annual quota of U visas would last for roughly seven years. S. 1925 mandates that the 5,000 visa increase each year would sunset once this balance was used up.

KANDEL CRS 2012, *supra* note 28, at 12 n.73.

125. Press Release, Senator Grassley on VAWA, *supra* note 122.

expansiveness of the immigration provisions and the possibility of fraud concerns.<sup>126</sup> Senator Grassley remarked that “VAWA is meant to protect victims of violence. It shouldn’t be an avenue to expand immigration law or to give additional benefits to people here unlawfully.”<sup>127</sup> He further cautioned that VAWA must be crafted so that its benefits are not manipulated by foreign criminals and “con artists” as a pathway to U.S. citizenship.<sup>128</sup>

Notably, however, and similar to the prior misplaced concerns about supposed extensive marriage fraud to secure immigration benefits,<sup>129</sup> there has never been proof that fraud in VAWA or U visa claims is widespread. A 2012 Congressional Research Service (CRS) Report on VAWA noted that there is limited empirical evidence to support the notion that VAWA provides dishonest immigrants opportunities to circumvent U.S. immigration laws.<sup>130</sup> In the report, CRS also noted that “consolidation of VAWA petition adjudications in [one Department of Homeland Security adjudicatory unit] was intended to . . . prevent fraud by assigning adjudications to a unit of specialists in domestic violence cases who could efficiently discern fraudulent petitions, fairly adjudicate legitimate petitions, and protect victims from accidental violations of confidentiality.”<sup>131</sup> Similarly, the law enforcement certification requirements of the U visa serve to protect against fraudulent applications for the visa.<sup>132</sup> As one immigrant advocate noted, the high demand for and oversubscription

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126. These concerns were highlighted in hearings before the Senate Judiciary Committee, including in testimony by a U.S. citizen whose immigrant husband allegedly falsely accused her of domestic violence and who spoke about the difficulties that accusation wrought. See *The Violence Against Women Act: Building on 17 Years of Accomplishments, Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 12–14 (2011) (statement of Julie Poner) (recounting her husband’s continued threats of abducting her children).

127. Press Release, Senator Grassley on VAWA, *supra* note 122.

128. *Id.*

129. See *supra* note 29 and accompanying text.

130. KANDEL CRS 2012, *supra* note 28, summary at 2; see also Olivares, *A Final Obstacle*, *supra* note 11, at 199–200 & n.242 (noting it is unlikely that the change in policy will lead to immigrants fraudulently obtaining relief and arguing that this is not a legitimate basis for refusing support).

131. KANDEL CRS 2012, *supra* note 28, at 13 n.76; see also U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., REPORT ON THE OPERATIONS OF THE VIOLENCE AGAINST WOMEN ACT UNIT AT THE USCIS VERMONT SERVICE CENTER: REPORT TO CONGRESS 3 (2010) (recognizing that a permanent staff “further[s] the mission and goals of USCIS to provide accurat[e], consisten[t], uniform[], and reliab[le]” results for battered immigrants).

132. See generally DHS U VISA RESOURCE GUIDE, *supra* note 85 (explaining that eligible victims can obtain nonimmigrant status if certain requirements are met).

of the U visa is not evidence of fraud, but, rather, that the U visa meets its purpose as an effective law enforcement mechanism.<sup>133</sup>

Despite the fervent controversy surrounding the proposed VAWA, the Senate passed S. 1925 with a vote of 68-31, which included the approval of fifteen Republican Senators.<sup>134</sup> Notably, this approved version of S. 1925 *kept* the increase in the number of available U visas,<sup>135</sup> one of the principle measures sought by immigration advocates. But the progress of S. 1925 effectively stopped there: the House of Representatives declined to pass the bill,<sup>136</sup> and it died when the 112th Congress recessed. Similarly, H.R. 4970, which kept the detrimental provisions against immigrants,<sup>137</sup> passed the House of Representatives but did not pass the Senate.<sup>138</sup>

On January 22, 2013 in the 113th Congress, Senator Patrick Leahy reintroduced VAWA as S. 47.<sup>139</sup> S. 47 tracked the language of the previous S. 1925 in almost all key respects,<sup>140</sup> including adding stalking to the list of eligible crimes for U visa eligibility and changing

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133. See Serwer, *supra* note 119 (recognizing that U visas are a tool for law enforcement officials as well as beneficial for immigrant victims).

134. See *VAWA Runs into Stumbling Blocks*, CQ ALMANAC (2012), <http://library.cqpress.com/cqalmanac/document.php?id=cqal12-1531-87297-2553305> (asserting that the House and Senate could not agree on provisions to expand the law or make it stricter); see also Samantha Kimmey, *Senate Passes VAWA Without Republican Changes*, WOMENS ENEWS (Apr. 25, 2012), <http://womensenews.org/story/domestic-violence/120426/senate-passes-vawa-without-republican-changes#.UxijGv00qCY> (noting that the Senate also rejected three proposed amendments to VAWA).

135. See KANDEL CRS 2012, *supra* note 28, at 13–14. The Senate-approved version of S. 1925 included a sunset provision for the increase in the U visa cap. See *id.* at n.73 (providing the increase will sunset once the balance is used).

136. See Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, J. FEDERALIST SOC'Y PRAC. GROUPS, July 2012, at 40, 40 (“S. 1925 was rejected by the House of Representatives, which offered its own version of the VAWA re-authorization in H.R. 4970.”); see also *VAWA Runs into Stumbling Blocks*, *supra* note 134 (stating that House Republicans did not want to conference with the Senate on the Senate bill because it contained a provision to raise fees for some immigrant visas).

137. See *supra* notes 108–09 and accompanying text; see also KANDEL CRS 2012, *supra* note 28, at 14–16 (citing, for example, the provision in H.R. 4970 requiring a higher standard of evidence for VAWA petitions).

138. Laura C. Saylor, Note, *Back to Basics: Special Domestic Violence Jurisdiction in the Violence Against Women Reauthorization Act of 2013 and the Expansion of Inherent Tribal Sovereignty*, 2014 CARDOZO L. REV. 1, 6 n.22 (2014); see also WILLIAM A. KANDEL, CONG. RESEARCH SERVICE, R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 15 (2013) [KANDEL CRS 2013] (declaring that after the passage of H.R. 4790, a procedural complication arose because the Constitution mandates that revenue-raising legislation begin in the House and that the S. 1925 provision to increase fees for certain visas sparked controversy).

139. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013). In the House of Representatives, Representative Gwen Moore (D-Wisconsin) introduced H.R.11, which had similar immigrant-friendly provisions. Violence Against Women Reauthorization Act of 2013, H.R. 11, 113th Cong. (2013).

140. See *supra* notes 108–09 and accompanying text.

the age-out procedures to protect children who reach twenty-one years of age before their VAWA petitions were approved.<sup>141</sup> Yet, importantly, and in a concession to critics' prior concerns of purported fiscal waste and extensive fraud, S. 47 did not include the provision to allow for the increase in the cap on U visas from 10,000 to 15,000.<sup>142</sup> This "leaner" S. 47 quickly made it through the Senate and, after reconciling the controversy concerning the provisions regarding jurisdiction for criminal prosecutions on tribal lands,<sup>143</sup> also passed the House of Representatives.<sup>144</sup> Almost two years after the initial introductions of the proposed reauthorizing legislation, President Obama signed VAWA 2013 into law in March 2013.<sup>145</sup>

The trajectory of VAWA since 1994 is illustrative in several key components. First, the importance of VAWA to victims of domestic violence cannot be overstated. Since 1994, over \$4.7 billion in federal funds have been used to assist organizations serving victims of domestic violence across the country through a broad network of grants and programs.<sup>146</sup> Administered by the Office of Violence Against Women as part of the U.S. Department of Justice (DOJ),<sup>147</sup> VAWA funds and programs have had extraordinarily far-reaching effects in community efforts to end domestic violence. Moreover, VAWA has provided key benefits to specialized groups of victims, including immigrants and other politically and socially marginalized people, like Native Americans and members of the LGBT community.<sup>148</sup> Indeed, it is this inclusion of benefits for subordinated

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141. See KANDEL CRS 2013, *supra* note 138, at 16 (observing that VAWA coverage would also be extended to derivative children whose self-petitioning parent died during the petition process).

142. *Id.*

143. See Smith, *supra* note 116 (recognizing the controversy over whether allowing tribal courts to prosecute non-Native Americans accused of domestic violence against Native American victims would adequately protect non-Native Americans' constitutional rights).

144. See S.1925 (112th): *Violence Against Women Reauthorization Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1925#overview> (last visited Dec. 19, 2014) (noting the bill passed in the House on May 16, 2012).

