

REMEDIES FOR NON-CITIZEN VICTIMS OF DOMESTIC VIOLENCE: A BRIEF HISTORY AND SOME OBSERVATIONS

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INTRODUCTION

This essay addresses the remedies available to immigrant survivors of domestic abuse, in historical context. With what will have to be very broad strokes, I will explain where immigration law began to provide relief to non-citizen victims of domestic violence, and where I hope the law will arrive in the not too distant future.

First, in addition to the multitude of barriers faced by those who seek to free themselves from domestic abuse, immigrants confront yet another hurdle: they may not be present in the United States legally, or their legal residence status may depend upon their relationship with their abuser. Thus, not only does the immigrant fear the abusive partner, spouse, or parent, but also deportation, in perhaps to a country where she has not lived in many years. Moreover, she may risk removal to a country where the government does not or cannot protect its citizens from family violence. For example, the government may condone family abuse, explicitly or implicitly, or the government may perpetrate violence itself. The specter of losing one's children is magnified by the prospect of removal, especially when the children are United States citizens. Often, the survivor does not speak English. Therefore, not only does the immigrant experience the alienation of abuse, but psychological, cultural, and language barriers specific to her otherness.

In the mid 1990s, Congress began to recognize that the traditionally gendered view of eligibility for immigration punished immigrants, especially women. Since then, the law has made great

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strides in fashioning remedies for all those subjected to domestic abuse. Nevertheless, the remedies available to non-citizen domestic violence victims are narrowly defined, inconsistently administered and, particularly in the case of political asylum, stymied by the cultural norms and unfounded fears that poison this country's perception of all immigrant populations.

Usually, a non-citizen permanently immigrates to the United States based upon a family relationship, employment, or refugee status.¹ The current legal system is based, in large part, on the McCarran-Walter Act, enacted in 1952. The survivor's obstacles begin with the Act's nineteen fifties traditionally gendered view favoring the traditional nuclear family structure and patriarchy.

Over half of the legal immigrants to the United States gain lawful permanent residence, or their "green cards," through family relationships.² Of that number, the overwhelming percentage immigrate to the United States through marriage to a United States citizen or lawful permanent resident.³ In 2008, that meant approximately 369,000 new immigrants immigrated to the United States through marriage. In 2007, that category numbered one half million. Those numbers do not include the minor immigrant children who "follow to join" on the parent's visa.⁴ For those immigration benefits based upon employment, the spouse and children's status is also wholly dependent upon the employment of the working parent, who is often the father.⁵ Although statistics for the undocumented are notoriously unreliable, of the estimated thirteen million persons residing in the United States without lawful status, a large percentage apparently live in a traditional family environment.⁶ Accordingly, the immigrant population at risk of domestic abuse is sizeable.

1. *See generally* Allocation of Immigrant Visas, 8 U.S.C. § 1153(a)–(b) (2006).

2. KELLY JEFFERYS & RANDALL MONGER, U.S. LEGAL PERMANENT RESIDENTS: 2007, ANNUAL FLOW REPORT (Mar. 2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf.

3. *Id.*

4. 8 U.S.C. § 1153(d) (2006). This law allows minor unmarried children to immigrate along with their parent without an independent qualifying status and without being counted against the total number of immigrant visas available each fiscal year.

5. *See* JEFFERYS & MONGER, *supra* note 2 (noting that in 2007, out of 1,052,000 total, 58% married, 55% female, and average age 32).

6. *Id.*; JEFFREY S. PASSEL, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION, PEW HISPANIC CENTER (Mar. 21, 2005), <http://pewhispanic.org/files/reports/44.pdf>.

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Before 1990, a person seeking lawful permanent residence in the United States based upon marriage who was subjected to domestic violence could seek help through the criminal justice system, but had virtually no relief available under the immigration laws. Approaching the criminal justice system is intimidating enough, but the government is even more terrifying to an individual present in this country unlawfully and/or who emigrated from a country where the government refused or was unable to protect its citizens from family violence. Accordingly, the victim suffers not only the physical and psychological harms discussed at this conference, but also threats of deportation (“I’ll report you to [the] INS”), because of a spouse’s refusal to follow through on sponsoring papers, and/or the spouse’s refusal to follow through and petition for the victim’s children, whether in the United States or abroad.

