

Mr. MAZZOLI. Mr. Myers.

Mr. MYERS. Thank you, Mr. Chairman.

Mr. MAZZOLI. Excuse me, I'm sorry, Ms. Davis is actually listed next. We'll go to Ms. Davis and then Mr. Myers.

**STATEMENT OF MARTHA F. DAVIS, STAFF ATTORNEY, NOW LEGAL DEFENSE AND EDUCATION FUND, ACCOMPANIED BY LESLYE ORLOFF, DIRECTOR OF DOMESTIC VIOLENCE, AYUDA**

Ms. DAVIS. Thank you. I'm testifying about section 108.

The battered spouse waiver was intended to enable conditional residents subjected to domestic violence to leave abusive marriages. These women may be physically or psychologically abused. For those experiencing extreme cruelty, their husbands may have confined, demeaned, neglected—particularly in cases of children—them or otherwise abused them. The batterer may be using the petitioning process itself as a vehicle for abuse by threatening to withdraw the petition. And the batterer may threaten to escalate abuse if they seek a divorce or seek help. These are the women and children that the battered spouse waiver is intended to assist.

At the outset, I want to make clear that the relationship between extreme cruelty and physical battering is one of degree, but they are all part of the same continuum. The INS requirement that battered spouses or children submit to a mental examination in order to prove extreme cruelty and qualify for the waiver undermines this purpose of the legislation. Conditional resident women who are in these types of abusive situations should certainly be at least in the same position as conditional resident women who are physically abused. Yet, the INS regulation requires that women experiencing extreme cruelty present the affidavit of a licensed mental health professional in order to even get in the doorway and make the application.

The INS has testified that they have received no complaints from applicants about this requirement. First of all, I want to say that certainly advocacy groups that are concerned about this have complained a great deal on behalf of their clients, and I wanted to introduce Leslye Orloff who is here today from Ayuda, a domestic violence project in D.C. that represents hundreds of battered immigrant women each year. She's available to answer questions specifically about their situations.

Second, the reason the INS hasn't received any complaints is that this requirement actually deters women from applying, so those who would complain can't even mount an application because licensed mental health professionals are simply not available to battered immigrant women. There are language difficulties. There are financial difficulties that confront women who try to obtain these sort of professional affidavits. Relatively few immigrant women actually seek help in battered women shelters because they are more apt to go to family, friends, or churches, as we heard this morning. And even if they do, very few clinics have licensed professionals on staff that could provide these kinds of affidavits. In addition, there are cultural barriers.

More fundamentally, this requirement follows a familiar pattern. Battered women—or, for that matter, any woman—charging abusive behavior, such as rape or sexual harassment—find their own

mental state at issue, rather than the facts of the abuse and the behavior of the abuser.

Other Federal institutions that have to face this issue and make determinations about domestic violence have taken steps to address this question, notably the Federal courts and the U.S. Justice Department, of which the INS is a part. The INS should take advantage of the training models that have been employed by these other institutions on domestic violence rather than denying women access to even apply for the waiver and perpetuating the gender bias in their adjudication of this issue.

There is, in fact, no sound reason for requiring this kind of proof as a prerequisite of establishing extreme cruelty. I'm saying "requiring it." Obviously, you know, in a perfect world, we would submit every piece of evidence we could find, but the problem is actually requiring this in order to even make the application.

The INS doesn't require specific affidavits on political asylum or deportation cases, where it recognizes its responsibility to assess relevant evidence and credibility based on the evidence submitted. That's the nature of an adjudicatory proceeding: That the agency is required to assess credible evidence.

The INS assertion that fraud will increase as a result of this amendment defies credulity. The Married Fraud Act's purpose is not undermined by eliminating the requirement of a mental health affidavit. Applicants must still prove the existence of a bona fide marriage. That's the crux of the Marriage Fraud Act. It's untouched by this change. In addition, I guess the figures that we got this morning indicating that only 84 or 85 applications under the battered spouse waiver have been received since 1991 indicate that this is not a fertile area of fraud. This is an area where women who are desperately in need are using the waiver in exactly the way that it was intended to be used, in order to escape abusive relationships.

