Spouse-Based Immigration Laws: The Legacies Of Coverture

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I. INTRODUCTION

A woman from the Philippines was abused by her United States citizen spouse. He threatened to have immigration authorites deport her to the Philippines if she tried to leave him. She stayed. He later cut her all over her back, head, and hands with a meat cleaver.[1]

An American citizen married a Polish woman and brought her to the United States. Shortly after her arrival he began beating her. She was afraid to go to the police because she feared deportation and what her husband might do to her in the future.[2]

A woman from China came to the United States to marry, but her husband refused to file a petition so she could become a permanent resident. He was very violent and she suffered physical injuries from his abuse. As a result she is separated from her husband and undocumented.[3]

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1. National Coalition Against Domestic Violence (May 17, 1989) (compilation of situations of entrapment of battered alien spouses) (available from author).

2. *Hearings on Legal Immigration Reform, Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong. 1st Sess., 665-68 (1989) [hereinafter *Hearings*] (testimony of the Honorable Louise Slaughter, member of Congress).

3. C. HOGELAND & R. ROSEN, DREAMS LOST, DREAMS FOUND; UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY (1990) (Survey Project of the Coalition for Immigrant and Refugee Rights, and Services Immigrant Women's Task Force).

A Dominican woman fled from her United States citizen husband's violent assaults only after being in the hospital for the fifth time as a result of his beatings. Her husband bashed her head against the wall and threatened to kill her if she told her doctor what happened. She had been afraid to leave him because he controlled her immigration status.[4]

A Chinese woman married an American citizen. Within a month of her arrival in the United States, her husband threatened her with a gun and subjected her to repeated physical abuse. She did not initially leave because she feared deportation and physical reprisal and could not speak enough English to gain information about her legal rights. After being repeatedly threatened with a gun, however, she sought help from a battered woman's shelter in New York. Later, during divorce proceedings, she discovered that her citizen husband had previously married two other alien wives who both had been deported.[5]

A woman from Ecuador married a United States citizen. He never filed a petition for her to become a permanent resident. She became pregnant and he battered her throughout the pregnancy. Another pregnant woman who already had one citizen child was also physically abused by her American spouse. Her husband refused to file a petition to obtain permanent resident status for her. She feared that initiating a divorce would lead to loss of custody of her citizen children because her husband threatened a custody battle.[6]

The mother of two citizen children was abandoned by her United States citizen husband. Because her husband never filed a petition for her legal immigration status, she was undocumented. He was later incarcerated. Although she worked, her lack of legal status prevented her from obtaining employment at a salary sufficient to fully support her citizen children. As a consequence, the children received supplemental assistance under the Aid to Families with Dependent Children program.[7]

Another spouse of a United States citizen and the mother of two United States citizen children was ordered deported from the United States. She had lived in the United States for more than seven years. One of her citizen children had a serious speech defect that could not be adequately treated in the mother's original country. But she did not have legal status because her husband had been unwilling to petition for her immigration status.[8]

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4. Walt, *Immigrant Abuse: Nowhere to Hide*, Newsday (New York), December 2, 1990, at 8.
5. *Hearings*, *supra* note 2, at 667.
6. National Coalition Against Domestic Violence, *supra* note 1.
7. Complaint, Perales v. Meese, Civ. Action No. 226588 S.D.N.Y.
8. Holley v. INS, 727 F.2d 189 (1st Cir. 1984).

These situations are a few of many[9] that illustrate the consequences of the legacies of coverture in the immigration law. The notion of coverture, that a wife is subordinate to her husband and under his control, was incorporated into the early immigration laws and strengthened by the 1986 Immigration Marriage Fraud Amendments.[10] This article details the history and impact of spouse domination in the immigration law and makes proposals for change.

First, the article describes the common law doctrine of coverture, which gave control of a married woman's property and the custody of the children of the marriage to her husband, and the subsidiary doctrine of chastisement, which allowed wife abuse. It then summarizes the domestic law's attempts to remove the notion of spousal domination and address the prevalent problem of wife abuse.

Second, the article details the incorporation of the assumptions of coverture into the early immigration laws and the failure of Congress to remove coverture premises from recent immigration legislation. It demonstrates how Congress's attempts to remove sex discrimination from the immigration law in the 1950s and 1960s were flawed because the legislature never fully confronted the consequences of the initial incorporation of the premises of coverture into the immigration law. It further describes how Congress substantially strengthened the notion of spousal domination in 1986 through the Marriage Fraud Amendments[11] and did not fully confront the consequences of the law's imprimatur of spousal control in the Immigration Act of 1990.[12]

Next, the impact of the law's perpetuation of spouse domination is

9. *See* other situations in the compilation by National Coalition Against Domestic Violence, *supra* note 1; C. HOGELAND & R. ROSEN, *supra* note 3; and in *Hearings*, *supra* note 2, at 666-68. Other organizations have reported similar incidents. The New York Asian Women's Center reported working with more than a hundred battered alien women whose husbands refused to cooperate with the joint petition process. National Coalition Against Domestic Violence, *supra* note 1. The Hawaiian legal service, Na Loio no na Kanaka, estimated that there were hundreds of female alien spouses in Hawaii confronted with problems caused by the Marriage Fraud Act. Most were Korean, Filipino, and Southeast Asian immigrant women. Most were married to U.S. servicemen. Many were subject to physical abuse, intimidation, and exploitation. They lived with the terror of facing deportation or continuing an abusive relationship. Na Loio no na Kanaka, November 23, 1988. The Center for Immigrants' Rights in New York City sponsored a training program for battered women's advocates on June 19, 1990, at which instances of spouses abusing their alien wives were related to the author.

10. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.).

11. *Id.*

12. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

described. The article shows that the immigrants harmed by the spouse domination perpetuated by the law are overwhelmingly women. This is because women have been the majority of spouse-based immigrants, the historical target of subordination because of sex, and the majority of abused spouses in the United States. It further shows how the law's imposition of spouse domination has led to serious harm for citizen children and also adversely impacts on U.S. society as a whole.

This article then proposes legislative and administrative changes to address the legacies of coverture in the immigration law. These proposals mitigate the spouse domination in the immigration law, but take into account the political reality of legislative attempts to prevent fraud.

II. The Common Law Doctrine of Coverture and the United States Domestic Law's Response

A. The Coverture Doctrine

In his Commentaries on the Law of England, Blackstone states:

> By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called . . . a feme-covert, . . . is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.[13]

Under the doctrine of coverture, a wife could not make a contract with her husband or with others. She could not engage in litigation. She could not sue or be sued without joining her husband. She could not sue her husband at all. She could not make a will. The personal property which a woman owned before marriage and that she acquired during the marriage became her husband's property. A husband had the use of his wife's real property during the marriage. If the marriage produced a child, the husband was entitled to the rents and profits of the wife's property during the husband's life.[14] The husband was the sole guardian of the couple's children.[15]

Under the English common law, the allegiance of a wife to her husband was analogous to a subject's allegiance to the King. For example, a wife who killed her husband was guilty of more than homicide. She had committed the crime of petit treason and therefore could be punished by being first dragged behind a horse and

13. 1 W. Blackstone, Commentaries on the Laws of England *443.

14. H. Clark, The Law of Domestic Relations in the U.S. § 8.1, at 500 (2nd ed. 1987).

15. B. Babcock, A. Freedman, E. Norton & S. Ross, Sex Discrimination and the Law 561 (1975).

then burned at the stake.[16] While the basis of the creation of the United States of America was the rejection of monarchial tyranny, coverture's absolute rule of husband over wife became part of the American law.[17]

The coverture doctrine thus did two things. First, it established the notion of spousal domination and control. A married couple was not viewed as two co-equal parties. Rather, one spouse was legally given absolute power over the other. Second, the coverture doctrine gave all the power to the male spouse.