145. *Id.*

146. SEGHETTI & BJELOPERA, *supra* note 76, at 4; see also *Grant Programs*, U.S. DEP'T JUST., <http://www.justice.gov/ovw/grant-programs> (last visited Dec. 19, 2014) (asserting that twenty-four grant programs are currently administered by the Department of Justice's Office on Violence Against Women).

147. See SEGHETTI & BJELOPERA, *supra* note 76, at 4 (recognizing that the Office on Violence Against Women was created within the DOJ in 1995 to administer grants under the VAWA).

148. VAWA incorporated provisions benefiting Native Americans in 1994 when the federal government implemented a full faith and credit requirement stating that state and tribes must honor and enforce other jurisdictions' protection orders as if the orders were their own. See Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the*

and marginalized communities that obstructed VAWA's eventual passage in 2013. To understand this transition from broadly supported legislation up to and including the VAWA 2005 reauthorization to the controversy that surrounded VAWA 2013, the intersections of marginalized identity undergirding the status of immigrant victims of domestic violence must be addressed and explored. Part III undertakes the exploration of this intersection, applying the theory to the VAWA 2013 example.

### III. THE IMMIGRANT DOMESTIC VIOLENCE VICTIM AT THE CROSSROADS OF SUBORDINATION: THE INFLUENCE OF IDENTITY POLITICS ON THE VAWA 2013 LEGISLATIVE PROCESS

Senator Dianne Feinstein (D-California) succinctly encapsulated the crux of the debate surrounding the VAWA 2013 reauthorization:

Let me put this on the table. . . . This bill [S. 1925, introduced in 2012] includes lesbians and gay men. The bill includes undocumented immigrants who are victims of domestic abuse. The bill gives Native American tribes authority to prosecute crimes. In my view these are improvements. Domestic violence is domestic violence.<sup>149</sup>

Feinstein was essentially identifying the source of the conflict that characterized the VAWA 2013 reauthorization fight: emphasis on the benefits given to marginalized populations made VAWA problematic for politically conservative legislators.

Indeed, for the first time in its almost twenty-year history, VAWA encountered significant opposition in the 2012–2013 reauthorization process. Despite the history of including immigrant victims of domestic violence in VAWA since its inception in 1994,<sup>150</sup> the legislative proposals and advocacy efforts aimed at assisting immigrant domestic violence victims ignited virulent controversy in VAWA 2013. Though part of the vulnerable population targeted for benefits under VAWA, in a political environment marked for its anti-

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*Violence Against Women Acts*, 90 KY. L.J. 123, 132 (2002). Although VAWA 1994 (and subsequent VAWA reauthorizations) highlights violence against women, the language has always been gender-neutral and not exclusionary (though also not explicit inclusionary) to same sex victims. See Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1100 (2000).

149. Ted Barrett, *Accusations Fly in Senate over Violence Against Women Act*, CNN, [www.cnn.com/2012/03/15/politics/senate-avaa-accusations](http://www.cnn.com/2012/03/15/politics/senate-avaa-accusations) (last updated Mar. 15, 2012, 8:40 PM).

150. Moreover, since VAWA 1994, the law contemplated a measure of protections for tribal and LGBT victims. See *supra* text accompanying note 148.

immigrant focus, the immigrant domestic violence victim is deemed not as worthy of benefits and for help as are other victims.<sup>151</sup>

This anti-immigrant animus stems in part from racialized and gendered attitudes about immigrant communities. Immigrants of color and immigrant women particularly bear the brunt of the negative rhetoric surrounding immigration reform. Moreover, as the literal noncitizen, the immigrant outsider does not benefit from the positive attribution that derives from being a citizen. As a result, the inclusion of the immigrant victim of domestic violence in the law's reach becomes divisive and affects the law's passage. Moreover, the proposed provisions of VAWA 2013 aimed at helping immigrant victims *uniquely*—like the proposal to increase the cap on the number of U visas for immigrant victims of crime<sup>152</sup>—faced a hard-fought and ultimately unsuccessful battle.<sup>153</sup> As a marginalized, disenfranchised, and otherwise politically and socially subordinated community, immigrants face anti-immigrant rhetoric, policies, and politics.<sup>154</sup>

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151. The author has explored the power of the immigrant in swaying legislative outcomes. See Mariela Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, 55 *How. L.J.* 359, 385–86 (2012) [hereinafter Olivares, *Recessionary Politics*] (comparing the Development, Relief, and Education for Minors Act (DREAM Act) failure with the State Children Health Insurance Program (SCHIP) success, and noting that the DREAM Act failed because its purpose was to benefit undocumented immigrants, unlike SCHIP, which was targeted towards helping uninsured children). By comparison, the immigrant domestic violence victim is seen as a similarly unworthy beneficiary of legislative reform in the VAWA context.

152. See *supra* note 124 and accompanying text. Although VAWA 2013 did not raise the cap on the number of U visas available to immigrant victims of crime, Congress loosened certain changes to definitions and eligibility requirements. See *supra* note 106 and accompanying text.

153. See *supra* note 142 and accompanying text. The U.S. Senate passed an earlier version of a VAWA reauthorization bill, which provided for an increase from 10,000 to 15,000 U visas. S. 1925, 112th Cong. § 805(a)(2) (2012). A month later, however, the House passed its own version without the increase. H.R. 4970, 112th Cong. § 802 (2012). The VAWA 2013 reauthorization ultimately maintained the 10,000 U visa limit. 8 C.F.R. § 214.14(d)(1) (2014) (citing 8 U.S.C. § 1184(p)(2) (2012)) (noting that only 10,000 U-1 visas can be granted each year). Meanwhile, the popularity of the program has continued to grow and to fall short of need. See Press Release, U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year (Dec. 11, 2013), *available at* <http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year> (announcing less than three months into fiscal year 2014 that the cap for U visas had been met for the fifth straight year).

154. One need only spend a brief amount of time perusing popular media sources to understand the environment surrounding topics of illegal immigration. Racist and xenophobic vitriol in the guise of nativism or, worse, patriotism is prevalent on television talk shows and news programs and on the Internet in media sources, blogs, and the anonymous comment sections commonly placed after such sources. See, e.g., Glenn Beck, *Transcripts: Arrests of Terror Suspects Reveal Security Concerns*, CNN, <http://transcripts.cnn.com/TRANSCRIPTS/0705/09/gb.01.html> (last visited Dec. 19, 2014) (“I’ve got a quick message for illegal aliens if you happen to be watching. You better start packing your bags. And to the politicians in Washington who are soft

This Part explores law and policy aimed at helping vulnerable populations to show how inclusion of the immigrant outsider within proposed legislation detrimentally affects the legislation's passage into law. The discussion considers the tri-faceted subordinated identity of immigrant victims of domestic violence and comments on how this identity obstructed the VAWA reauthorization process in 2013.

A. *The Immigrant Victim of Domestic Violence Is a Person of Color: Race in the VAWA 2013 Controversy*

The intersection of subordination theory and immigration law is not a new concept. Scholars have highlighted the obvious racialized restrictions and focus that immigration law and policy has espoused since the earliest establishment of congressional plenary power in immigration law.<sup>155</sup> In the seminal case of *Chae Chan Ping v. United States*,<sup>156</sup> which upheld the plenary power of Congress to create immigration law, the laws at issue formally restricted the immigration of Chinese immigrants.<sup>157</sup> Implicit in the restrictions was a preference—indeed, a requirement—that new Americans be white, although the construction of “whiteness” was not well defined.<sup>158</sup> Coupled with the long-standing and enduring requirements in immigration law that exclude noncitizens who are “public charge[s],”<sup>159</sup> have criminal records,<sup>160</sup> and have certain mental or physical

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on illegal immigration, start packing up your office, because when the terrorists strike, which they will, and we find out that they're here illegally from some other country, we will be telling all of you to get the hell out.”); Glenn Beck, *Transcripts: No Pardon for Border Patrol Agents*, CNN, <http://transcripts.cnn.com/TRANSCRIPTS/0701/12/gb.01.html> (last visited Dec. 19, 2014) (“It’s time we wake up in this country. We are dealing with an illegal alien crime wave, and drug smuggling is just the beginning.”).

155. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (10th ed. 2006) (recognizing that Congress limited naturalization to “white persons” in 1790); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1115 (1998) [hereinafter Johnson, *Magic Mirror*] (asserting that it is not a coincidence that anti-immigrant sentiment has risen in tandem with anti-minority backlash).

156. 130 U.S. 581 (*The Chinese Exclusion Case*) (1889).

157. *Id.* at 589, 604–11 (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”).

158. See *id.* at 595–97, 606–07 (proposing that Chinese laborers had a “baneful effect” on California’s material interests); see LÓPEZ, *supra* note 155, at 27 (noting passage of the Chinese Exclusion Act in 1882, creation of the “Asiatic barred zone” in 1917, a Senate bill excluding “all members of the African or black race,” and a quota system designed to limit immigration to western and northern Europeans (internal quotation marks omitted)).