Finally, I wanted to make a couple of factual clarifications about the history of this provision, since it's come up earlier in the proceeding. The battered spouse waiver was enacted in 1990. Prior to that time, there was no formal mechanism for the INS to receive applications by battered spouses to try to get a waiver of the application. So what the INS indicated this morning about its procedures for assessing evidence on physical battering prior to 1990 I'm afraid is misrecollection, because there simply was not a formal mechanism prior to 1990 for making those kinds of applications. In 1990, the physical battering and the extreme cruelty provisions were enacted as part of law, and the regulations that we're considering relate to applications that have been made since 1990.

Prior to that time, the only two waivers available were the good faith, good cause termination of marriage waiver and then the waiver available for extreme hardship upon deportation. I, like the other speakers before me, will get back to the committee on what the requirements were for proving those two waivers.

Mr. MAZZOLI. I'd like that very much.

[As of the time of publication, this document had not been received.]

Ms. DAVIS. Thank you.

Mr. MAZZOLI. Thank you, Ms. Davis. That really gets to a point I'm going to talk about in just 1 minute.  
 [The prepared statement of Ms. Davis follows:]

**PREPARED STATEMENT OF MARTHA F. DAVIS, STAFF ATTORNEY, NOW  
 LEGAL DEFENSE AND EDUCATION FUND**

SUMMARY OF TESTIMONY

(1) Section 108 clarifies Congressional intent that the battered spouse waiver be available to individuals subjected to either physical battering or extreme cruelty. Unless this clarification is made, INS regulations will continue to effectively deny waivers to immigrant women who are subjected to extreme cruelty by imposing an impossibly high standard of proof, i.e., the requirement of an affidavit of a licensed mental health professional. Not only is such an affidavit beyond the means of most immigrant women, it is often impossible to find mental health professionals with appropriate language skills to examine clients. Further, in many instances mental health counselling violates cultural taboos that women cannot overcome. These barriers are particularly insuperable for women who have not left the abusive relationship or who have fled to friends or relatives rather than to a professionally-staffed shelter.

(2) The claim that affidavits of licensed mental health professionals are necessary to enable INS officers to make a determination of extreme cruelty is flawed. INS officers routinely apply standards such as "extreme hardship," and "well-founded fear of persecution." No requirement of affidavits is used to deter applications in those instances. Instead, the INS recognizes that it must assess the evidence that is presented to it, based on its own determination of credibility.

(3) The INS assertion that a mental health professional's affidavit is necessary to detect fraud is also a red herring. The potential "fraud" addressed in the Marriage Fraud Act is in the underlying marriage, not in any claim of abuse. Permitting immigrant women to apply for a battered spouse or child waiver based on credible evidence of extreme cruelty will in no way undermine the INS determination of the marriage's bona fides.

(4) The INS rule mandating a licensed mental health professional's affidavit in order to prove "extreme cruelty" is part of a pattern of decisionmakers according women diminished credibility based on gender stereotypes. The findings of the California Judges Survey of all 1500 judges in that state dramatically demonstrate that gender influences the way adjudicators accord credibility to victims of domestic violence. Responding to the question, "In a proceeding involving allegations of domestic violence, supporting declarations and testimony are often exaggerated," fifty-three percent of the male judges agreed or strongly agreed with this statement. Only twenty-five percent of the female judges took this position while seventy-five percent of them disagreed or strongly disagreed. The solution to this "gender-gap" in credibility determinations is not to impose additional proof requirements to deter applicants, but to train adjudicators to understand domestic violence and to overcome their own biases in making determinations.

INTRODUCTION

Mr. Chairman and Members of the Subcommittee:

On behalf of the NOW Legal Defense and Education Fund ("NOW LDEF"), we would like to thank the Subcommittee for the opportunity to testify today. Founded in 1970 by the leaders of the National Organization for Women, NOW LDEF is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to secure equal rights. We are particularly concerned about the intersection of violence against women and the rights of immigrant women, and we are active members of the New York-based Network for the Rights of Immigrant Women, a group of service providers, women's organizations and individuals working for the rights of immigrant women.

On May 17, 1991, the Immigration & Naturalization Service ("INS") issued an interim rule implementing the "battered spouse and child waiver" to the Marriage Fraud Act,<sup>1</sup> enacted as part of

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<sup>1</sup> 56 Fed. Reg. 22635-38 (1991) (codified at 8 CFR § 216.5)

the Immigration Act of 1990. Among other things, this rule defines the terms "battered" and "extreme cruelty" for purposes of the waiver, and sets out guidelines and requirements for proof of these elements.<sup>2</sup>

This interim rule has had and will have an enormous impact on the safety and well-being of immigrant women and children. In particular, as discussed below, the rule thwarts Congressional intent in enacting the waiver by imposing an impossibly high standard of proof for establishing extreme cruelty such as confinement, neglect, kidnapping and threats of violence. The INS rule effectively denies the benefits of the waiver to women subjected to extreme cruelty, solely because they lack access to a licensed mental health professional.