B. The Right of Chastisement

A husband's total control over his wife's livelihood, home, and children created a coercive situation which was reflected in a subsidiary doctrine, the right of "chastisement." This kind of control over activity, livelihood and children established by coverture carried with it the power to enforce that control. In describing coverture, Blackstone speaks about a husband's right of "chastisement" to restrain his wife from "misbehavior."[18] There is some controversy over whether the common law right of chastisement afforded a legal privilege for a husband to beat his wife. One position is that at common law the husband had a right to beat his wife so long as he used a stick that was no larger than his thumb,[19] but others doubted that the common law gave such overt permission for wife battering.[20] The American courts reflected this ambivalence, with some courts upholding a husband's right to use force[21] and others rejecting it.[22]

It is, however, undisputed that the American common law failed to protect wives from injury by their husbands. A wife could not sue her husband in tort for injuries caused by him. She had no resources with which to escape her husband's abuse, as all her property was

16. M. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1659 (1981).

17. U.S. COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB; BATTERED WOMEN AND THE ADMINSITRATION OF JUSTICE (1982) [hereinafter U.S. COMMISSION ON CIVIL RIGHTS]; H. CLARK, *supra* note 14, at 498-502.

18. W. BLACKSTONE, *supra* note 13, at *444.

19. *See* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17, at 2; Comment, *Spouse Abuse: A Novel Remedy for a Historic Problem*, 84 DICK. L. REV. 147, 151 (1979). *See also* Comment, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPPERDINE L. REV. 213, 214 (1978).

20. H. CLARK, *supra* note 14, § 8.3 at 526.

21. *See, e.g.*, Bradley v. State, 1 Miss. 156 (1824); State v. Black, 60 N.C. 262 (Win. 266) (1864).

22. *See, e.g.*, Fulgham v. State, 46 Ala. 146-47 (1871).

under his control. Further, turning to the courts for protection was futile, as an 1868 North Carolina case illustrates.[23] In that case, the court asserted that a husband did not have any right to whip his wife. However, the court upheld the husband's acquittal of the charge of assault and battery on his wife because the court could "not interfere with family government in trifling cases."[24]

C. *Attempts to Legislatively Remove and Reject the Premises of Coverture and Chastisement*

In the middle of the nineteenth century, state legislatures began to enact statutes that reduced the legal disabilities of married women.[25] These statutes, generally known as Married Women's Property Acts, gave women greater control over the raising of children and the disposition of family wealth.[26] By the turn of the century, all states had versions of such statutes and subsequently additional laws were passed that specified the removal of married women's legal disabilities.[27] These laws afforded married women rights including: the right to joint custody of children;[28] the right to sue and be sued; the right to contract; and the right to own and control real and personal property.[29]

Attempts to correct the legacies of the "chastisement" component of coverture were not made until much later. Assault had long been defined as a crime and no American jurisdiction had promulgated a statutory defense based on the fact that the victim was a spouse.[30] However, statutes and case law did not begin to address the problem of wife abuse until the legislators and courts looked beyond these facially neutral and seemingly sufficient laws and confronted historical and social fact.

In the 1970s and 1980s the women's movement brought attention to the issue of battered women.[31] Many studies demonstrated the

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23. State v. Rhodes, 61 N.C. 453 (1868).

24. *Id.* at 459. For a description of how this attitude continued and barred battered women from seeking assistance of the courts, see Bruno v. Codd, 90 Misc.2d 1047, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dept. 1978), *aff'd*, 47 N.Y.2d 582, 419 N.Y.S.2d 901, 393 N.E.2d 976 (1979), *appeal denied*, 48 N.Y.2d 6566, 421 N.Y.S.2d 1032, 396 N.E.2d 488 (1979).

25. H. CLARK *supra* note 14, § 8.1, at 503.

26. However, one commentator concludes that these changes did not seriously challenge the separate domestic sphere of married women. *See* Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L. J. 1359, 1425 (1983).

27. H. CLARK, *supra* note 14, § 8.1, at 503.

28. *Id.* at 503.

29. *See id.* at 503 n.4 for list of state statutes. *See also id.* at 507-23 for a summary of current law. The law of domicile, however, is not quite as settled. *See* H. KAY, SEX-BASED DISCRIMINATION 204, 205 (1988).

30. M. Marcus, *supra* note 16, at 1657, 1662.

31. Schneider, *The Dialectic of Rights and Politics: Perspectives From The Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

extensive incidence of spouse abuse in American society[32] and concluded that the overwhelming majority of victims were women.[33] Furthermore, the impact of the legacy of coverture on the attitude of government officials, e.g., police, prosecutors and judges, was recognized. The notion of a husband as king of his castle with a right to control his home and family life had resulted in the refusal of officials to enforce laws prohibiting assault when a husband assaulted his wife.[34] These realizations led to government recognition of its responsibility to remove the societal permission for wife battering. Laws were passed to protect the abused and change the social message to convey that violence against a spouse is not sanctioned. Generally these laws are not sex specific; i.e., they do not prohibit wife abuse, but spouse abuse. However, they confront a problem which most frequently adversely impacts on women.

While there are still several gaps in these efforts, particularly with regard to funding for programs and the implementation of remedies for battered spouses,[35] many changes have been made. States have passed laws that seek to protect the abused by providing for civil orders of protection that can be obtained by a battered spouse to order a batterer to stop abuse and leave the marital home.[36] States have provided criminal sanctions, including mandatory arrest, for violation of these orders.[37] Class action cases forced law enforcement officials to use existing criminal laws to arrest batterers.[38] Under some state laws, battered spouses can go into court and request the criminal prosecution of their batterers.[39] Some states have provided funds for battered women's shelters and services.[40] States have abol-

32. H. CLARK, *supra* note 14, § 8.3, at 525.
33. *Id.*; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17, at v.
34. M. Marcus, *supra* note 16, at 1659-60; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17, at v.; G. GOOLKASUAN, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES (U.S. Department of Justice, National Institute of Justice, 1986).
35. NATIONAL CENTER ON WOMEN AND FAMILY LAW, WOMEN BATTERING: THE FACTS (1989); *see also* NATIONAL CENTER ON WOMEN AND FAMILY LAW, ARREST IN DOMESTIC VIOLENCE CASES: A STATE BY STATE SUMMARY (1987) [hereinafter ARREST IN DOMESTIC VIOLENCE CASES]; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17, at 82.
36. G. GOOLKASUAN, *supra* note 34, at 5.
37. ARREST IN DOMESTIC VIOLENCE CASES, *supra* note 35.
38. *See, e.g.*, Bruno v. Codd, 90 Misc.2d 1047, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dept. 1978), *aff'd*, 47 N.Y.2d 582, 419 N.Y.S.2d 901, 393 N.E.2d 976 (1979), *appeal denied*, 48 N.Y.2d 6566, 421 N.Y.S.2d 1032, 396 N.E.2d 488 (1979).
39. G. GOOLKASUAN, *supra* note 34, at 5.
40. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17, at 82.

ished interspousal immunity, thus paving the way for battered spouses to use tort remedies for injuries sustained from beatings by their spouses.[41] The federal government has sponsored reports that have suggested reforms in state law.[42] Additionally, Congress has passed two statutes that provide funds for battered spouses and the programs that assist them, the Family Violence Prevention and Services Act[43] and the Victim Compensation and Assistance Act.[44]

These developments demonstrate a rejection of the assumptions of coverture and an acknowledgment of the legislative responsibility for removing the social legacies of this doctrine. The laws addressing married women's rights and spouse abuse communicate that a married woman has a right to control her own property and livelihood, have custody of her children, and live free from abuse. The immigration laws, on the other hand, continue to promote the assumptions of coverture and have not fully communicated an intolerance of spouse abuse.