159. 8 U.S.C. § 1182(a)(4) (2012).

160. *Id.* § 1182(a)(2)(A)(i).

disabilities,<sup>161</sup> the race and ethnicity requirements shaped what American society values in prospective members of its citizenship.<sup>162</sup>

As a result of the implementation of these U.S. immigration laws, immigrants of color experience a heightened measure of subordination and oppression. As Kevin Johnson writes, “[a]t bottom, U.S. immigration law historically has operated—and continues to operate—to prevent many poor and working noncitizens of color from migrating to, and harshly treating those living in, the United States.”<sup>163</sup> Johnson chronicles the racialized categorization of immigration law, noting the explicit racism of the Chinese exclusion laws of the 1800s (the earliest days of formalized federal immigration law),<sup>164</sup> which essentially barred the migration of Chinese people to the United States and punished those who violated this prohibition.<sup>165</sup> The Immigration Act of 1924 created a national origins quota system that restricted the immigration of people from any country of only up to two percent annually of the number of noncitizens of that nationality represented in the 1890 U.S. census.<sup>166</sup> The effect of the quota system was to continue the severe restrictions on Asian immigrants as well as other non-white immigrants,<sup>167</sup> to

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161. *Id.* § 1182(a)(1)(A)(iii).

162. *See* Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975) (describing the grounds for exclusion of noncitizens under the U.S. immigration laws as “like a magic mirror, reflecting the fears and concerns of past Congresses”); Johnson, *Magic Mirror*, *supra* note 155, at 1119–20 (stating that even though discrimination on the basis of alienage status may mask an intent to discriminate against racial minorities, the political process subjects noncitizens to the will of the majority because the Supreme Court typically defers to alienage classifications made by Congress, which are traditionally “immune from legal constraint”). Although immigration law contained explicit racist exclusions and quotas, the first major wave of elimination of racialized quotas did not occur until 1965, when Congress enacted the Immigration and Nationality Act amendments of 1965. *See generally* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (providing a historical analysis of the 1965 INA amendments and concluding, based on interviews with politicians and government officials who worked on the amendments, that Congress intended that race would not be a factor in immigration law).

163. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 2 (2009) [hereinafter Johnson, *Intersection of Race and Class*].

164. *Id.* at 15–22; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19–43 (1996) (describing the federalization of immigration law in the late 1800s as well as state legislative immigration activities during the same time period with respect to, among other categories of people, noncitizen criminals and foreign poor and disabled individuals).

165. Johnson, *Magic Mirror*, *supra* note 155, at 1120.

166. *See id.* at 1127–28 (recognizing that Congress passed the quota system after passing legislation requiring a literacy test that excluded all illiterate aliens over the age of sixteen).

167. *See id.* at 1127–30 (noting that southern and western European immigrants “were racialized as non-white” (internal quotation marks omitted)).

“keep[] America American,”<sup>168</sup> to “confine immigration as much as possible to western and northern European stock”<sup>169</sup> and, thus, to essentially target the rise of immigration from southern and eastern European countries.

This pervasive preference for white immigrants, who were deemed to be easily assimilated into the dominant American culture, continued through the twentieth century.<sup>170</sup> Between the 1880s and the repeal of the national origin quota system in 1965, immigration law targeted various groups of immigrants of color. During the Depression, for example, efforts to deport low-wage workers, primarily Mexican immigrants and people of Mexican descent, resulted in the forcible deportation of roughly 500,000 people, the majority of whom were U.S. citizens.<sup>171</sup> Beyond immigration to the United States, immigration law has historically prohibited people of color from becoming U.S. citizens. Ian Haney López writes about the prohibition of the acquisition of citizenship by people of color through both birthright citizenship and naturalization, noting that birthright citizenship and naturalized citizenship were both conditioned on race until 1940 and 1952, respectively.<sup>172</sup>

Although the immigration law restrictions on acquisition of citizenship and of naturalization ended, and the Immigration Act of 1965 abandoned the explicit prohibitory quota system against people of color and the limitations on who can lawfully migrate to this country,<sup>173</sup> the cumulative effect of decades of restrictive legislating and policymaking is a system in which immigrants of color receive heightened scrutiny in seeking immigration status and relief.<sup>174</sup> Indeed, as more immigrants of color came to the United

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168. A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 AM. J. INT'L L. 737, 740 (1924).

169. LÓPEZ, *supra* note 155, at 27 (internal quotation marks omitted).

170. See LÓPEZ, *supra* note 155, at 27 (stating that the restriction on immigration to the United States on the basis of race lasted from 1880 until 1965); Johnson, *Magic Mirror*, *supra* note 155, at 1129–30 (recognizing that the national origins quota system was designed to preserve the traditional cultural and sociological balance of the United States).

171. LÓPEZ, *supra* note 155, at 27 (citing U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 10 (1980)) (suggesting that the mass deportation was spurred by the economic distress of the Great Depression).

172. *Id.* at 28–34.

173. Immigration and National Act, Amendments, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); see also Johnson, *Intersection of Race and Class*, *supra* note 163, at 2–3 (adding that the 1960s civil rights movement led to the elimination of the quota system in the 1965 INA amendments); Johnson, *Magic Mirror*, *supra* note 155, at 1131 (same).

174. See Johnson, *Magic Mirror*, *supra* note 155, at 1133 (recognizing that “similarly situated persons . . . may face radically different waits for immigration depending on

States with the relaxation of formalized legal racism,<sup>175</sup> anti-immigrant rhetoric grew louder and took on euphemistic categorizations and labels aimed at immigrants of color—including the recent example of “national security.”<sup>176</sup> More recently, efforts to target immigrants of color have come to legislative fruition through federal programs like Secure Communities,<sup>177</sup> which created a mandatory partnership between local law enforcement and federal immigration authorities.<sup>178</sup> Additionally, states have begun to target these

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their country of origin”); see also Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1839 (2007) (noting that racial stereotypes heavily influence perceptions about undocumented immigrants and that the “linkage between perceived alien status and illegal status is thus cemented in the public mind in racialized terms”); Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101–02 (2013) (examining how the DREAM act is an indication of American’s changing views on citizenship). As another example, immigration law preferences for educated immigrants and those who are financially stable are barriers for the increased immigration of people from the developing world who, overwhelmingly, are people of color. See generally Johnson, *Intersection of Race and Class*, *supra* note 163 (explaining that U.S. immigration laws discriminate directly and indirectly on the basis of class and race because they discriminate against poor immigrants).

175. The relative percentage of individuals gaining legal permanent resident status has shifted drastically based on countries of last residence. See *Yearbook of Immigration Statistics: 2012*, tbl.2, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents> (showing that 56% of LPRs came from European countries during the 1950s but accounted for just 13% of LPRs from 2000–2009, while, in stark contrast, LPRs from non-white regions increased substantially over the same period, including from Latin America and the Caribbean (20.3% to 41%), Asia (5.4% to 33.7%), and Africa (0.5% to 7.4%)).

176. Assertions seem more legitimate when overtly racist terminology is replaced with facially neutral language such as “national security,” but this may be little more than a semantic proxy for racist motivations. See *infra* notes 187–90 and accompanying text (detailing several examples of racism in immigration law and policy); see also Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 341 (2012) (noting that, although Secure Communities is ostensibly geared towards deporting violent criminals, it actually targets any undocumented person in its implementation).

177. See Consolidated Appropriations Act of 2007, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2050 (appropriating two-hundred million dollars to the Department of Homeland Security (DHS) to enhance efforts to remove aliens from the United States after they are deemed deportable for being convicted of a crime or sentenced to imprisonment).

178. See *Secure Communities: Get the Facts*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Dec. 19, 2014) (attempting to resolve “confusion” about the mandatory nature of the Secure Communities program by clarifying that jurisdictions “cannot opt out” of the program); see also Press Release, U.S. Dep’t of Homeland Sec., U.S. Immigration & Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (Mar. 28, 2008), available at <https://www.ice.gov/news/releases/0804/080414washington.htm> (adding that one of the most important features of the plan is the distribution of integration technology that will link local law enforcement agencies to DHS and Federal Bureau of Investigations (FBI) biometric databases).

communities—as Arizona did in Senate Bill 1070 (S.B. 1070),<sup>179</sup> which delegates immigration enforcement powers to local Arizona police and authorities.<sup>180</sup> Under the guise of national security concerns and “protecting our borders” hype, Secure Communities and S.B. 1070 have operated to disproportionately target immigrants of color for arrest, incarceration, and eventual removal from the country.<sup>181</sup> Recognizing that immigrants of color are perpetual law enforcement targets in the implementation of these laws, scholars and activists have rallied against the provisions,<sup>182</sup> asserting that the measures unconstitutionally deputize local law enforcement regimes with federal immigration authority and serve as a proxy for racial profiling practices.<sup>183</sup> Thus, although neither federal nor local laws

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179. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). The U.S. Supreme Court invalidated most of S.B. 1070’s provisions but upheld a provision that established a local and federal immigration partnership. *See Arizona v. United States*, 132 S. Ct. 2492, 2507–10 (2012) (providing that if a state officer makes a lawful arrest, the officer may contact ICE to verify the arrestee’s immigration status before the person is released).