#### Background Of Waiver And Description Of Regulations

The battered spouse waiver was enacted in recognition of the serious problem posed by domestic violence against immigrant women and children, and the role of spousal sponsorship requirements in facilitating that violence. Following the passage of the Immigration Marriage Fraud Act of 1986, it became apparent that, because the Act gave the citizen or resident spouse enormous control over the conditional resident's immigration status and thus the ability to live and work in the

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<sup>2</sup> Additional issues raised by the interim rule are discussed in Davis & Calvo, "INS Interim Rule Diminishes Protection for Abused Spouses and Children," 68 Interpreter Releases 665 (June 3, 1991). See also Calvo, "Spouse Based Immigration Laws: The Legacies of Coverture," San Diego L. Rev. (forthcoming, 1992).

United States, some citizens and residents used the requirements of the Act as a means to perpetuate domestic violence and abuse.<sup>3</sup>

Congress reacted by passing, as part of the Immigration Act of 1990, an additional waiver available in instances of abuse of the conditional resident or a child by the citizen or resident spouse.<sup>4</sup> The conditional resident qualifies for the abuse waiver by showing that she entered into the marriage in good faith and that she or a child was subject to battering or extreme cruelty by the citizen or resident spouse.<sup>5</sup>

The INS regulations implementing the abused spouse or child waiver defines the statutory terms "battered" and "extreme cruelty" together as including (but not be limited to) "any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury." It further states that "psychological or sexual abuse or exploitation, including rape, molestation, incest or forced

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<sup>3</sup> 36 Cong. Rec. H8642 (daily ed. Oct. 2, 1990 (statement of Rep. Louise Slaughter (D-N.Y.)). It is worth noting that a large number of abused immigrants whose spouses refuse to file an initial petition on their behalf cannot obtain conditional resident status and are unaffected by the availability of the battered spouse waiver. Instead, they will be able to leave these abusive relationships only if Congress enacts new legislation permitting a waiver of the initial sponsorship requirement upon proof of abuse.

<sup>4</sup> In addition, under the 1990 Act, a waiver applicant can show that she entered into the marriage in good faith but that the marriage has been terminated. She no longer need demonstrate that the marriage was terminated for good cause. INA § 216(c)(4)(B).

<sup>5</sup> INA § 216(c)(4).

prostitution" will be considered "acts of violence."<sup>6</sup>

Despite this joint definition, the regulation provides different criteria for evidence demonstrating "physical abuse" and evidence demonstrating "extreme mental cruelty," imposing burdensome requirements only in the latter instance.<sup>7</sup> A waiver application based on extreme cruelty must be supported by the affidavit of a licensed clinical social worker, psychologist or psychiatrist.<sup>8</sup> In contrast, to prove physical abuse, a waiver applicant may submit evidence including, but not limited to, reports and affidavits from police, judges, medical personnel, school officials and social service agency personnel.<sup>9</sup>

The requirement of a mental health affidavit to prove extreme cruelty undermines the Congressional intent that the battered spouse waiver should "ensure" that neither a spouse nor a child would be "entrapped in the abusive relationship by threat of losing their legal status."<sup>10</sup>

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<sup>6</sup> 8 CFR § 216.5(e)(3)(i).

<sup>7</sup> "Extreme mental cruelty" is not a term from the statute, which refers to "extreme cruelty."

<sup>8</sup> 8 CFR § 216.5(e)(iv)-(vii).

<sup>9</sup> 8 CFR § 216.5(e)(3)(iii). The open-ended wording of these regulations indicates that an applicant might also rely on her own affidavit or testimony of other witnesses.