Under these circumstances, if a client hinted to her attorney her desire to leave the marriage, or explicitly showed fear of the petitioning spouse, the attorney had to advise the client that without the petitioner’s cooperation, she could not attain lawful immigration status, and the attorney had no remedy to preserve the client’s emotional and physical well-being in the interim. The client would either become subject to removal (deportation) or would have to find another avenue to attain lawful permanent residence. For the most part, the only potential avenue would be through work, a remedy that required a job offer for a position for which there were no available United States workers, and entailed a lengthy process.⁷

In 1986, Congress amended the procedure to gain residence based upon marriage. Previously, once the couple married, the citizen or “legal permanent resident” (“LPR”) spouse “petitioned” to adjust the status of the non-citizen spouse. The petition was filed with appropriate supporting documents, the couple was called for an interview, and assuming all was in order, the non-citizen became a LPR as of the interview date. Accordingly, if the non-citizen were

7. The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255(a) (2006) probably created a narrow opportunity for abused non-citizen spouses to achieve lawful status without the support of the abusive spouse when it enacted an “amnesty” for the undocumented who could prove five years of continuous presence in the United States, among other requirements. Beginning in 1987 and spanning twelve months, the abused spouse could apply in his or her own right if they could document independently the requisite number of years of unlawful residence in the U.S. This may have been difficult if the abused non-citizen were a woman, and the lease, utility bills, etc., the most commonly used forms of proof, were all in the abuser’s name.

suffering abuse and could hold out through the processing, she was in a less precarious position once she left the marriage.

The new procedure was implemented based largely upon inflated fears of rampant fraud in the immigration by marriage process.⁸ Under the new procedure, an initial approval of the petition and a satisfactory interview led to a grant of “conditional residence” only. The non-citizen spouse then had to wait another 18 to 24 months to “lift” the condition, during which time the marriage had to endure to prove that the marriage was viable and not solely for immigration purposes.⁹

Due primarily to lobbying by public interest, grass roots organizations, Congress realized that the new structure contributed to domestic violence problems because the process gave abusers even more power over their victims.¹⁰ At this same time, society was becoming more aware of the prevalence and effects of domestic violence. As a result, in 1990, Congress legally recognized the plight of non-citizen victims of domestic abuse when it amended the Immigration Marriage Fraud Act (“IMFA”) to waive certain requirements for battered women, including the requirement that the petitioning spouse appear.¹¹ Of course, the person seeking legal residence status had to be married, and had to have been granted conditional residence in the first place.

The Violence Against Women Act (“VAWA”) provided the next major remedy. Enacted in 1994, the immigration remedy formerly called “suspension of deportation” and currently called “cancellation of removal” was amended consistent with VAWA to allow the non-citizen to self-petition when a United States citizen or LPR spouse or parent refused to file the relevant family-based petition, or threatened to withdraw the petition, as a means of victimizing the non-citizen.¹² As a corollary, in 1996, Congress amended the bases for removal to include criminal convictions for domestic violence crimes and violating protective orders.

8. See, e.g., *INS Reveals Basis for Fraud Claims*, 65 INTERPRETER RELEASES 26 (Jan. 11, 1988).

9. See 8 U.S.C. § 1186(a) (2006).

10. See Symposium, *Panel One—Empowering Survivors with Legal Status Challenges*, 22 BERKELEY J. GENDER L. & JUST. 304, 319–21 (2007).

11. See, e.g., 8 U.S.C. § 1186a(c)(4)(c).

12. 8 U.S.C. § 1229b(b)(2)–(4).