III. The Incorporation and Perpetuation of Coverture in the Immigration Law

A. Early Immigration Laws: The Incorporation of Coverture

The premises underlying the coverture doctrine were incorporated into the initial laws controlling immigration status. From the inception, immigration laws incorporated and enforced the notion of spousal domination and gave the control and power to the male spouse. A Congressional report stated that early immigration laws contained "a legislative enactment of the common-law theory that the husband is the head of the household."[45] The history of the immigration laws confirms that conclusion. Both alien and citizen women were disadvantaged. Male citizens and resident aliens were given the right to control the immigration status of their alien wives. Before any immigration benefit could attach to an immigrant wife, her husband had to petition for her or she had to accompany him. The alien woman's immigration status depended on her husband's actions. Citizen or resident alien women did not have the same right as their male counterparts to petition for their male alien spouses. Male spouses could not gain immigration status by accompanying their citizen wives. These restrictions incorporated the assumptions

41. Restatement (Second) of Torts § 895F (1977).

42. *See, e.g.*, U.S. Commission on Civil Rights, *supra* note 17; Department of Justice, Attorney General's Task Force on Family Violence, Final Report (1984); G. Goolkasuan, *supra* note 34.

43. 42 U.S.C. § 10410 (Supp. V 1987).

44. 42 U.S.C. § 10601 (Supp. V 1987).

45. S. Rep. No. 1515, 81st Cong., 2d Sess. 414 (1951).

of coverture, that a wife was under the control and authority of her husband and subservient to him.

The immigration law's imposition of the subordination of a wife to her husband was evident in the laws that governed the admission of immigrants from the beginning of restrictions on immigration. In the first hundred years of the existence of the United States, there were very minimal restrictions on immigration.[46] Between 1875 and 1917 laws were passed[47] that excluded aliens with certain characteristics from entry into the United States, such as convicts, prostitutes, persons with contagious diseases, and persons who were illiterate.[48] However, male citizens and male resident aliens were given the right to have exemptions from some of these exclusion grounds made for their alien wives.

A 1903 statute provided that certain residents of the United States could send for their alien wives and have them admitted to the United States, even if they had a contagious disease, if it was curable or not dangerous.[49] The 1917 act continued this exemption to the contagious disease ground of exclusion. It also provided that the wife of a citizen or admissible alien sent for by her husband would not be excluded because she could not read, if she were otherwise admissible.[50] The 1917 act barred the immigration of persons from a geographical area called the Asiatic zone.[51] Exceptions included government officials, professional people and missionaries and their accompanying wives, but not their husbands.[52]

In the 1920's, the first numerical restrictions were imposed on immigration. This law restricted the number of aliens who could immigrate into the United States, i.e., those aliens who could become permanent residents of the United States with the right to live and work in the United States and eventually become eligible for naturaliza-

46. An example is the short lived Alien and Sedition Act, Act of June 25, 1798, ch. LVIII, 1 Stat. 570.

47. In 1882, Congress passed the Chinese Exclusion Act, which suspended Chinese immigration and made the Chinese ineligible for citizenship. This act, the first of the nation's racist restrictive immigration laws, was not repealed until 1943. (Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58, repealed by Act of Dec. 17, 1943, Pub. L. No. 199, 57 Stat. 600.)

48. Act of March 3, 1875, ch. 141, 18 Stat. 477; Act of Aug. 3, 1882, ch. 376, 22 Stat. 214; Act of March 3, 1891, ch. 551, 26 Stat. 1084; Act of March 3, 1903, Pub. L. No. 162, 32 Stat. 1213; Act of Oct. 16, 1918, Pub. L. No. 221, 40 Stat. 1012.

49. Act of March 3, 1903, Pub. L. No. 162, 637, 32 Stat. 1213, 1221.

50. Act of Feb. 5, 1917, Pub. L. No. 301, 63, 39 Stat. 874, 877.

51. *Id.* at 876.

52. *Id.* at 876-77.

tion.[53] The immigration law continued to incorporate the assumptions of coverture. It gave the power over a wife's immigration status to her husband by requiring that the husband file a petition for his wife, or that she accompany him before she could obtain immigrant status. It further did not allow the immigration of the husbands of female citizens and resident aliens on the same basis as the wives of male citizens and resident aliens.

In 1921, temporary numerical restrictions on immigration were enacted.[54] In 1924, Congress made numerical limitations on immigration permanent.[55] However, certain persons were designated as "non-quota" immigrants and exempt from numerical limitations. The definition of non-quota immigrant included the wife of a United States citizen.[56] However, the citizen husband controlled the immigration status of his alien wife. The alien wife would not be designated as non-quota immigrant unless her citizen husband had filed a petition for her.[57] Non-quota immigrants also included the accompanying wives of immigrants born in the Western Hemisphere, ministers, and professors.[58]

The 1924 law further provided that certain preferences would be given in the issuance of immigrant visas to aliens subject to numerical limitations. While the wife of a United States citizen was not subject to any quota, the husband of a United States citizen was subject to numerical limitation and given a preference if the United States citizen wife was at least twenty-one years old.[59] Another preference applied to "a quota immigrant who [was] skilled in agriculture, and his accompanying wife and dependent children."[60]

The 1924 law established national quotas based on the population of that nationality in the United States in 1890. This resulted in very few places available for aliens born in southern and eastern Europe.[61] Thus, the ability to fit under quotas of other nationalities was important. Under the 1924 law, the wife, but not the husband, of an alien of a different nationality could enter the country under the

53. Act of May 29, 1921, Pub. L. No. 5, § 2(a), 42 Stat. 5.

54. *Id.* The 1921 law provided that in the enforcement of the numerical quotas, preference was to be given to the wives, but not the husbands, of U.S. citizens and certain resident aliens. *Id.* at § 2(d).

55. Act of May 26, 1924, Pub. L. No. 139, § 11, 43 Stat. 153, 159.

56. *Id.* § 6(a), at 155. However, if the alien wife was ineligible for citizenship, i.e., Chinese, her citizen husband could not secure her immigration. *See* Gudendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 255-56 (1988); Chinese Exclusion Act of May 6, 1882, *supra* note 47.

57. Act of May 26, 1924, Pub. L. No. 139, § 4(a), 43 Stat 155.

58. *Id.* § 4(c)-(d), at 155.

59. *Id.* § 6(a)(1), at 155.

60. *Id.* § 6(a)(2), at 155.

61. *Id.* § 11, at 159.

quota for her husband's nationality, if the quota for her nationality was full.[62] The statute also provided an exception to its exclusion of aliens ineligible for citizenship for the wife, but not the husband, of an admissible immigrant.[63]

In the 1930s and 1940s some changes were made that addressed the immigration law's treatment of female United States citizens and residents with alien husbands. However, the law's basic notion that one spouse was dominant, and therefore rightfully controlled the other spouse's immigration status was never confronted and rejected. Even the changes that focused on the immigration of the husbands of female citizens and aliens were made in parsimonious steps. In 1932, an alien husband of a United States citizen became eligible for admission into the United States as a non-quota immigrant, but only if the marriage occurred prior to July 1, 1932.[64] In 1948, Congress addressed this restriction and considered the position that "an alien husband of an American citizen should have the same status under our immigration laws as is enjoyed by an alien wife of an American citizen, irrespective of the date of marriage of the alien husband to the citizen wife."[65] The House Judiciary Committee found such a suggestion "unwise," pending the completion of an investigation and study of the entire immigration system, and recommended only that the husbands of United States citizens be considered non-quota immigrants if the marriage took place prior to January 1, 1948.[66] This recommendation was enacted in May of 1948 and became law.[67]

B. The Immigration Laws of 1952 and 1965: Flawed Attempts to Remove Coverture Premises

The Immigration and Nationality Act of 1952, the basis for current immigration law, consolidated and modified prior immigration laws.[68] In 1950, the Senate Judiciary Committee reported on its investigation of the immigration system which led to the passage of the 1952 Act.[69] The report examined the issue of inequality of the sexes