<sup>10</sup> H.R. Rep. No. 723 at 78. In approving the new waiver, the House Judiciary Committee acknowledged that in many cases there are obstacles preventing a victim of domestic violence from initiating a divorce, such as fear of further physical violence or lack of resources to pay a lawyer. H.R. Rep. No. 723 at 51. See also 136 Cong. Rec. 8642 (daily ed. Oct. 2, 1990) (statement of Rep. Louise Slaughter). The House report also made it clear that a wide variety of evidence should be accepted to support the

The Pervasiveness Of Domestic Violence

The Attorney General of the United States as well as others have recognized that domestic violence, particularly wife abuse, is a serious problem in the United States.<sup>11</sup> An estimated 3 to 4 million American women are battered each year by their husbands or partners.<sup>12</sup> Ninety-five percent of the victims of domestic violence are women.<sup>13</sup>

Not surprisingly, abuse is also a fact of life in many immigrant families. A recent survey conducted by the San Francisco-based Immigrant Women's Task Force of the Coalition for Immigrant and Refugee Rights found that 20% of the Filipina and 34% of the Latina women surveyed had been subjected to either physical, emotional or sexual abuse by their domestic partner.<sup>14</sup> Domestic violence and spousal abuse is also a serious problem in Asian communities. According to one survey of 150 Korean immigrant women, 60% had been abused by spouses.<sup>15</sup> Some experts

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waiver application and that the Attorney General's discretion to decide to deny the waiver would be limited to rare and exceptional circumstances. Id. at 78-79.

<sup>11</sup> Attorney General's Task Force on Family Violence, U.S. Department of Justice, Final Report 2 (1984).

<sup>12</sup> E. Stark, "Wife Abuse in the Medical Setting" (1981).

<sup>13</sup> Bureau of Justice Statistics, Report to the Nation on Crime and Justice (1983).

<sup>14</sup> Hogeland & Rosen, Dreams Lost, Dreams Found: Undocumented Women in the Land of Opportunity 15-16 (1990).

<sup>15</sup> Ramirez, "Violence at Home Grips Alien Women," San Francisco Examiner, March 10, 1991, A20, col.1. See also Lin, "Is INS Hinderling Abused Wives?," New York Newsday, July 8, 1991, p.21, col.1.

speculate that the experience of immigration, as well as different gender roles and expectations in a new country, aggravate spousal abuse.<sup>16</sup>

While each situation is different, spousal abuse often begins gradually. Seemingly innocent tensions or disagreements are followed by threats and mental cruelty, finally culminating in physical violence.<sup>17</sup> Thus, in those instances where psychological, rather than physical, abuse is present, victims may be at risk of serious harm, either because of the real possibility of physical violence in the future or because of the harmful effects of psychological abuse itself.

#### The Realities Facing Immigrant Women

Women who must depend upon a sponsoring spouse for their immigration status are particularly vulnerable to exploitation and abuse within their marriage.<sup>18</sup> Battering spouses may use their control over their victim's immigration status to coerce

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<sup>16</sup> Jang, "Triple Jeopardy: The Plight of Battered Immigrant and Refugee Women," 19(2) Immigration Newsletter 6 (1990); Banales, "Abuse Among Immigrants," The Washington Post, Sept. 16, 1990, E5.

<sup>17</sup> Congressional Caucus for Women's Issues, "Violence Against Women," Jan. 1992, p. 5. See also Family Violence Prevention Fund, Coalition for Immigrant & Refugee Rights and Services, Immigrant Women's Task Force, and National Immigration Project of the National Lawyers Guild, Inc., Domestic Violence in Immigrant and Refugee Communities: Asserting the Rights of Battered Women, at II-5.

<sup>18</sup> Since 1930, the majority of immigrants to the United States have been women, with female immigrants most predominant in categories of spouse-based immigration. Houstoun, Kramer & Barrett, "Female Predominance of Immigration to the United States Since 1930: A First Look," 18 Int'l Migration Rev. 908, 909, 922 (1984).

women to stay in an abusive relationship. Further, because of the battering spouse's control over his victim's legal status -- encompassing the right to work, the right to social services and the right to reside in the United States -- immigrant women may feel that they have little real choice but to submit to continued abuse of themselves or their children.

The legal control that battering spouses exert over their victims' immigration status is often compounded by immigrant women's isolation in a strange new country. Many immigrant women are poor. A survey of immigrant women in the San Francisco area found that incomes were well below the national poverty level.<sup>19</sup> An abused immigrant woman's poverty may be heightened by the fact that her husband controls the family finances, and she cannot draw on this money to pay for legal assistance, filing fees, psychological counseling or other services, without incurring more spousal abuse.