180. *See generally* Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010) (discussing the central legal issues raised by S.B. 1070, such as those involving “federalism, criminal law and procedure, and interaction with existing law”).

181. *See* Ramos, *supra* note 176, at 341 (concluding that communities intimidate residents with the Secure Communities program by placing “people [typically] unnoticed by ICE [in] removal proceedings,” thereby “creat[ing] an atmosphere of fear, and . . . a group of even further second-class citizens”); Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 674 (2011) (surveying recent federal and state measures, including Secure Communities, which have “expanded and entrenched a ‘criminal alien’ social construct that both legitimizes and increases the harsh measures against Latinos”); William E. Gibson, *Deportation Program Targets Felons but Nets Those Without Criminal Records*, SUN SENTINEL (Feb. 16, 2014), [http://articles.sun-sentinel.com/2014-02-16/news/fl-florida-deportations-spark-pushback-20140213\\_1\\_secure-communities-criminal-records-deportations](http://articles.sun-sentinel.com/2014-02-16/news/fl-florida-deportations-spark-pushback-20140213_1_secure-communities-criminal-records-deportations) (reporting that nearly 6,000 people who did not have known criminal records were deported from Florida over the last five years because of Secure Communities).

182. *See, e.g.*, Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants’ Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011) (asserting that S.B. 1070 was the legislature’s attempt to rid the state of people who are or appear to be Latino); Ramos, *supra* note 176, at 329 (proffering that the goal of Secure Communities is to propagate racial bias through a flawed correlation of people of Mexican descent with undocumented immigrants); Daniel Denvir, *The ICE Man: Obama’s Backdoor Arizona-Style Program*, SALON (July 17, 2010, 7:01 AM), [http://www.salon.com/2010/07/16/immigration\\_safe\\_communities\\_obama](http://www.salon.com/2010/07/16/immigration_safe_communities_obama) (pointing out the contradiction between the Obama Administration’s condemnation of Arizona’s SB 1070 with its support for the federal Secure Communities program, which in some cases has had the same effect of racializing and criminalizing immigrants as did the Arizona bill); *see also Arizona*, 132 S. Ct. at 2510 (enjoining as federally preempted all provisions of Arizona Law S.B. 1070 except the provision that allowed for officers to check the immigration status of arrestees).

183. *See, e.g.*, Ramos, *supra* note 176, at 318 (asserting that Secure Communities encourages counties and law enforcement officers to engage in racial profiling).

explicitly and formally include racially or ethnocentrically prohibitive provisions, the practical effect of law and policy is to continue to disparately oppress immigrants of color.

As immigrants of color are subordinated by racial and ethnocentric policies inherent within the immigration law system and that permeate broader American societal norms, the policies have a heightened detrimental effect on immigrant domestic violence victims of color. In her seminal work concerning the intersection of marginalizing characteristics that affect women of color who are victims of domestic violence, Kimberlé Crenshaw notes, “Intersectional subordination . . . is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.”<sup>184</sup> Thus, the immigrant domestic violence victim in the United States confronts a host of disempowering burdens that heighten her marginalizing experience, including a lack of English proficiency, poverty, and ignorance of the laws and justice system and of the role of police and law enforcement, as highlighted in Part I.<sup>185</sup> Additionally, if she is a person of color or perceived as a person of color, the immigrant victim of domestic violence also contends with the oppressive effects of racialized immigration law and policy regimes. As a result, legislation and policy aimed at *benefiting* these immigrants—like the immigration provisions of VAWA 2013—must battle against these racially motivated systems to ultimately prevail.

Indeed, in his many statements opposing the expansion of provisions for marginalized communities in VAWA 2013 and remarking on the 2012 version (S. 1925), Senator Grassley stated that “[i]f every group is a priority, no group is a priority.”<sup>186</sup> Such commentary, coupled with the misguided belief that immigrant-friendly provisions in VAWA 2013 will perpetuate widespread immigration fraud and lead to “U.S. citizenship for foreign con artists and criminals”<sup>187</sup> ignores the long and deep history of explicit and implicit racism in formal and informal immigration law and policy. To be sure, racist anti-immigrant rhetoric continues to permeate the political environment in the current era of comprehensive immigration reform.<sup>188</sup> In a March 2013 interview regarding his views

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184. Crenshaw, *supra* note 16, at 1249.

185. See *supra* Part I (describing the vulnerabilities of battered immigrants).

186. Press Release, Senator Grassley on VAWA, *supra* note 122.

187. *Id.*

188. See, e.g., Victoria M. DeFrancesco Soto, *Anti-Immigrant Rhetoric Is Anti-Latino*, THE NATION (Feb. 24, 2012, 10:30 AM), <http://www.thenation.com/blog/166442/anti-immigrant-rhetoric-anti-latino#> (observing that the 2012 Republican primary

on immigration reform measures facing Congress, Representative Don Young (R-Alaska) referred to migrant farmworkers as “wetbacks.”<sup>189</sup> Representative Steve King (R-Iowa), a vocal opponent of congressional efforts at comprehensive immigration reform that includes provisions for regularizing the immigration status of undocumented immigrants, declared in a July 2013 interview that “[f]or everyone who’s a valedictorian [in reference to the beneficiaries of the failed DREAM Act], there’s another 100 out there who weigh 130 pounds—and they’ve got calves the size of cantaloupes because they’re hauling 75 pounds of marijuana across the desert.”<sup>190</sup>

Consequently, it is not a stretch to conclude that racist prejudices endure in congressional decision making and that such attitudes inform legislative advocacy, support, and opposition. In VAWA 2013, by attempting to shut out immigrants from an expanded purview of benefits, VAWA critics furthered and bolstered racialized regimes against immigrants of color.

*B. The Immigrant Domestic Violence Victim Is a Woman: How Gender Animus Influenced VAWA 2013*

Compounded with her identity as an immigrant of color, the immigrant domestic violence victim also must contend with gender animus. Although domestic violence affects both men and women, the societal image of the domestic violence victim matches the

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became a contest of who had the biggest “anti-immigrant badge” with “top . . . honor[s]” going to Herman Cain); Eyder Peralta, *University of Texas Students Cancel ‘Catch an Illegal Immigrant Game’*, NPR (Nov. 19, 2013, 9:46 AM), <http://www.npr.org/blogs/thetwo-way/2013/11/19/246122143/university-of-texas-slams-catch-an-illegal-immigrant-game> (reporting the cancellation of a game titled “catch an illegal immigrant” hosted by the Young Conservatives of Texas at the University of Texas designed purportedly to “spark a campus-wide discussion about the issue of illegal immigration” (internal quotation marks omitted)); Dan Roberts, *Immigration Reform Debate Marred by Angry Clashes in US Senate*, THE GUARDIAN (May 9, 2013, 6:05 PM), <http://www.theguardian.com/world/2013/may/09/immigration-debate-clashes-senate/print> (reporting anti-immigrant language used by U.S. senators in a debate over comprehensive immigration reform, including comments by Senator John Cornyn, who spoke about immigrants crossing the Mexican border “wearing turbans,” and Senator Lindsey Graham, who suggested that individuals cross into the U.S. from Mexico because they come from “hell hole[s]” (internal quotation marks omitted)).

189. *Rep. Young Apologizes for Using Term ‘Wetbacks’ in Interview*, FOX NEWS (Mar. 29, 2013), <http://www.foxnews.com/politics/2013/03/29/rep-young-says-meant-no-disrespect-by-using-term-wetbacks> (internal quotation marks omitted).

190. Todd Beamon & John Bachman, *Rep. Steve King Slams Norquist over Attacks on Immigration*, NEWSMAX (July 18, 2013, 6:00 PM), <http://www.newsmax.com/Newsfront/king-norquist-attacks-immigration/2013/07/18/id/515882> (internal quotation marks omitted); see *infra* notes 234–35 and accompanying text (discussing the young people who were intended beneficiaries of the failed Development, Relief, and Education for Minors (“DREAM”) Act legislation as the best and brightest of the immigrant community, including high-achieving students and engaged community members).

historical statistics proving that women are far more often the victims of violence than are men.<sup>191</sup> As such, the immigrant woman domestic violence victim suffers the effects of gender bias that pervade immigration law and policy, specifically, and societal expectations, generally.