62. *Id.* § 12(a)(2), at 160.
63. *Id.* § 13(c)(2), at 162.
64. Act of July 11, 1932, Pub. L. No. 277, § 4(a), 47 Stat. 656.
65. S. REP. No. 1206, 80th Cong., 2d Sess. 1, *reprinted in* 1948 U.S. CODE CONG. & ADMIN. NEWS 1555-56.
66. *Id.* at 1556.
67. Act of May 19, 1948, Pub. L. No. 538, § 4(a), 62 Stat. 241.
68. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 166.
69. S. REP. No. 1514, 81st Cong., 2d Sess. (1950).

under the immigration law.[70] It concluded that "there is no justification for according different treatment to the sexes under the immigration laws," and the committee recommended that "the laws be amended to remove all such inequalities."[71] However, the steps taken in the 1952 Immigration Act and subsequent immigration laws did not address the real problem. They did not reject the basic notion of coverture, that one spouse controls all aspects of the other spouse's life. They merely changed the word, wife, to the word, spouse. Thus, while the law appeared facially neutral, in reality, it continued the notion of spousal domination and control.

Under the 1952 statute, non-quota immigrants included the spouses, and not just the wives, of United States citizens. Also included as non-quota immigrants were Western Hemisphere-born immigrants, ministers, and certain alien employees of the United States and their accompanying spouses, not just wives.[72] Similarly, the spouses, not just the wives, of permanent residents were given a preference under the quota system.[73] Furthermore, the provisions of the law that determined to which quota an immigrant could be charged were changed. The 1952 law provided that either spouse, not just the wife, could be charged to the spouse's nationality quota if necessary to prevent the couple's separation.[74]

However, the provisions of the 1924 law which had placed an alien wife's immigration status under her husband's control still remained. For an alien spouse to be granted status as an immigrant, it was not sufficient that the alien had in good faith entered into a bona fide marriage with a United States citizen or resident alien. The citizen or resident spouse had to file a petition requesting that the alien spouse be designated as an immigrant. Whether the alien spouse would acquire a legal immigration status was thus left in the citizen or resident spouse's power.[75]

The reports leading up to the passage of the 1952 immigration laws[76] were the last instances of serious Congressional attention to the issue of sex discrimination in the context of the immigration laws.[77] Congress apparently believed it had solved the problem. In

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70. *Id.* at 414.

71. *Id.* at 417.

72. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 101(a)(27), 66 Stat. 166.

73. *Id.* § 203(a)(3).

74. *Id.* § 202(a)(2).

75. *Id.* §§ 204, 205.

76. S. REP. NO. 1515, 81st Cong., 2d Sess (1950); H.R. REP. NO. 1365, 82nd Cong., 2nd Sess. (1952), *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653.

77. In 1986, a provision of the law that discriminated against men was changed. The definition of child was changed to recognize a bona fide parent-child relationship between a father and his illegitimate child where prior law had recognized only the mother in relationship to an illegitimate child. 100 Stat. 3359, 3439, 8 U.S.C. §

1952, a Congressional report asserted that the proposed 1952 law removed sex discrimination from the immigration laws.[78] The report also asserted that the bill "[e]liminates race as a bar to immigration."[79] The Congressional belief in 1952 that it had removed the racism and sexism incorporated into earlier immigration laws was mistaken.

In 1965 Congress recognized the lingering racism in the immigration law and made major reforms, primarily to remove the racial and ethnic discrimination of the 1952 Act's national origins quota system.[80] The 1965 Act changed the immigration system from one which promoted the immigration of certain racial or ethnic groups to one which was based on family relationship and the unfulfilled labor needs of United States business.[81]

Under the 1965 Act, spouse-based immigration was a substantial part of immigration based in family relationship. "Immediate relatives" of United States citizens were allowed to immigrate without regard to any numerical quotas.[82] The definition of "immediate relative" included the spouse of a U.S. citizen.[83] Numerical quotas were imposed on other immigrants.[84] These quotas were distributed according to a preference system which also favored family relationships.[85] The second preference included the spouses of legal permanent residents.[86]

Even though the 1965 law favored immigration based on family relationships, in which spouse-based immigration played a large part, Congress did not confront the historical sexism of marriage based immigration. To the contrary, the 1965 Act continued the spousal control underlying coverture's discrimination against women.

1101(b)(1)(D) (1988).

78. In this report, which accompanied the House's bill that eventually became the 1952 immigration law, the Committee on the Judiciary stated that the bill "[e]liminates discrimination between sexes." H.R. REP. No. 1365, *supra* note 76, at 1679.

79. *Id.*

80. H.R. REP. No. 745, 89th Cong., 1st Sess. (1965); S. REP. No. 748, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3328, 3333, 3350. Furthermore, out of sensitivity to the racist history of the immigration laws, proposals for post-1965 reforms have been examined to ascertain whether they would have a racially or ethnically discriminatory impact, even if they do not include explicitly racist provisions. *See, e.g.*, H.R. REP. No. 1206, 95th Cong., 2d Sess. (1978).

81. Act of October 3, 1965, Pub. L. No. 236, 79 Stat. 911.

82. 8 U.S.C. § 1151(a)-(b) (1988).

83. 8 U.S.C. § 1151(b) (1988).

84. 8 U.S.C. §§ 1151(a), 1153(a) (1988).

85. 8 U.S.C. § 1153(a) (1988).

86. 8 U.S.C. § 1153(a)(2) (1988).

The citizen or resident spouse's control over the immigration status of his alien spouse found in the 1965 Act continues in current immigration law. In 1965 and currently, an alien spouse cannot gain legal immigration status unless the citizen or resident spouse files a petition.[87] The citizen or resident can withdraw the petition[88] and a denial of the petition can be appealed only by the citizen or resident.[89] An alien spouse has no control over her immigration status even if she married a citizen or resident spouse in good faith, is living with him, and has a child with him.

In the 1965 Act, Congress did add a provision that stated, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence."[90] However, the discussion in the reports, hearings, and debates leading up to the enactment of this provision focused on the removal of the national origin discrimination in the immigration law. Sex was added without comment.[91]

C. *The 1986 Immigration Law Amendments: The Strengthening of the Legacies of Coverture*

In 1986, Congress made several changes in the immigration law. One change was the enactment of the Immigration Marriage Fraud Amendments of 1986.[92] This law substantially added to the control of a citizen or resident spouse over his alien spouse's immigration status. It allowed the citizen or resident's actions to affect whether his spouse continued to maintain legal status after it was initially obtained. Loss of legal immigration status establishes the basis for deportation.[93] Even before deportation is effectuated, under another 1986 change, control over immigration status means control over ability to work in the United States.[94]

Prior to the passage of the 1986 law, the Commissioner of the Immigration and Naturalization Service (INS) asserted there was substantial fraud in immigration cases based on marriage and there-

87. 8 U.S.C.A. § 1154(a) (West Supp. 1991).
88. 8 C.F.R. § 205.1(a)(1) (1991).
89. 8 C.F.R. § 204.1(a)(4) (1991).
90. Act of Oct. 3, 1965, Pub. L. No. 236, § 2, 79 Stat. 911, codified in 8 U.S.C. § 1152(a) (1988).
91. H.R. REP. NO. 745, *supra* note 80.
92. Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended with scattered sections of 8 U.S.C.).
93. 8 U.S.C.A. § 1251(a)(1)(D) (West Supp. 1991).
94. Under the employer sanctions provision of the immigration law, an employer is required to check the citizenship or alien status of employees to assure that they have a status that permits work. Employers can be fined or jailed for hiring an unauthorized alien. 8 U.S.C. § 1324a (1988). *See, e.g.*, Newsday (New York), June 28, 1990, at 8, col. 1, for a description of the difficulty faced by undocumented aliens in finding a job.

fore requested several changes in the law relating to marriage-based immigration.[95] When the INS study upon which the contentions of marriage fraud abuse was based was eventually disclosed after the passage of the Marriage Fraud Act, it was shown to have several serious flaws.[96] Nevertheless, the assertions of the existence of widespread fraud had already been accepted by Congress and significant changes had been made to the immigration law.