Many immigrant women are also isolated by language and cultural barriers, which deter them from seeking services if they are abused. For example, 75 different languages are spoken in Northern Virginia, yet the Domestic Violence Program in Alexandria, Virginia provides regular counselors in only four of those languages.<sup>20</sup> Even when immigrant women seek help, many shelters turn them away because of concerns that funding streams

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<sup>19</sup> Hogeland & Rosen, Dreams Lost, Dreams Found: Undocumented Women in the Land of Opportunity 10-11 (1990).

<sup>20</sup> Banales, "Abuse Among Immigrants," The Washington Post, Sept. 16, 1990, at E5.

will not cover services provided to immigrant women and because of language barriers to providing services.

There are myriad examples of the types of extreme cruelty to which this vulnerable population is subjected by battering spouses. Battered immigrant women served by Main Street Legal Services, Inc., a legal services office located at the City University of New York Law School in Flushing, Queens, have been

locked up in their apartments or in one room of their apartments, have been deprived of necessary medical care and medication, of food for herself and/or her children, and of money to purchase food and other necessities. Batterers will frequently abuse or threaten to abuse a woman's pet, as well as destroy her or her children's property, particularly things that are very dear to her and will be difficult to replace.<sup>21</sup>

The Hostos Women's Center, located at Hostos Community College, City University, in Bronx, New York, has also counseled women who have been confined by their battering husbands, and who have been stalked by abusers seeking to psychologically intimidate them.<sup>22</sup>

We know about these stories because the battered women were able to contact service providers for help. Unfortunately, many more women are unable to contact the police or seek help from other "institutional" sources. The San Francisco area survey cited above found that only 6 women -- out of 136 who acknowledged abuse -- had ever called the police for help. The

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<sup>21</sup> Letter to INS from Maria Arias and Pamela Goldberg of Main Street Legal Services, dated June 14, 1991, re. INS no. 1423-91, Interim Rule, Section 701 of the Immigration Act of 1990.

<sup>22</sup> Personal communication, Marta Rivera, Director, Hostos Women's Center, Bronx, New York, March 10, 1992.

factors identified as contributing to their isolation and failure to seek services included: (1) fear that abuse would escalate; (2) fear that husbands would withdraw sponsorship petitions; (3) lack of fluency in English; (4) lack of support from family and friends; (5) lack of access to culturally sensitive services."<sup>23</sup>

Issues Raised By The Standard Of Proof For Extreme Cruelty

The proof requirement that the interim rule imposes on spouses and children who have been subjected to "extreme cruelty" raises a number of serious problems.

First, the ambiguity of the INS definition of battering and extreme cruelty is problematic. Because battering and extreme cruelty are given a single definition, it is impossible to ascertain what abuse is considered "physical abuse" for purposes of the waiver application and what abuse falls into the category of "extreme cruelty." Yet because of the different types of proof that must be submitted for each category of abuse, this distinction is critical for a waiver applicant. For example, should an applicant who has been subjected to "forceful detention" rely on police records, or must she obtain the affidavit of a licensed clinical social worker? What type of abuse -- physical abuse or extreme cruelty -- is neglect of a child? The INS regulations give no guidance. However, if the

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<sup>23</sup> Family Violence Prevention Fund, Coalition for Immigrant & Refugee Rights and Services, Immigrant Women's Task Force, and National Immigration Project of the National Lawyers Guild, Inc., Domestic Violence in Immigrant and Refugee Communities: Asserting the Rights of Battered Women, at II-2 (citing Hogeland & Rosen survey).

applicant makes the wrong choice, in the absence of any mechanism for appeal, the consequence may be an immediate loss of legal status.

Second, as a practical matter, immigrant women and children are unlikely to have access to professionals of the type required by the INS. Few domestic violence shelters have licensed clinical social workers on staff, much less psychologists or psychiatrists. Those licensed clinical social workers who are employed by shelters are typically in management positions, and do not have responsibility for direct client contact.<sup>24</sup>

Most abused immigrant women will not even have contact with shelters, but will instead flee to family or friends. For these women, the lack of access to mental health professionals is compounded by their lack of resources. Very few women fleeing an abusive relationship will be able to first locate, then pay for a mental evaluation by a psychologist or other professional.<sup>25</sup>

Third, cultural factors prevent many immigrant women from obtaining a mental health affidavit. Patricia Eng, Director of the New York City Asian Women's Center, reports that even when

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<sup>24</sup> Personal communication, Patricia Eng, Director, New York Asian Women's Center, May 13, 1992; personal communication, Debbie Lee, Family Violence Prevention Fund, San Francisco, May 7, 1992.