First, as a woman in 2014, the immigrant victim of domestic violence confronts an anti-woman political rhetoric. For example, states across the United States have passed a spectrum of legislation restricting women's access to abortion and reproductive health services<sup>192</sup>—laws that affect women uniquely. Under the banner of a pro-life agenda, proponents of such measures have fought against making abortion available only in the case of rape or severe health risks to the mother,<sup>193</sup> arguing, for example, that a rape exception is not needed because a woman cannot biologically get pregnant after

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191. See *Domestic Violence Facts*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE (July 2007), [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) (reporting that eighty-five percent of domestic violence victims in the United States are women).

192. E.g., H.B. 2, 83rd Leg., 2d Sess. §§ 2–3 (Tex. 2013) (banning abortions after twenty weeks, requiring doctors performing an abortion to have admitting privileges at a nearby hospital, and requiring that all abortions be performed in surgical centers); H.B. 2780, 52d Leg., 2d Sess. § 2 (Okla. 2010) (requiring a woman to undergo an ultrasound during which the performing doctor is required to “[p]rovide a simultaneous explanation of what the ultrasound is depicting”), *invalidated by* *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012) (per curiam), *cert. denied*, 134 S. Ct. 617 (2013); see also *State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INST. (Nov. 4, 2014), available at [https://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](https://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf) (reporting that, as of November 1, 2014, 26 states require women seeking an abortion to wait a specified period of time before undergoing the procedure; 42 states prohibit abortions after a certain point in pregnancy, with limited exceptions where an abortion is necessary for the mother's life and health; and 38 states require parental involvement in a minor's decision to have an abortion).

193. E.g., H.B. 819, 2013 Leg., Reg. Sess. § 4(c) (Miss. 2013) (justifying a 2013 Mississippi abortion ban lacking a rape exception by proclaiming that the State of Mississippi would not punish “persons conceived through a sexual assault . . . with the loss of his or her life”); see also SHARON LEVIN ET AL., NAT'L WOMEN'S LAW CTR., “SHUT THAT WHOLE THING DOWN:” A SURVEY OF ABORTION RESTRICTIONS EVEN IN CASES OF RAPE 4 (2013), available at [http://www.nwlc.org/sites/default/files/pdfs/shutthatwholethingdown\\_report\\_final.pdf](http://www.nwlc.org/sites/default/files/pdfs/shutthatwholethingdown_report_final.pdf) (providing examples of states, such as the State of Mississippi, that have attempted to prohibit rape victims from obtaining abortions); Susan Donaldson James, *Oklahoma Abortion Law: No Exceptions, Even Rape*, ABC NEWS (Apr. 29, 2010), <http://abcnews.go.com/Health/okla-abortion-law-exceptions-rape/story?id=10507849> (reporting that a new State of Oklahoma abortion law did not include exceptions for victims of rape and incest). But see Laura Bassett, *Rape, Incest Exceptions Quietly Added to Trent Franks' Abortion Bill*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/06/14/rape-exception-abortion-trent-franks\\_n\\_3443916.html](http://www.huffingtonpost.com/2013/06/14/rape-exception-abortion-trent-franks_n_3443916.html) (last updated June 14, 2013, 5:48 PM) (reporting backlash over U.S. Representative Trent Franks' comment that “the incidence of rape resulting in pregnancy are very low” and Franks' subsequent inclusion of an exception for rape and incest in his proposed federal anti-abortion bill (internal quotation marks omitted)).

being raped.<sup>194</sup> Similarly, in 2012, the Oversight and Government Reform Committee of the U.S. House of Representatives held a hearing on the federal government's decision not to exempt religiously affiliated employers from having to offer health insurance that covers contraception to their employees.<sup>195</sup> The hearing included a panel comprised exclusively of ten men from politically conservative religious organizations.<sup>196</sup> That access to birth control and pregnancy affects women directly, with women bearing the overwhelming effect of such contraceptive decisions, was of little consequence to many legislators.

Alarming in their ignorance, these ideas are fueled by centuries of ideology and practice—both cultural and formalistic—which hold women inferior to men. As Lawrence Sager surmises in discussing the importance of passing VAWA as a remedy for gender discrimination:

For much of our history, women have been disabled by the laws of every state and the national government. Women were excluded from the franchise, from many political offices, from occupations spanning the professional Bar to the tending of bars, and from many elite academic institutions. Women were hobbled in their ability to engage in commercial transactions and, upon marriage, saw their property rights attributed to their husbands. Most importantly for our purposes here, perhaps, women were made explicitly and legally vulnerable to the physical predations of their husbands.<sup>197</sup>

Gender animus is heightened for the victim of domestic violence, who faces these perceptions while also navigating a broader discriminatory societal system. As Sally Goldfarb notes, this intersection between the gender (women) status of domestic violence

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194. See John Eligon & Michael Schwartz, *Senate Candidate Provokes Ire with 'Legitimate Rape' Comment*, N.Y. TIMES (Aug. 19, 2012), [http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html?\\_r=0](http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html?_r=0) (reporting Representative Todd Akin's assertion that "[i]f it's a legitimate rape, the female body has ways to try to shut that whole thing down" (internal quotation marks omitted)).

195. Laura Bassett & Amanda Terkel, *House Democrats Walk Out of One-Sided Hearing on Contraception, Calling It an 'Autocratic Regime'*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out\\_n\\_1281730.html](http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out_n_1281730.html) (last updated Feb. 16, 2012, 2:00 PM). In the summer of 2014, the U.S. Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.* held that a federal regulatory mandate requiring corporations to provide their employees with health insurance coverage for contraceptive methods that the companies' owners sincerely believe facilitate abortions substantially burdened the free exercise of religion. 134 S. Ct. 2751, 2759 (2014).

196. Bassett & Terkel, *supra* note 195.

197. Lawrence G. Sager, *Congress's Authority to Enact the Violence Against Women Act: One More Pass at the Missing Argument*, 121 YALE L.J. ONLINE 629, 631–32 (2012) (footnotes omitted).

victims is compounded by the gender discrimination women face, generally and specifically, as a result of their identity as domestic violence victims.<sup>198</sup> Indeed, VAWA was explicitly promoted in part on the premise that domestic violence affected women more critically because of pervasive societal gender discrimination. Goldfarb, for example, expertly summarizes how members of Congress lobbied for VAWA 1994 by touting how violence against women amounted to gender inequality, resulting in higher rates of female poverty and homelessness while also restricting women's agency.<sup>199</sup> That VAWA at its inception contemplated gender discrimination underscores the importance that identity as a woman plays for the victim of violence.

Similarly, immigration law and policy has historically embraced a gender divide, positioning women at a disadvantage in procuring and retaining immigration benefits. Much like the formalized racist provisions of the nineteenth and twentieth centuries discussed above,<sup>200</sup> early immigration law and policy also contained explicitly sexist discriminatory provisions. With its origins in the legal doctrine of coverture in which women were essentially considered property of their husbands and were unable to act independently in the eyes of the law,<sup>201</sup> early immigration law contained provisions that formally discriminated against women, including both foreign nationals looking to immigrate and U.S. citizen women.<sup>202</sup> Until the provisions

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198. See Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U.J. GENDER SOC. POL'Y & L. 251, 251–52 (2003) (arguing that domestic violence “occurs on a continuum” with other types of discrimination, including workplace inequality and deprivation of reproductive rights).

199. *Id.* at 255–57. Professor Goldfarb further notes that, to successfully argue that Congress had power to implement VAWA under the Commerce Clause, Congress had to prove that “violence undermines women’s ability to function as economic actors and exacerbates their economic inferiority to, and dependency on, men.” *Id.*

200. See *supra* notes 155–70 and accompanying text (discussing early U.S. laws explicitly restricting immigration based on race).

201. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*442 (clarifying that under the law of coverture, the woman, a “*feme-covert*,” was incorporated or consolidated into the legal entity of her husband during their marriage); see also Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 596 (1991) (explaining that under the law of coverture, married women could not, among other things, make contracts, independently sue or be sued, or make a will); Marisa Cianciarulo, *U.S. Immigration Law: Where Antiquated Views on Gender and Sexual Orientation Go to Die*, 55 WAYNE L. REV. 1897, 1897–99 (2009) (describing the history of gender inequality in U.S. immigration law).