The 1986 law continued the initial power of a citizen or a permanent resident spouse over the alien spouse's immigration status by allowing the alien spouse to become a legal permanent resident only if the United States citizen or resident spouse petitioned for her.[97] However, the Immigration Marriage Fraud Act went much further by giving the citizen or resident spouse control over the continuation of legal immigration status of the alien spouse who had already become a permanent resident.[98]

Prior to 1986, an alien who became a permanent resident was allowed to continue in that status. The 1986 amendments imposed a conditional status on any alien whose immigration status was based on a marriage to a United States citizen or resident alien that was less than two years old.[99] The conditional residence status lasts for two years from the time the alien gains that status.[100]

The alien spouse's status automatically terminates if a joint petition by both spouses is not submitted to the INS ninety days before the expiration of the alien spouse's two year conditional status.[101] Upon termination of her status, the alien spouse becomes a deportable alien and loses her right to live and work in the United States.[102]

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95. *Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Immigration Status: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 2-22 [hereinafter *Fraudulent Marriage and Fiance Arrangements*] (Statement of Alan C. Nelson, Commissioner of the INS).

96. *INS Reveals Basis for Fraud Claims*, 65 INTERPRETER RELEASES 26-27 (1988).

97. 8 U.S.C. § 1154(a)(1) (1988).

98. 8 U.S.C. § 1186a (1988).

99. 8 U.S.C. § 1186(a)(1), (g)(1) (1988).

100. 8 U.S.C. § 1186(a)(1), (c)(1)(A), (d)(2). The conditional time is based on when the status is acquired, not when the marriage took place. Therefore, the qualifying marriage has to endure more than two years.

101. 8 U.S.C. § 1186a(c)(2) (1988). If within the two year time period the marriage is judicially annulled or terminated, or the Attorney General determines that the marriage was entered into fraudulently or for a fee, the Attorney General is directed to terminate the resident status of the alien spouse. 8 U.S.C. § 1186a(b)(1) (1988).

102. 8 U.S.C. § 1251(a)(1)(D) (1988).

For an alien spouse's conditional status to become permanent, both spouses must jointly submit the petition and additionally appear at a subsequently scheduled interview with an INS official. They must demonstrate that the marriage was not entered into for the purpose of procuring the alien's entry into the United States as an immigrant, that no fee was paid for the filing of a petition for the alien spouse, and that the marriage has not been judicially annulled or terminated.[103] If a favorable determination is made after the interview, the alien spouse's conditional status is removed and she is granted permanent resident status. If an unfavorable determination is made, she loses legal status and the ability to work in the United States and becomes deportable.[104]

The loss of immigration status affects others besides the alien spouse. Her sons or daughters, whose resident status was initially based on her marriage, would also lose immigration status. Any son or daughter of an alien spouse whose immigration status is based on his or her parent's marriage is afforded only conditional permanent resident status.[105] The son or daughter's conditional status terminates if the parent's status terminates and becomes permanent only if the parent's status becomes permanent.[106]

Furthermore, the alien spouse and her children cannot apply to make their status in the United States permanent on any other basis. A conditional permanent resident who qualifies for permanent resident status on another basis, e.g. special employment related skills, is precluded from adjusting her status to permanent resident on the alternative basis.[107]

The 1986 Marriage Fraud Amendments thus gave the citizen or resident spouse enormous power over the alien spouse. He controls whether she and her children can stay, live, and work in the United States. He can make his spouse and her children illegal aliens by refusing to initially file a petition for her, by refusing to file a petition to remove her conditional status, or by refusal to appear at an interview.

The 1986 Act contained two very limited discretionary waivers which somewhat ameliorated the strictures of this power.[108] Under the 1986 law, an alien spouse could have requested that the Attorney General transform her conditional status into permanent status, even though she could not meet the joint petition and joint interview re-

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103. 8 U.S.C. § 1186a(c)(1) (1988). The interview requirement may be waived. 8 U.S.C. § 1186a(d)(3).
104. 8 U.S.C. § 1186a(c)(3) (1988).
105. 8 U.S.C. § 1186a(a)(1), (g)(2) (1988).
106. 8 U.S.C. § 1186a(a)(1), (b), (c) (1988).
107. 8 U.S.C. § 1255(d) (1988).
108. These waivers were modified in the 1990 Immigration law as discussed *infra*.

quirements, if she could satisfy the criteria for an extreme hardship waiver or a good faith, good cause waiver.[109]

The Attorney General had the discretion to remove the conditional basis of the alien spouse's status if the alien spouse could demonstrate that extreme hardship would result if she were deported. In determining whether there was extreme hardship, the Attorney General could consider only those circumstances which occurred during the period that the alien spouse was admitted for permanent residence on a conditional basis.[110] The Attorney General could also remove the conditional basis of an alien spouse's immigration status if the alien spouse could demonstrate that she entered into the marriage in good faith, the marriage had been terminated by her for good cause, and she was not at fault in failing to meet the statute's petition and interview requirements.[111]

However, an alien spouse who demonstrated the facts that would constitute extreme hardship or good faith and good cause was not guaranteed a waiver. The statute gave the Attorney General discretion to grant or deny either of these waivers.[112] Even if the alien spouse met the criteria for one or both of the waivers, a waiver could still be denied by the Attorney General.[113]

The INS, the Attorney General's designee for the application of the statute, promulgated regulations interpreting the Immigration Marriage Fraud Amendments.[114] The administrative interpretations of the statute's waiver provisions limited their use in mitigating the Marriage Fraud Act's coverture-like harms to alien spouses, even those abused by their United States spouses.

The INS regulations regarding the extreme hardship waiver stated that any deportation from the United States is likely to result in a certain degree of hardship and that a waiver would be granted only when the alien meets the burden of demonstrating that extreme hardship existed.[115] In response to comments on the proposed regulations, the INS refused to clarify the term "extreme hardship." The

109. 8 U.S.C. § 1186a(c)(4)(1988).
110. 8 U.S.C. § 1186a(c)(4)(A) (1988).
111. 8 U.S.C. § 1186a(c)(4)(B) (1988).
112. 8 U.S.C. § 1186a(c)(4) (1988).
113. The Supreme Court has held that when the Attorney General has discretion to grant or deny a particular petition, meeting the criteria does not entitle a petitioner to the relief requested. *See, e.g.*, INS v. Rios-Pineda, 471 U.S. 444, 446 (1985); INS v. Abudu 485 U.S. 94, 105 (1988).
114. 53 Fed. Reg., 30011-23, August 10, 1988; 8 C.F.R. §§ 1, 204, 205, 211-12, 214, 216, 223, 223a, 235, 242, 245 (1990).
115. 8 C.F.R. § 216.5(e)(1) (1990).

INS stated only that the words were used in accordance with their everyday meaning.[116]

An indication of restrictive interpretation of the extreme hardship waiver provision was expressed in an INS official's opinion. She stated that for the waiver to be granted the alien must establish that the extreme hardship would ensue as a result of the alien's deportation.[117] Therefore, in her opinion, the extreme hardship waiver would be unlikely in a situation in which the alien was a battered spouse, because "the hardship has already been suffered while in the United States, and it would not be likely to be aggravated by departure from this country."[118]

This approach ignored the extreme hardship inherent in a battering situation. If deported, a battered alien spouse could not pursue criminal or divorce proceedings against her abuser. She could not continue the health care and counseling needed to recover from the abuse. Deporting her would force her to go to a place where she may not have legal or physical protection from the battering spouse or be stigmatized because of having been battered.[119] Deportation of a battered spouse would heap additional extreme trauma on a person who has been subjected to the harrowing experience of violence in her own family at the hands of an individual from whom she expected love and affection.