<sup>25</sup> Hogeland & Rosen, *supra* note 2, at 10-11 (monthly incomes of immigrant women typically below national poverty line); Letter to INS from Maria Arias and Pamela Goldberg of Main Street Legal Services, dated June 14, 1991, re. INS no. 1423-91, Interim Rule, Section 701 of the Immigration Act of 1990 (describing financial difficulties faced by poor immigrant women seeking to apply for battered spouse waiver).

Asian women seek help at the Center's shelter -- already overcoming cultural taboos against acknowledging abusive relationships -- it is "culturally inconceivable" for them to submit to counselling by mental health professionals.<sup>26</sup> Most dramatically, the Center's clients adamantly refuse treatment even when they are suicidal. The cultural taboos and shame associated with mental health counselling and therapy are simply too strong to overcome.

#### Blaming The Victim And Gender Stereotyping

The INS's stringent proof requirement, focusing exclusively on the applicant's mental state rather than the abuser's activity, is based on a misconception about what "abuse" is and how it may be proved. In the preface to the regulations, the INS claims that professional affidavits are necessary because most Service officers "are not qualified to make reliable evaluations of an abused applicant's emotional or mental condition."<sup>27</sup> However, as with claims of sexual harassment, rape and other acts of aggression and violence primarily directed against women, a waiver applicant's mental condition is not and should not be at issue. The question before the INS -- whether extreme cruelty occurred -- is not a subjective determination based on the applicant's mental state, but requires an inquiry into the facts of the abuser's behavior.

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<sup>26</sup> Personal communication, Patricia Eng, Director, New York Asian Women's Center, May 13, 1992.

<sup>27</sup> 56 Fed. Reg. 22636 (May 16, 1991).

Further, a mental examination may not be probative of whether abuse occurred. An emotionally resilient woman who has been deprived of medical care or deprived of economic support may legitimately claim the protection of the waiver, even if she has been able to mentally cope with her predicament. In her case, a professional's affidavit may reveal nothing about the abuse, while her own factual affidavit and affidavits of witnesses, clergy or others may clearly establish that she was subjected to extreme cruelty within the scope of the waiver. Not will the professionals designated by the INS even necessarily be the best judges of whether abuse has occurred, in contrast to shelter workers, clergy and others with more extensive experience working with abuse victims. In one study, nearly half of the psychotherapists surveyed failed to identify obvious evidence of domestic violence -- despite their professional training (and licenses).<sup>28</sup>

The INS rule mandating a licensed mental health professional's affidavit in order to prove "extreme cruelty" is part of a pattern of institutional decisionmakers according women diminished credibility based on gender stereotypes. Ironically, the INS has exhibited few qualms about the decisionmaking entrusted to it in areas where women are not the overwhelming majority of applicants, such as determinations of a "well-founded fear of persecution" in asylum cases or "extreme hardship" in

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<sup>28</sup> See Harway & Hanson, "Therapists' Recognition of Wife Battering: Some Empirical Evidence," 6 Family Violence Bulletin 16 (Fall 1990).

deportation cases.

Gender bias such as that demonstrated in the INS regulation implementing the battered spouse waiver is pervasive in domestic violence cases, where "[i]nstead of focusing on why men batter and what can be done to stop them, many judges and court personnel ask battered women what they did to provoke the violence, subject them to demeaning and sexist comments, shuttle them from court to court, and issue mutual orders of protection when the respondent has not filed a cross-petition and there is no evidence that the petitioner was violent."<sup>29</sup> In one court proceeding in Maryland, for example, a judge dismissed a woman's testimony concerning her husband's violent threats, stating that,

I don't believe anything you are saying. The reason I don't believe it is because I don't believe that anything like that could happen to me. If I was you and someone threatened me with a gun, there is no way that I would continue to stay with them. There is no way I would take that kind of abuse from them. Therefore, since I would not let it happen to me, I can't believe that it happened to you.<sup>30</sup>

The findings of the California Judges Survey of all 1500 judges in that state dramatically demonstrate gender influences the way adjudicators accord credibility to victims of domestic violence.<sup>31</sup> Responding to the question, "In a proceeding

<sup>29</sup> L.H. Shafran, "Overwhelming Evidence: Reports on Gender Bias in the Courts," Trial 30 (Feb. 1990).