202. See Calvo, *supra* note 201, at 600–01 (discussing how the law of coverture was incorporated into early immigration laws to give a husband dominance and control over his alien or immigrant wife and explaining that a noncitizen woman seeking lawful status encountered restrictions rooted in the popular belief that wives were subservient to their husbands); Cianciarulo, *supra* note 201, at 1898 (explaining that gender inequality in U.S. immigration has taken many forms, from “blatant discrimination . . . [to] facially neutral laws . . . [with] a disparate impact based on sex”).

of VAWA 1994 allowing for a self-petitioning process for certain battered immigrants,<sup>203</sup> foreign national women were beholden to their husbands' actions in allowing for their immigration to the United States.<sup>204</sup> Moreover, only those foreign national women who themselves could be citizens—i.e., only white women—could naturalize through their U.S. citizen husbands.<sup>205</sup> Similarly, U.S. citizen women were at one time stripped of their citizenship if they married foreign nationals ineligible for citizenship.<sup>206</sup> As Ian Haney López observes, this law (partially repealed in 1922) had a distinctly oppressive effect on U.S. citizen white women who wished to marry foreign nationals of color who were themselves forbidden entry into the ranks of U.S. citizenship.<sup>207</sup>

Although VAWA and its provisions for immigrants heralded an appreciation for the plight of women<sup>208</sup> and the explicitly sexist discriminatory provisions of immigration law have been repealed,<sup>209</sup> immigration law and policy continues to disproportionately disadvantage women. As discussed above, the 1986 Immigration Marriage Fraud Amendments, which purported to address a proliferation of sham marriages for immigration benefits,<sup>210</sup> disproportionately affected and targeted women who were dependent

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203. See *supra* notes 48–49 and accompanying text; see also *supra* note 56 and accompanying text (noting that even in VAWA, the domestic violence victim still must be married to the abuser to qualify for relief).

204. See LÓPEZ, *supra* note 155, at 33 (citing Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 1604) (explaining that under an 1855 Act of Congress, “a foreign woman automatically acquired citizenship upon marriage to a U.S. citizen, or upon the naturalization of her alien husband”).

205. *Id.*

206. See *id.* at 34 (citing Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228) (providing that American women who married foreigners were required to take their husband's nationality).

207. *Id.* (citing Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1021, 1022) (explaining that although Congress repealed the 1922 law, women who married non-white foreigners were still stripped of their citizenship until 1931); see also *Kelly v. Owen*, 74 U.S. 496, 498 (1868) (explaining that under the 1855 Act only “free white women” could gain citizenship by marrying U.S. citizens); Cianciarulo, *supra* note 201, at 1898 (listing the 1855 Act as one example of gender inequality that women have faced under U.S. immigration law); Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 161 (1996) (arguing that these race-based laws penalized women for marrying non-white citizens).

208. See *supra* notes 32–36 and accompanying text (describing how VAWA created a self-petitioning process for battered immigrant women); see also Cianciarulo, *supra* note 201, at 1898 (noting the various ways in which immigration law has moved towards but not completely achieved gender equality).

209. See LÓPEZ, *supra* note 155, at 34 (indicating that prior to the repeals, “marriage to a non-White alien by an American woman was akin to treason against this country”).

210. See *supra* notes 29–30 and accompanying text.

on their citizen or LPR husbands for immigration benefits.<sup>211</sup> Similarly, the amnesty program of the 1986 IRCA disproportionately advantaged men,<sup>212</sup> who were more often employed in the agricultural industries that were targeted for benefits in IRCA amnesty. Undocumented women, on the other hand, were more often employed in domestic industries (when they could work outside of the home) and thus could rarely qualify for IRCA amnesty under the eligibility provisions.<sup>213</sup>

In more recent congressional and public debates over proposed comprehensive immigration reform legislation, advocates for women immigrants have voiced concern over proposals that would give disproportionate advantages to immigrant men over women, including proposals that allocate more visas for highly-skilled immigrants in the science, technology, engineering, and math fields.<sup>214</sup> Because these coveted visas target immigrants with high levels of education, they favor men, who regularly achieve higher levels of education than women in many countries around the world.<sup>215</sup> The principal beneficiaries of these visas (again, mostly men) can petition for their spouses as derivative beneficiary visa

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211. See, e.g., Calvo, *supra* note 201, at 607 (suggesting that the IMFA gave the citizen or LPR husband even greater “power” over his spouse’s immigration status); Crenshaw, *supra* note 16, at 1247 (concluding that under these circumstances, noncitizen victims of domestic violence were more likely to remain married to their abusers).

212. See Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN’S L.J. 138, 205 (2004) (noting the gender disparity in the immigrants who were granted amnesty under IRCA and describing the large wave of family members and significant others who came to the United States seeking family reunification after IRCA granted amnesty to 2.7 million immigrants).

213. See Mendelson, *supra* note 212, at 205–06 (arguing that specific IRCA provisions offering legalization to agricultural workers benefited male immigrants because agricultural workers are primarily male, noting that IRCA did not include a similar provision for women who work in homes, and suggesting that on the whole, IRCA granted more amnesty to men); Laura E. Enriquez, *Gendered Laws: VAWA, IRCA and the Future of Immigration Reform*, HUFFINGTON POST (Mar. 7, 2013, 3:56 PM), [http://www.huffingtonpost.com/laura-e-enriquez/domestic-violence-immigration\\_b\\_2793828.html?](http://www.huffingtonpost.com/laura-e-enriquez/domestic-violence-immigration_b_2793828.html?) (arguing that IRCA’s provisions requiring proof of work status disadvantaged undocumented women who do not often have bills or accounts in their name and who tend to work in private homes that do not want to confirm their employment).

214. See Ruth Tam, *Can Women Give Immigration Reform the Boost It Needs?*, WASH. POST (Nov. 20, 2013), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/11/20/can-women-give-immigration-reform-the-boost-it-needs> (observing that the so-called “gang of eight” tasked with drafting comprehensive immigration reform in the U.S. Congress in 2013 was comprised of all men (internal quotation marks omitted)).

215. *Id.*; see also Cianciarulo, *supra* note 201, at 1905–06 (noting the ways that immigration law continues to disfavor and oppress women, such as in the U and T visa implementation and the process for refugee status determination).

holders.<sup>216</sup> Yet, current regulations prohibit many of these derivative visa holders from lawfully working,<sup>217</sup> thereby keeping these spouses (again, mostly women) financially dependent on their husbands.

Political conservatives opposing the VAWA 2013 reauthorization continued to bolster formalized gender oppression by challenging what had for decades been largely noncontroversial legislation. As noted, by 2013, debates had erupted over various legislative programs targeting the rights of women. Acknowledging this anti-woman environment, Senator Dianne Feinstein (D-California) placed the VAWA 2012–2013 partisanship within this broader context, noting, “This is part of a larger effort, candidly, to cut back on rights and services to women. . . . We’ve seen it go from discussions on *Roe v. Wade*, to partial birth abortion, to contraception, to preventive services for women. This seems to be one more thing.”<sup>218</sup> Though heralding themselves as pro-women, especially in light of Republican losses among women voting constituencies in the most recent elections,<sup>219</sup> the votes against VAWA 2013 reauthorization aligned more closely with anti-woman critics, who ascribe to viewpoints that VAWA is grounded in feminist-created stereotypes, such as that “men are naturally batterers and women are naturally victims.”<sup>220</sup>

Thus, even in 2014 (but buoyed by centuries of historical practice), the immigrant domestic violence victim in the United States confronts her status as woman in social, political, and legislative discriminatory systems. As a woman and a woman of color, she is at a critical intersection of subordinated identity, facing disempowering burdens that heighten her marginalizing experience. VAWA 2013, focused on benefiting this population, suffered the political effects of this oppression.

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216. 8 U.S.C. § 1101(a)(15)(F), (H) (2012); see 8 C.F.R. § 214.2(f)–(g) (2014) (allowing certain principal visa holders to petition for their derivatives).

217. See, e.g., 8 C.F.R. § 214.2(f)(15)(i), (h)(9)(iv) (prohibiting H and F visa holders’ spouses and minor children from working in the United States).

218. Jonathan Weisman, *Women Figure Anew in Senate’s Latest Battle*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/15/us/politics/violence-against-women-act-divides-senate.html>? (internal quotation marks omitted).

219. See *id.* (discussing efforts among Republicans to gain electoral support from women and, in particular, the political difficulties with women voters that accompany opposing VAWA reauthorization).

220. Phyllis Schlafly, *Day of Reckoning for Violence Against Women Act*, TOWNHALL (Feb. 7, 2012), [http://townhall.com/columnists/phyllisschlafly/2012/02/07/day\\_of\\_reckoning\\_for\\_violence\\_against\\_women\\_act/page/full](http://townhall.com/columnists/phyllisschlafly/2012/02/07/day_of_reckoning_for_violence_against_women_act/page/full).