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The VAWA influenced concept of self-petitioning was a huge step for immigration law. Before its enactment, the only persons who could self-petition for permanent residence were “superstars,” those persons of extraordinary ability, with international acclaim, coming to the United States to work in their particular field.¹³ To allow a victim of domestic violence to qualify for permanent residence, without the cooperation of the qualifying spouse or parent, recognized the particular cruel and permanent effects of domestic violence in immigrant communities.¹⁴ Subsequent amendments¹⁵ broadened the remedy’s availability by softening some of the more onerous evidentiary burdens in the original statute. Most practitioners who represent persons eligible for this relief consider the legislation a tremendous success.¹⁶

Nevertheless, there remained a significant population of non-citizens whose abusers were also non-citizens or who were not legally related to the victim, such as a non-marital partner or a trafficking victim. Similar to the public’s growing awareness of domestic violence, Congress and the public grew more aware of the growth of trafficking in persons from abroad. This category includes so-called mail order wives, persons promised legitimate jobs in the U.S. who, upon arrival, are forced into prostitution, or those, often minors, “purchased” abroad as commodities. In 2000, Congress created the “T” and “U” visas to allow trafficking and domestic violence victims a road to legalizing their status if they cooperated with police investigating such crimes.¹⁷ These visas grant temporary status to cooperating individuals, regardless of any familial relationship with the abuser or trafficker, and after three years of temporary status, the cooperating individuals may seek lawful permanent residence.

T and U visas have not protected as many victims as advocates had hoped. Advocates have raised claims of inconsistent administration by the United States Citizenship and Immigration Services (“USCIS”), and a huge processing backlog stranded many eligible applicants in immigration limbo.¹⁸ Moreover, USCIS first

13. See 8 U.S.C. § 1153(b)(1)(A).

14. Laura Carothers Graham, *Relief for Battered Immigrants Under The Violence Against Women Act*, 10 DEL. L. REV. 263, 265 (2008). This remedy also posed hurdles for the non-citizen, including challenging evidentiary burdens.

15. See 8 U.S.C. § 1229b(b)(2)–(b)(4).

16. Symposium, *supra* note 10.

17. 8 U.S.C. § 1101(a)(15)(T), (U).

18. In a May 22, 2009 memorandum, USCIS pledged to reduce the backlog of U

issued regulations for adjustment from T and U status to lawful permanent residence in December 2008—five years after the initial visa holders became eligible.¹⁹

Outside of these remedies,²⁰ the only alternative for the victim of domestic violence may be political asylum. The scenario shifts here, however, from the non-citizen imprisoned in an abusive relationship in the U.S. to the non-citizen who flees her country of citizenship or residence to seek safe haven here. The political asylum laws in the United States have their origins in the aftermath of World War II, and were enacted primarily to assist individuals fleeing religious and ethnic persecution and/or persecution based on political beliefs.²¹ If political asylum is granted, after one year in that status, the asylee generally may adjust status to lawful permanent residence.²² In the mid-1990s, advocates began to seek relief under the political asylum regime for those who were subjected to domestic violence abroad, and the victims' countries of citizenship or residence either condoned, or were unable to stop, the domestic abuse.²³

The landmark case of Rodi Alvarado brought the plight of domestic violence abroad to the attention of many.²⁴ Ms. Alvarado was 26 years old at the time she fled her marriage in Guatemala after 10 years of the most horrific abuse at the hands of her husband, a Guatemalan soldier. The Guatemalan police and courts refused to “interfere in [her] domestic disputes.”²⁵ The Immigration Judge who

petitions by 10,000 by the end of the current fiscal year (Sept. 30, 2009). Aytes memo, 5/22/09: Response to Recommendation 39, published in Appendix V, pp. 1709–13, 86 Interp Rel no. 23, 6/15/09.

19. Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75540, 75558 (Dec. 12, 2008).

20. Another potentially useful statute was enacted in 2006 when Congress imposed stricter conditions on international marriage brokers. The Act mandates closer scrutiny of men using these agencies' services and requires broad disclosures to women immigrants regarding the laws governing their stays in the United States. 8 U.S.C. § 1375a(a) (2006).

21. *Id.* § 1101(a)(42) (2006).

22. *Id.* § 1159 (2006).

23. See *In re R-A*, 22 I. & N. Dec. 906, 906–10 (BIA 1999); see also *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996) (holding for the first time that female genital mutilation by tribal elders constituted persecution and that women qualified as a particular social group under asylum law).

24. This case has been well written about in countless newspaper and scholarly articles. See, e.g., Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 124–25 (2007); Edwidge Danticat, *A Crime to Dream*, THE NATION, May 2, 2005.