<sup>30</sup> Testimony from a public hearing witness (Roslyn Smith, Mont. City, TR. MD. pp. 97-102) in Gender Bias in the Courts (1989), Report of the Maryland Special Joint Committee on Gender Bias in the Courts.

<sup>31</sup> California Judges' Survey, 1989, Appendix D., p.3, in Achieving Equal Justice for Women and Men in the Courts.

involving allegations of domestic violence, supporting declarations and testimony are often exaggerated," fifty-three percent of the male judges agreed or strongly agreed with this statement. Only twenty-five percent of the female judges took this position while seventy-five percent of them disagreed or strongly disagreed. Id.

The solution to this "gender-gap" in credibility determinations is not to impose additional proof requirements to deter applicants and undermine access to the adjudicatory system, but to train INS decisionmakers to understand domestic violence, focus on factual determinations and overcome their own biases in making determinations.

Numerous specialized training models have already been employed by judges, police and other decisionmakers working with abuse victims. These training models can be readily adapted for INS officers, to assist them in making fair and accurate decisions.

#### The INS Responsibility To Assess Credibility

Contrary to INS statements defending these regulations, the question of whether abusive activity occurred and the credibility of affidavits concerning that activity are precisely the types of judgments that INS officers are regularly and appropriately called upon to make. As discussed above, INS officers routinely make such judgments when considering political asylum applications and orders of deportation.

Though the INS has suggested that stringent proof

requirements are necessary to deter fraud, there is simply no basis for the INS assumption that individuals will fake a history of abuse and extreme cruelty, particularly when other waiver options are more readily available. Further, it is important to remember that the Marriage Fraud Act is designed to deter fraudulent marriages. This primary purpose will be unaffected if a more reasonable standard of proof for extreme cruelty is adopted. The INS will still be in the same position vis-a-vis its determinations of the underlying bona fides of the marriages, a requirement for every waiver.

Finally, the INS's assertions of pervasive fraud in waiver applications must be taken with a grain of salt, in light its prior use of spurious figures to support such assertions. At the July 1985 hearings before the Senate Subcommittee on Immigration and Refugee Policy that preceded enactment of the Marriage Fraud Act, the then-Commissioner of the INS testified that "based on a preliminary survey . . . on marriage fraud, and this is in three cities during fiscal year 1984, we believe that as much as 30 percent, which is an extremely high figure, of the spousal relationships may be fraudulent."<sup>32</sup> Yet in sworn deposition testimony, the designer and project director of the "fraud survey" acknowledged that the survey was intended to measure INS workload and "it would not be justified for [recommending

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<sup>32</sup> See Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Immigration Status: Hearing Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. at 35 (1985).

legislative reform] or any other purpose than measuring workload."<sup>33</sup> The deposition also revealed that high-ranking INS officials were aware of and discussed the deficiency of the survey before it was relied on by the INS at the Senate hearings.<sup>34</sup> Nevertheless, the INS did not reveal this deficiency to Congress prior to the enactment of the Marriage Fraud Act.

#### CONCLUSION

The INS approach to the battered spouse waiver thwarts Congressional intent to extend this waiver to the most vulnerable population of conditional residents -- women and children unable to leave an abusive relationship because of fear or lack of resources -- and instead turns the statute on its head by creating more restrictive proof requirements than those necessary to qualify for a good faith/termination waiver. By imposing unfair and impossible requirements on applicants, the INS abrogates its responsibility to weigh the evidence submitted by victims of extreme cruelty and to make a judgment concerning their applications.

The federal government, particularly the Department of Justice in its 1984 report on family violence, has come a long way in recognizing the extent of wife abuse in the United States and in insisting that measures to protect victims of domestic

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<sup>33</sup> Deposition testimony of David Nachtsheim in Manwani v. INS, Civ. No. C-C-88-41-M (W.D.N.C.) at pages 96:4 to 97:3.

<sup>34</sup> See id. at pages 95:12-96:3.

Violence are not thwarted by decisionmakers with little understanding of abuse. It is ironic that the INS, a component of the Justice Department, seems to harbor the same suspicious attitudes about abuse victims rejected by the Attorney General almost ten years ago.