C. *The Immigrant Domestic Violence Victim Is Not a Citizen: How Citizen Outsider Identity Influenced the VAWA 2013 Debate*

Correspondingly, American citizenship-centric laws and societal structure work to create another system of oppression against immigrant victims of domestic violence. Much like the racial and ethnic discriminatory practices that have prevented immigrants of color from achieving access to and propriety in mainstream American society,<sup>221</sup> the broader constructs of citizenship as the winner among members of the polity mean that the immigrant—the literal noncitizen—is the perpetual loser. Thus, her status as a citizen outsider serves as yet another facet of her subordinated identity, with concomitant results in the VAWA 2013 political process.

To understand the ways that citizenship enjoys superior cultural, social and political status as compared to non-citizenship, one must consider a preliminary basic question: what does “citizenship” even mean? Scholars have confronted this question, defining and exploring the contours of the concept of citizenship, and have come out with many themes and frameworks from which to understand its complexities.<sup>222</sup> From a rights and privileges framework, citizenship confers especially important rights—a literal place in the societal polity—to those afforded its breadth.<sup>223</sup> Here, citizenship entails that those within its membership will benefit from certain formalized rights and privileges.<sup>224</sup> Others have defined the concept of citizenship as evoking a measure of civic or political engagement.<sup>225</sup> Indeed, this “engaged citizen” framework has been a topic of scholarship, public discussion, and debate through the Development, Relief, and Education for Minors (“DREAM”) Act legislative journey and ultimate failure<sup>226</sup> and President Obama’s 2012 conferment of

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221. See *supra* Part III.A (discussing historical immigration law with racial and ethnic requirements that prevented immigrants of color from gaining citizenship).

222. E.g., Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 452, 455 (2000) (noting the various mechanisms analysts have proposed to distinguish between diverse understandings of citizenship and arguing that “citizenship can fairly be said to exceed the bounds of the nation to some degree, though the process of denationalization has occurred more extensively and meaningfully in some domains than in others”).

223. See *id.* at 464–65 (explaining how political theorists Judith Shklar and Rogers Smith have both stated that “citizenship refers to an individual’s ‘standing’ in society” and have remarked on how the law structures the contours of that standing).

224. *Id.* at 465.

225. See *id.* at 470 (explaining that political theorists commonly use the term “citizenship” to “denote[] active engagement in the life of the political community”).

226. See Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 82–83 (2013) [hereinafter Olivares, *DREAM Act Redux*] (describing parallels between immigrants targeted by the DREAM Act and the

temporary relief from deportation through the Deferred Action for Childhood Arrivals (DACA) program.<sup>227</sup> In those examples, immigrant advocates have characterized potential DREAM Act (“DREAMers”) and DACA beneficiaries as citizens in a civic and/or politically engaged sense<sup>228</sup> because many of them risked being removed from the country for speaking out in favor of the legislative proposals.<sup>229</sup>

Third, as a legal construct, citizenship status is especially powerful. In this formulation, a nation-state’s geographic and political borders determine the confines of citizenship of its members.<sup>230</sup> Placing the rights and privileges afforded to citizens within the responsibilities of the nation makes sense: although the construction may have some complexities, national citizenship is a well-established concept globally.<sup>231</sup>

In contrast to a grounding of citizenship within borders, other scholars have considered citizenship as evoking a personal,

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employment-based visa system and factors that determine each group’s desirability as prospective U.S. citizens).

227. President Barack Obama, Remarks on Immigration Reform and an Exchange with Reporters (June 15, 2012) (announcing that DHS is allowing young immigrants “who do not present a risk to national security or public safety . . . to request temporary relief from deportation proceedings and apply for work authorization”); see also Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012) [hereinafter DHS Memorandum, *Exercising Prosecutorial Discretion*], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (setting forth criteria for prosecutorial discretion relating to undocumented young people).

228. See Tara Bahrapour, *Students Disclose Illegal Status as Part of Push for Immigration Law Reform*, WASH. POST (July 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072006121.html> (describing undocumented students’ arrest in Washington, D.C. for protesting in support of the DREAM Act); *DREAM Act Rally in North Carolina Leads to Arrests*, FOX NEWS LATINO (Sept. 7, 2011), <http://latino.foxnews.com/latino/politics/2011/09/07/immigration-rally-leads-to-arrests-at-cpcc> (discussing a DREAM Act protest in which police arrested over a dozen people).

229. See Kate Linthicum, *L.A. Drops Charges Against Westwood Protesters Who Supported DREAM Act*, L.A. TIMES (Mar. 4, 2011), <http://articles.latimes.com/2011/mar/04/local/la-me-protesters-20110304> (discussing the Los Angeles city government’s decision not to prosecute undocumented students arrested in May 2010 for protesting in support of the DREAM Act); Julia Preston, *Illegal Immigrant Students Protest at McCain Office*, N.Y. TIMES (May 17, 2010), <http://www.nytimes.com/2010/05/18/us/18dream.html> (describing how undocumented students—three of whom were arrested—staged a sit-in at Senator John McCain’s Tucson office asking for DREAM Act support).

230. See, e.g., Bosniak, *supra* note 222, at 456 (asserting that the locus of citizenship status is the nation-state and the bond of allegiance that citizenship represents relates to the national political community).

231. See, e.g., *id.* at 456–63 (stating that citizenship is almost always conferred by the nation-state and that nation-state citizenship is recognized internationally and suggesting that the rise of dual and multiple citizenship status in the European Union, for example, would be an exception to the typical practice).

psychological identity, or as Linda Bosniak summarizes, “people’s collective experience of themselves.”<sup>232</sup> Once again, the experience of DREAMers and DACA beneficiaries provides an apt example of this conception of citizenship. Often hailed as the embodiment of the American dream,<sup>233</sup> they are the young people who have been in the United States since an early age but remain in undocumented immigration status.<sup>234</sup> Their ties to the psychological and cultural aspects of American citizenship inform their self-perception as being American even though they remain outside of any formal legal structure.<sup>235</sup>

Although the conceptual frameworks by which to understand citizenship and its contours may differ in application or analysis, what they have in common is a recognition that in a hierarchal construction of rights and privileges, the status of “citizen” affords broader protections than that of alien, immigrant, or noncitizen. As Bosniak notes in discussing the “citizenship as status” framework but which could apply generally to noncitizens: aliens are “outsiders to citizenship” because “they reside in the host country only at the country’s discretion; there are often restrictions imposed on their travel; they are denied the right to participate politically . . . and they are often precluded from naturalizing. Furthermore, they symbolically remain outsiders to membership in the polity.”<sup>236</sup>

Moreover, in the United States, the conferment of this “membership in the polity” is at the discretion of Congress, which creates and drafts the laws defining the membership guidelines.

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232. *Id.* at 479.

233. See Olivares, *DREAM Act Redux*, *supra* note 226, at 80–82 (describing the young people who would have benefited from the passage of the DREAM Act but whose promising futures were dampened by Congress’s failure to pass the DREAM Act).

234. See Keyes, *supra* note 174, at 103 (discussing how the DREAM Act attempts to “create[] a path to citizenship for [individuals] who came to the United States before the age of sixteen, who are still below the age of thirty-five, who have resided in the United States for at least five years, who completed high school [or an equivalent], and who . . . possess ‘good moral character’”).

235. See *id.* at 116 (stating that these young people—dubbed the “DREAMers”—echo old definitions of the American dream, such as opportunity and contribution, in their ideas of what being an American citizen entails); see also Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 *YALE J.L. & HUMAN.* 110, 115–18 (2011) (positing that people who are most rooted in American society deserve formalized citizenship pursuant to her concept of “*jus nexi*” citizenship).

236. Bosniak, *supra* note 222, at 451 n.10, 461–62, 489–90 (arguing that, no matter what framework one uses, the concept of citizenship is always one of paramount importance that performs an enormous legitimizing function and that the word “citizenship” “communicates the highest political value”); see also Ediberto Román, *The Citizenship Dialectic*, 20 *GEO. IMMIGR. L.J.* 557, 567–68 (2006) (articulating that while the grant of citizenship is significant because it guarantees certain constitutional rights, its real importance lies in its identification of the individual as “an equal member of the political community”).

Through the complex network of laws, regulations, and policies delineating the rules and procedures affording U.S. citizenship for immigrants seeking to naturalize, Congress creates the steps and gates along the way. It is only through the congressional process that an immigrant can achieve citizenship status through naturalization.<sup>237</sup>

Whichever conception of citizenship is utilized, the power of citizen status affects legislative processes and outcomes, as evidenced by the VAWA 2013 debates. As inclusion in the citizen club confers certain rights and benefits, exclusion from its network results in hostility<sup>238</sup> and a suppression of benefits through the legislative process.<sup>239</sup> Thus, while the immigrant domestic violence victim—a woman of color and a noncitizen—experiences the personalized subordinating experience of her intersected identities, the systemic marginalization of these identities affects the larger political process.