25. *Matter of R-A*, 22 I. & N. Dec. 906, 908–09 (BIA 1999).

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first heard her case granted political asylum based upon the Guatemalan government's failure to protect her as a member of a "particular social group"—women subjected to abuse by their husbands.²⁶ The [former] Immigration and Naturalization Service appealed the decision and prevailed on appeal.²⁷ Then ensued a ten-year procedural roller coaster, ultimately resulting in any decision being held in abeyance, while Ms. Alvarado remained in immigration limbo until now.²⁸

During that ten-year period, the lack of guidance concerning similar claims led to remarkable inconsistency among adjudicators.²⁹ The inconsistencies were also fed by an unfounded fear of hordes of battered women storming the shores of the United States.³⁰ When a non-citizen was granted asylum because of domestic violence abroad, adjudicators strained to compartmentalize the claim under one of the branches of the refugee definition other than "particular social group" for the proverbial fear of floodgates.³¹ For example, a young Moroccan woman brutalized over a period of years by her orthodox Islamic father was granted asylum on the basis of religious persecution; her refusal to adhere to the dictates of Moslem orthodoxy, and the Moroccan government's failure to protect her from persecution on account of "religious" belief compelled the favorable decision.³²

CONCLUSION

What seems most remarkable about this area of law is the progression the law has taken, in a climate that has been particularly harsh for immigrants generally, and the undocumented specifically.

26. *Id.* at 911. The court characterized the group as "Guatemalan women involved intimately with Guatemalan men who believe in male domination of females." *Id.*

27. *Id.*

28. In July 2009, after this talk was delivered, but before this article was published, Ms. Alvarado finally prevailed on her claim. She was formally granted asylum on December 15, 2009. 86 Interpreter Releases 3074 (Dec. 21, 2009).

29. Musalo, *supra* note 24, at 126.

30. *Id.* at 132–33.

31. *Id.* (explaining that the floodgates argument has been refuted by Canada's experience. Canadian refugee law has allowed such claims since 1993 and has not seen its borders overrun by domestic violence victims from around the world.)

32. Matter of S-A, 21 Immig. Rptr. B1-179 (BIA 1999) (Lexis BIA & AAU Non precedent Decisions). The court did not address the domestic violence/particular social group claim.

The progress achieved in this narrow slice of immigration law for those abused by persons in the U.S. far outpaces any progress made for other categories of non-citizens, including the asylum arena and the undocumented generally. Congress appears less hesitant to act here and displays a level of empathy not shown to other non-citizen groups, whether it be the potential beneficiaries of the Development, Relief and Education for Alien Minors Act (“DREAM Act”), which has been raised and rejected in every session of Congress since 2001,³³ or even to the non-citizen families of those who perished on September 11, 2001.³⁴

That victims of domestic violence have been treated so generously may indicate several phenomena: that politically and socially, immigrant victims of domestic violence garner more sympathy than the public’s perception of the “ordinary” non-citizen; or that the stigma of non-citizenship or “illegality” is vitiated by suffering domestic violence; or that females are more deserving of protection than impoverished males from other cultures. Some attribute this phenomenon to the organized and extensive activism by immigrant advocates,³⁵ but that cannot be the sole factor at work here. The public may be more educated today about the effects of living with domestic violence, but still entertains many false perceptions about the undocumented and/or the non-citizen. Perhaps, this is a social label people can relate to. In any event, society’s willingness to extend remedies to these individuals, regardless of immigration status, has achieved tremendously positive results for many who believed their situation to be hopeless.

33. See, e.g., American Dream Act, H.R.1751, 111th Cong. (2009).

34. The families of the WTC victims negotiated for seven years before they were granted temporary immigration status benefits in 2008. Kirk Semple, *Visas for 15 Who Lost Relatives on 9/11*, N.Y. TIMES, Aug. 15, 2008, available at <http://www.nytimes.com/2008/08/16/nyregion/16immig.html>.

35. *Symposium: Panel One-Empowering Survivors with Legal Status, Challenges*, 22 BERKELEY J. GENDER L. & JUST. 304, 319–21 (2007).