The opinion that the extreme hardship waiver did not apply to situations of spouse abuse also ignored clear Congressional intent. The Senate Judiciary Committee's Report discussed the extreme hardship waiver and indicated that the Committee intended this provision to be interpreted liberally in situations in which a marriage broke down for legitimate causes.[120] The report gave specific examples of situations in which the Committee expected the waiver would be granted and these included a situation in which the alien spouse was abused by a citizen or resident spouse.[121]

The INS interpretation of the good faith, good cause waiver was also restrictive and gave unnecessary and arbitrary control over the legality of the alien spouse's immigration status to the citizen or resident spouse.[122] The INS rejected the assertion that the statute al-

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116. 53 Fed. Reg. 30,015 (Aug. 10, 1988).

117. Letter from Bonnie Derwinski, Acting INS Director for Congressional and Public Affairs, Oct. 19, 1989, *reproduced in* 66 Interpreter Releases 1428-29, App. III (Dec. 18, 1989) [hereinafter Derwinski's Letter].

118. *Id.*

119. *See, e.g.*, Martinez Mendoza v. INS, 567 F.2d 1222, 1223-24 (3d Cir. 1977).

120. S. REP. No. 491, 99th Cong, 2d Sess. 8 (1986).

121. *Id.*

122. The preliminary statistics regarding this category showed that as of October 1989, the INS had received 3,625 good faith/good cause waivers. Of these, 1452 had been granted, 510 were denied and 1663 were still pending. Derwinski's letter, *supra* note 117.

lowed the filing of a good faith, good cause waiver when the citizen or resident spouse initiated divorce proceedings. The Service took the position that the alien spouse was not eligible for the waiver unless she initiated the divorce or annulment proceedings, even if she lived in a state with no fault divorce laws or even if the United States spouse was ultimately found to be at fault.[123]

Further, the INS insisted on independent judgment of the issue of whether the alien spouse terminated the marriage for good cause.[124] The regulations stated that the finding of a court that the citizen or resident spouse was at fault was not conclusive evidence that the alien spouse terminated the marriage for good cause.[125]

The INS interpretation of the good faith, good cause waiver did not even afford a realistic alternative for abused women. Under the INS's interpretation, to be eligible for the good faith, good cause waiver, an abused spouse had to initiate and obtain a judicial termination of her marriage.[126] For a battered woman, such a requirement was often very difficult and dangerous. It required her to leave an abusive situation, find a lawyer, and race her spouse to the courthouse. Further, the requirement of a judicial proceeding can put an abused spouse in extreme danger. It brings her into contact and physical proximity with the person she is trying to escape. The initiation of divorce proceedings could infuriate a batterer and lead to increases in the frequency and intensity of the battering. In fact, the time period in which a battered spouse is trying to formally terminate the relationship is one of the most dangerous for her.[127] Thus, the INS's restrictive and erroneous interpretation of the Mariage Fraud Amendment's waiver provisions provided very little respite from the coverture-based control imposed by this law.

123. 53 Fed. Reg. 30,014 (Aug. 10, 1988); *see also INS Central Office Responses to Questions About the Marriage Fraud Act*, 67 INTERPRETER RELEASES 337-41, questions 27, 47, 53, 54 (1990).

124. 8 C.F.R. 216.5 (e)(2)(iii) (1990); 53 Fed. Reg. 30,014 (Aug. 10, 1988).

125. 8 C.F.R. 216.5 (e)(2)(iii) (1990).

126. 8 U.S.C. § 1255(d) (1988).

127. OKUN & LEWIS, WOMAN ABUSE FACTS REPLACING MYTHS 56 (1986) (noting the higher incidence of abuse among divorcing couples).

D. The 1990 Immigration Act: Coverture-Based Principle of Spouse Domination Remains But With Some Amelioration of 1986 Increases

While the Immigration Act of 1990[128] substantially revised the legal immigration system,[129] it basically maintained family-based immigration and the role of spouse-based immigration in that system. Under the 1990 law, immediate relatives, including the spouses of U.S. citizens, may become permanent residents without regard to numerical quotas.[130] The spouses of permanent residents are part of a group which receives preference in the distribution of world-wide numerical quotas.[131] Furthermore, under the 1990 act a substantial portion of the visas in this category are not subject to per country limitations.[132]

While spouse-based immigration is thus favored, the 1990 law continued the coverture-based control first incorporated into the 1917 and 1924 acts. Under the 1990 law, an alien spouse still can become a legal resident only if her citizen or permanent resident spouse files a petition for her to become a resident.[133] The citizen or resident spouse can still withdraw the petition at will and is the only one who can appeal a denial of the petition.[134] The basic conditional resident system for spouses established in 1986 continues. An alien spouse's residence is conditional for two years. She generally must have the cooperation of her citizen or resident spouse to continue in a legal status after that time.[135]

However, in 1990 Congress modified the good faith waiver and created an additional waiver based on the abuse of the conditional resident or her child by the citizen or resident spouse.[136] Thus, currently there are three waivers to the joint petition requirement to prevent the termination of a conditional resident's legal status. First, the conditional resident continues to have the option to show that her deportation would result in extreme hardship. Second, a conditional resident can show that she entered into the marriage in good faith, but that the marriage has been terminated. She no longer needs to

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

129. The law expanded employment based immigration and added a category designated "diversity" to allow the immigration of aliens from recently low admission countries. Among other changes, it modified grounds for exclusion and deportation. ALEINKOFF & MARTIN, IMMIGRATION PROCESS AND POLICY 61 (1991).

130. 8 U.S.C.A. § 1151(a)-(b) (West Supp. 1991).

131. 8 U.S.C.A. § 1153(a)(2)(A) (West Supp. 1991).

132. 8 U.S.C.A. § 1152(a)(4) (West Supp. 1991).

133. 8 U.S.C.A. § 1154(a) (West Supp. 1991).

134. 8 C.F.R. §§ 204.1(a)(4), 205.1(a)(1) (1991).

135. 8 U.S.C.A. § 1186a (West Supp. 1991).

136. 8 U.S.C.A. § 1186a(c)(4)(B), (C) (West Supp. 1991).

demonstrate that she terminated the marriage for good cause. Third, the conditional resident can show that she entered into the marriage in good faith, but she or her child was subject to battering or extreme cruelty by the citizen or resident spouse.[137] All three waivers are subject to the exercise of the Attorney General's discretion; i.e., the alien may qualify for the waiver and still be denied.[138]

These statutory waivers, while an improvement over the 1986 provisions, are still limited and do not totally remove spousal domination. Furthermore, the INS has issued interim regulations which continue a restrictive administrative approach to the statutory waivers that prevent automatic termination of the alien spouse's legal status. The details of these restrictions and how they should be changed are discussed in Section V.

IV. IMPACT OF SPOUSE-BASED IMMIGRATION LAWS

Thus, the immigration law still perpetuates a citizen or resident spouse's domination over his alien spouse. The citizen or resident spouse can choose whether or not to initiate his alien spouse's legal residence. If the citizen or resident spouse does not initiate the alien spouse's legal residence, she does not have the right to work in the United States and faces deportation. If she has citizen children, she also loses her ability to live with them in the United States. A citizen or resident spouse still has basic control over the termination of his alien spouse's legal residence once obtained. This control is the norm under the law. It is only somewhat limited by the availability of some waivers that are subject to INS discretion.