Indeed, VAWA immigrant beneficiaries fall outside of the societal and political preference for specialized treatment of U.S. citizens. But VAWA is not limited to undocumented immigrants: many VAWA self-petitioners maintain lawful immigration status.<sup>240</sup> Thus, the citizen/noncitizen dichotomy in affording rights to the former and restricting the rights and benefits of the latter is not necessarily a debate concerning illegal immigration or the purported scourge of “illegal aliens” on the United States. The vitriol and nativism surrounding the illegal immigration debate, however, permeated into the discussions about VAWA provisions. For example, lawful immigrants who would be well on the road toward naturalization (but for the abuse of their LPR or U.S. citizen petitioning spouse) are still deemed outside of the polity and thus unworthy of the benefits of citizenship. The power of the immigrant outsider is especially

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237. See, e.g., Marouf, *supra* note 14, at 135 (“The categories of ‘legal’ and ‘illegal’ immigrant are . . . fluid because Congress . . . constantly changes the criteria for determining when permanent residents should lose their status.”); see also DHS Memorandum, *Exercising Prosecutorial Discretion*, *supra* note 227 (explaining that beneficiaries under the Deferred Action for Childhood Arrivals program are not afforded a path to U.S. citizenship).

238. See, e.g., Bosniak, *supra* note 222, at 503 (opining that those who do not enjoy the citizenship of “one of the world’s most privileged nations” tend to view those privileged nations “as deeply exclusionary and self-aggrandizing and sometimes violent institutions”).

239. See Olivares, *Recessionary Politics*, *supra* note 151, at 383–88 (comparing the successful passage of the State Children’s Health Insurance Program with the failure of the DREAM Act and highlighting that congressional passage of “pure” immigration law legislative proposals has been decidedly harder because of how the measure is lobbied and packaged); see also Keyes, *supra* note 174, at 126 (noting that proponents of the DREAM Act attempted to provide “a different lens,” that of citizen through identity, through which to view these youth).

240. See *supra* Part II.B.1 (outlining the effects of VAWA on immigrant women).

relevant here because the VAWA self-petition eligibility guidelines restrict benefits to those immigrants with familial connections to a U.S. citizen or LPR who would have served as the petitioner in a family-based petition for LPR status.<sup>241</sup> The history of this self-petitioning process contemplates, then, that this particular category of immigrant victim of domestic violence was worthy of VAWA relief only because of this perceived entitlement to the family-based petition process.

Yet in the 2013 VAWA reauthorization debate, the focus was not on the well-established history of the immigration provisions in VAWA. Instead, the rhetoric of VAWA opponents focused on the unproven assertions that VAWA benefits (including the U visa) were regularly and frequently misused to commit immigration fraud, or as Senator Grassley noted, “manipulated as a pathway to U.S. citizenship for foreign con artists and criminals.”<sup>242</sup>

These anti-immigrant politics have a history of legislative obstruction, as Kevin Johnson explored in 1995 concerning Proposition 187, the proposed California law that would have stripped undocumented immigrants of access to the few public benefits they were able to access, including public education.<sup>243</sup> Johnson’s admonitions about the state of anti-immigrant proposals in 1995 call to mind the earliest days of formalized immigration law and policy<sup>244</sup> and ring resoundingly true today:

As some of the more draconian immigration laws exemplify, immigrants historically have been unpopular in the political process. This is even more true today for undocumented immigrants. The unpopularity of immigrants predictably waxes during times of relative economic uncertainty and hardship. . . . When immigrants directly cost taxpayers money through provision of benefits or incarceration (as compared to less clear

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241. See *supra* note 52 and accompanying text (explaining that the self-petition process was only available to women married to or divorced from either a U.S. citizen or an LPR).

242. Press Release, Senator Grassley on VAWA, *supra* note 122.

243. Johnson, *Public Benefits and Immigration*, *supra* note 58, at 1515, 1540; see also *Plyler v. Doe*, 457 U.S. 202, 205, 230 (1982) (invalidating a Texas statute that withheld public funding for educating children who had not been legally admitted to the United States, thereby upholding the right to primary public education for all children). See generally Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1769–84 (2009) (discussing a wave of state-enacted post-secondary residency requirements).

244. See *supra* notes 155–62 and accompanying text (discussing harsh provisions in immigration law regarding entry into the U.S. and deportation).

costs, such as job displacement), public antipathy for them grows and they are easy targets.<sup>245</sup>

More recently, the failure of the DREAM Act to pass Congress proved that even the narrative of innocent children could not overcome the political scapegoat that is the undocumented immigrant.<sup>246</sup>

Similarly, in the VAWA 2013 reauthorization debates, attention was drawn away from the decades of success in helping victims of domestic violence and focused instead on the inclusion of the “alien” outsider—and other marginalized people—within the purview of proposed expanded VAWA benefits.<sup>247</sup> Indeed, in the end and to secure VAWA’s passage, proponents of the bill had to eliminate the key provision increasing the 10,000 cap on U visas.<sup>248</sup> Although VAWA 2013 contains important immigrant-friendly provisions,<sup>249</sup> the vociferousness of the debate surrounding the inclusion and expansion of immigrant provisions aptly illustrates the continuing, ironic power of the politically and socially marginalized and disenfranchised immigrant outsider to sway legislation.

#### CONCLUSION

The long history of formal and informal law and policy, which explicitly and implicitly works to further subordinate marginalized communities teaches that, though immigrants in the United States may have recently achieved more widespread acceptance and support, identity politics continue to serve as an oppressive force in the drafting and passing of legislation. From the struggle of undocumented children seeking access to public education in *Plyler v. Doe*,<sup>250</sup> to the vitriol surrounding the “illegal alien epidemic” in California Proposition 187 and Personal Responsibility and Work Opportunity Reconciliation Act rhetoric,<sup>251</sup> to the recent efforts to

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245. Johnson, *Public Benefits and Immigration*, *supra* note 58, at 1541.

246. See Olivares, *Recessionary Politics*, *supra* note 151, at 384–85 (recounting how the narrative of the future of America’s children used by proponents of the DREAM Act could not overcome the stigma of the “illegal alien”).

247. See *supra* notes 119–21 and accompanying text (highlighting the controversy surrounding the inclusion of marginalized groups, such as immigrants, Native Americans, and members of the LGBT community, in the debates).

248. S. 47, 113th Cong. § 805 (2013).

249. See *supra* note 148 and accompanying text (discussing the benefits provided to key groups, including immigrants, by VAWA 2013).

250. See *supra* note 243 and accompanying text (discussing the U.S. Supreme Court decision in *Plyler* upholding the right for undocumented immigrant children to attend public school).

251. See *supra* notes 62–65, 243–44 and accompanying text (discussing Proposition 187, the proposed California law that would have denied undocumented immigrants access to public education, and PRWORA, which prohibited most immigrants from receiving many types of federally-funded benefits).

pass the DREAM Act,<sup>252</sup> the lesson is that the intersectionality of subordinated identities yields impressive clout in influencing legislative progress. In this sense, the reauthorization battle of VAWA 2013 was no different.

What marks the VAWA 2013 political struggle as unique, however, is the previous noncontroversial nature of the Act, including the immigration provisions, which have been part of VAWA since its genesis. But as this Article has shown, even the most noncontroversial legislation struggles against the powerful intersection of identity, which characterizes the immigrant victim of domestic violence in an oppressive political environment. The immigrant domestic violence victim faces tri-layered prejudice in her daily struggles because she is a person of color, a woman, and a noncitizen. This prejudice also permeates the legislative process. As an example of legislation—even one aimed at the most vulnerable among us—VAWA 2013 provides a unique window into how immigrant outsider identity works against otherwise uncontroversial legislation.

In the current calls for immigration reform, much political and public attention has been given to the need for bipartisan movement and cooperation. Advocates for immigrant domestic violence victims, buoyed by the eventual success of VAWA 2013, are working to include provisions that were not passed in VAWA 2013—including the increased annual cap on U visas<sup>253</sup>—into the final immigration reform law. As the debates in Congress and in the broader social and political communities continue on the plight of immigrants in our country and the role that immigrants play in our society, the influence of oppressed identity remains present and powerful.

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252. See *supra* notes 226–35 and accompanying text (highlighting the struggles experienced by proponents of the DREAM Act to get it passed).

253. See H.R. 15, 113th Cong. § 3406 (2013) (increasing the annual cap on U visas from 10,000 to 18,000); see also *The Border Security, Economic Opportunity, and Immigration Modernization Act (H.R. 15) and Immigrant Survivors of Violence*, IMMIGRANT JUST. (Nov. 2013), <http://immigrantjustice.org/sites/immigrantjustice.org/files/Final%20updated%20HR%2015%20one-pager%2011%2018.pdf> (advocating support of provisions to expand the annual U visa cap from 10,000 to 18,000).