This kind of spousal control is analogous to the power over married women's livelihood, home, and children imposed by coverture. In the initial petition process, it also raises problems similar to coverture in situations of spouse abuse. The law gives so much power to the citizen or resident spouse that the alien spouse is faced with a Hobson's choice: either remain in an abusive relationship, or leave and confront deprivation of home, livelihood, and ability to promote a child's best interests.

Alien spouses of both sexes are theoretically subject to the law's spousal domination. However, the law has the greatest adverse impact on women immigrants. This is true for three reasons. First, the immigrants gaining status as spouses have been predominantly fe-

137. 8 U.S.C.A. § 1186a(c)(4) (West Supp. 1991).
138. 8 U.S.C.A. § 1186a(c)(4) (West Supp. 1991).

male.[139] Second, wives have legally and socially been the historical target of subordination in marriage.[140] Third, spouse abuse in the United States is pervasive and the majority of victims of spouse abuse are women.[141] Furthermore, because women are most frequently the primary caretakers of children, and wife abuse is associated with child abuse, the spouse-based immigration laws harm both the alien and citizen children of alien spouses.[142]

A. The Predominance of Female Spouse-Based Immigration

The prevailing view of immigrants is that the vast majority are young males.[143] Yet the reality is different. Women have in the past, and will in the future, comprise a substantial proportion of the immigrant population. Since 1930, overall migration into the United States has been predominantly female.[144] Even prior to 1930, when migration was predominately male, females made up a substantial proportion of immigrants.[145] The predominance of female migration to the United States has been pronounced in categories of spouse-based immigration, i.e., immigration based on marriage to a United States citizen or legal permanent resident.[146]

Since 1930, overall migration into the United States has been predominated by females.[147] Furthermore, women have predominated as immigrants into the United States from most regions and countries of the world.[148] In each year from 1930 to 1979,

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139. *See* Section A *infra.*

140. *See* discussion of coverture, *supra* Section II. Kurz, *Social Science Perspectives on Wife Abuse: Current Debates and Future Directions*, 3 GENDER & SOCIETY 495-96 (1989) and Section B *infra.*

141. *See* Section B *infra.*

142. *See* Section C *infra.*

143. Houstoun, Kramer & Barrett, *Female Predominance of Immigration to the United States Since 1930: A First Look*, 18 INT'L MIGRATION REV. 908, 909 (1984) [hereinafter Houstoun]; Donato & Tyree, *Family Reunification, Health Professionals, and the Sex Composition of Immigrants to the United States*, 70 SOC. & SOC. RES. 226, 226 (1986) [hereinafter Donato].

144. Houstoun, *supra* note 143, at 913.

145. The percentage of female migration into the United States before 1930 ranged from a low of 30.4% in the decade from 1900-1909 to a high of 43.8% in the decade from 1920-1929. Houstoun, *supra* note 143, at 910, 951, 960, 961. This analysis is based on tabulations of immigrant flows by sex which were available only after 1856. Donato, *supra* note 143, at 226.

146. Houstoun, *supra* note 143, at 922.

147. Decades from 1930-1979 had the following percentages of female immigrants: from 1930-39, 55.3% of immigrants were female; 1940-49, 61.2% female; 1950-59, 53.7% female; 1960-69, 55.6% female; 1970-79, 53% female. *Id.* at 913.

148. For example, a study of immigration for the years between 1975 and 1980 found that women outnumbered men from countries in the Western Hemisphere except from Mexico, whose immigrants to the United States were 48% female. Women predominated in most European immigration into the United States. Most immigration from Asian countries with large numbers of immigrants had a higher percentage of women. For example, China, Japan, Korea, Phillippines, Taiwan, and Thailand sent

the percentage of females immigrating was higher than the percentage of males.[149] Beginning in 1982, there was a shift to a slight male majority until 1986 and 1987, when there were slightly more female immigrants.[150] Government projections indicate that future migration will include slightly more females than males.[151]

Studies have demonstrated the particular predominance of women in spouse-based immigration[152] into the United States.[153] For example, for the time period from 1972 to 1979, sixty-two percent of spouses of United States citizens entering the United States as immigrants were women. In that same time period, almost two-thirds of the spouses of permanent residents entering as immigrants were women.[154] A study by the General Accounting Office found that in 1985, native-born citizens petitioning for spouses were predominantly male.[155]

The fact that women predominate in spouse-based immigration has been discounted in the enactment of immigration legislation. Thus any focus on the impact that the law has on immigrant women has been suppressed. In the 1951 Senate Judiciary Committee Report leading to the passage of the 1952 Immigration Act, the Com-

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more women while Vietnam and India sent more men. Males dominated the smaller immigration flows from Africa and countries in the Middle East. Donato & Tyree, *Understanding the Sex Composition of Immigrants to the U.S.* 1, 23-24 (1986) (Paper presented at the Annual Meeting of the American Sociological Association in New York, Aug., 1986. Available from the Dept. of Sociology at SUNY Stony Brook) [hereinafter Donato & Tyree].

149. Houstoun, *supra* note 143, at 962-63.

150. STATISTICAL ANALYSIS BRANCH, IMMIGRATION AND NATURALIZATION SERVICE, THE PRESIDENT'S COMPREHENSIVE TRIENNIAL REPORT ON IMMIGRATION 12 (1989); U.S. DEPT. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, 1988 STATISTICAL YEARBOOK 24 (1989).

151. U.S. GENERAL ACCOUNTING OFFICE, IMMIGRATION: THE FUTURE FLOW OF LEGAL IMMIGRATION TO THE U.S. 32, 33 (1988) (Report to the Chairman, Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, U.S. Senate) [hereinafter G.A.O.].

152. The spouses of United States citizens comprise most of the spouse-based immigration. *Fraudulent Marriage and Fiance Arrangements, supra* note 95, at 21. For example, from 1972-1979, 408,691 aliens immigrated to the United States as the spouses of United States citizens, while 187,456 aliens immigrated to the United States as the spouses of permanent resident aliens. Houstoun, *supra* note 143, at 924, 925.

153. Donato, *supra* note 143, at 226; Donato & Tyree, *supra* note 148, at 2.

154. Houstoun, *supra* note 143, at 925.

155. The study found that most United States citizen petitioners for immediate relative immigrants were native-born citizens rather than naturalized citizens, and that these native-born petitioners most frequently petitioned for spouses. In the 1985 G.A.O. study, there was some indication that female citizens in increasing numbers are seeking the immigration of male spouses. The General Accounting Office reported an increase in the male spouse based immigration in 1982-84. G.A.O., *supra* note 151, at 33.

mittee asserted that "a preponderance of male immigrants is one of the principal characteristics of international or long distance migration."[156] Yet the facts before the Committee supported a different conclusion.[157] The report noted, but then discounted, the predominance of female immigration into the United States since the 1930's, particularly in the area of spouse-based immigration.[158] The committee concluded that "the present preponderance of female immigration will not continue."[159] Despite the 1951 judiciary committee's predictions, migration into the United States, and particularly spouse-based immigration, remained predominantly female.[160] Yet the heavy female composition of spouse-based immigration was not mentioned or considered by the executive or legislative policy makers in post-1952 changes in the immigration laws, even when the topic of reform was family renunification or marriage-based immigration.

In hearings leading up to the Marriage Fraud Act, the information presented to the Senate Subcommittee on Immigration and Refugee Policy by the Commissioner of the INS consisted of statistics on immigration to the United States based on marital relationships in general, with no indication of the sex composition of this population.[161] Furthermore, the United States citizens testifying before the subcommittee that they had been the subject of fraudulent marriages with aliens were women, giving the impression that aliens immigrating as spouses were male.[162]

The fact that spouse-based immigration has been substantially and, for many years, predominantly female needs to be acknowledged and taken into account in the formulation of immigration law and policy. The failure to do so contributes to the perpetuation of the premises of coverture in the immigration laws.

B. The Historical and Social Domination of Wives by Husbands and the Pervasiveness of Wife Abuse

As discussed previously, the doctrine of coverture and its component, the right of chastisement, established a legal basis for the subordination of women and their total domination by their husbands.[163] It has taken a number of years for legal institutions to confront and

156. S. REP. NO. 1515, *supra* note 76, at 160.

157. The report noted that in the decade from 1931-1940, females comprised 56.6% of immigrants and, in the decade from 1941-1950, females comprised 59% of immigrants, thus demonstrating a preponderance of female immigration since 1930. *Id.* at 160.

158. *Id.* at 160-61.

159. *Id.* at 161.

160. *See* Houstoun, *supra* note 143; G.A.O., *supra* note 151.

161. *Fraudulent Marriage and Fiance Arrangements*, *supra* note 95, at 21.

162. *Id.* at 42-56.

163. *See* Sections II A and B *supra*.

reject the underlying premises of these doctrines, and the process is not complete.[164] Furthermore, even though the law has changed dramatically since the beginning of the twentieth century, social norms of spouse domination and control persist. Control of wives by husbands still is seen by many as the husband's right. This is accompanied by the social acceptance of violence as a means of control.[165] The "king of his castle" analogy persists. The "king" has absolute power and the expectation of control and obedience. If his expectation is not met, he has the right to use force to maintain control.

These lingering cultural norms set the stage for and influence the extent of wife battering.[166] While social scientists have different perspectives about the causes of wife abuse,[167] there is agreement that the power of men over women and the perception of the husband's right to dominate are major fundamental factors in the high level of wife abuse in our society.[168]

Wife abuse is a serious social problem in the United States.[169] Inter-spousal violence occurs in all socio-economic levels.[170] National Surveys suggest that twenty to twenty-five percent of adult women in the United States have been physically assaulted by an adult intimate: between twelve and fifteen million women.[171] Conjugal assaults comprise five to eleven percent of reported assaults in the United States, and studies show that conjugal assaults are underreported to the police.[172] Conjugal assaults tend to have more serious consequences than other assaults.[173] For example, the National Crime Survey found that while only five percent of all assaults were conjugal assaults, they accounted for twelve percent of assaults end-

164. *See* Section II C *supra.*
165. Kurz, *supra* note 140, at 496-97.
166. L. OKUN, WOMAN ABUSE, FACTS REPLACING MYTHS 69, 90-91 (1986).
167. Kurz, *supra* note 140, at 489-90; DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 46 (D. Sonkin ed. 1986).
168. Kurz, *supra* note 140, at 493, 495-97.
169. L. OKUN, *supra* note 166, at 35-39; A. BROWNE, WHEN BATTERED WOMEN KILL 4 (1987); ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 42, at 2; Planned Parenthood of Southeastern Pa. v. Casey, 60 U.S.L.W. 4796, 4810-12 (U.S. June 29, 1992); Council on Scientific Affairs, American Medical Association, *Violence Against Women: Relevance for Medical Practitioners,* 267 J. AM. MED. A. 3184, 3185-87 (1992) [hereinafter Council on Scientific Affairs].
170. L. OKUN, *supra* note 166, at 45.
171. House Report 101-737, Sept. 21, 1990 accompanying House Congressional Resolution 172. *See also* M. STRAUS, R. GELLES & S. STEINMETZ, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 36, 40, 50 (1980); R. GELLES & M. STRAUSS, INTIMATE VIOLENCE 104, 250 (1988).
172. L. OKUN, *supra* note 166, at 35.
173. *Id.* at 35-36.

ing in serious injury and sixteen percent of those requiring medical care.[174] Moreover, eight to eighteen percent of murder victims in the United States were killed by their spouses.[175]

Most studies show that men are much more likely than women to engage in serious spousal assaults.[176] For example, the National Crime Survey found a rate of thirteen assaulted wives for every assaulted husband.[177] One study found that almost thirty-seven percent of wives seeking divorce alleged physical abuse by their husbands.[178] Even when both spouses participated in inter-spousal violence, ninety-five percent of the time, the woman, rather than the man gets injured.[179] Most battered women experience multiple assaults[180] and the extent of violence and injury tends to increase over time.[181] Pregnancy tends to increase the frequency of wife abuse.[182] Thirty to forty percent of female murder victims in the United States were the wives of their murderers.[183]

Since wife abuse is so pervasive in the United States, it is not surprising that alien wives are abused by their citizen and resident husbands, as the individual situations in the introduction illustrate. Surveys of alien women have also found that they suffer substantial abuse. For example, a survey of alien women in San Francisco found that twenty-four percent of the Latina and twenty percent of the Filipina study participants had experienced domestic violence, and that for forty-two percent of the Latinas and twenty percent of the Filipinas their dependence on their husbands for legal status was a major problem.[184] Another survey reported sixty percent of the surveyed Korean immigrant women had been abused by their spouses.[185]

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174. *Id.* at 36.

175. *Id.*; *Casey,* 60 U.S.L.W. at 4811.

176. The Gelles and Straus surveys have been criticized for not distinguishing among different kinds and degrees of violence. Kurz, *supra* note 140, at 494-95. However, even these surveys recognized the dominance of male violence in serious spouse abuse. While these surveys found that women and men engage in violence in about the same numbers, they also found that many of the assaults by women against husbands are in self-defense and that the violence by men is more injurious. M. STRAUS, R. GELLES & S. STEINMETZ, *supra* note 171, at 43; R. GELLES & M. STRAUS, *supra* note 171, at 90.

177. L. OKUN, *supra* note 166, at 39.

178. *Id.* at 37.

179. A. BROWNE, *supra* note 169, at 8.

180. L. OKUN, *supra* note 166, at 49.

181. L. WALKER, THE BATTERED WOMAN SYNDROME 25-26 (1984).

182. *Casey,* 60 U.S.L.W. at 4810-11; Council on Scientific Affairs, *supra* note 169, at 3187; L. OKUN, *supra* note 166, at 51.

183. *Casey,* 60 U.S.L.W. at 4811; L. OKUN, *supra* note 166, at 36.

184. C. HOGELAND & R. ROSEN, *supra* note 3, at 15.

185. Ramirez, *Violence at Home Grips Alien Women,* San Francisco Examiner, Mar. 10, 1991 at A20, col. 1; *see also* Lin, *Is INS Hindering Abused Wives?,* Newsday (New York), July 8, 1991 at 21 col. 2, reporting on the large percentage of battered immigrant women with citizen or resident spouses serviced by the Asian Women's Shel-

Furthermore, the social situation of many immigrant women makes them particularly vulnerable to an abusive spouse. Wife abusers are usually extremely controlling. They try to dominate their wives and make them completely dependent. Abusers seek to remove any sense of their wives' autonomy. They try to isolate them socially and deprive their wives of money and resources.[186] A recent immigrant is frequently very socially dependent on her citizen or resident spouse. Often, she has left behind the family and friends that could provide her other support. She is unlikely to be familiar with the culture, the legal system, her legal rights, social service agencies, or medical care services.[187]

In addition to the horror of domestic violence, these alien spouses must confront an immigration law that blocks their escape from abuse. The current immigration law gives the citizen or resident spouse the legal ability to control and isolate his alien spouse. He controls her alien status and therefore her ability to live and work in the United States. His control over her status is also his control over her alien children's status and may impact her ability to maintain the custody of citizen children. Concern about child custody is a common factor in preventing women from leaving a battering situation.[188]

The law itself can thus be a contributing factor to spouse abuse. The battering spouse's propensity toward violence and domination are exacerbated by the extensive power of a law which gives him total control over his spouse's immigration status. The abused alien spouse's perception of entrapment and hopelessness caused by the abuse is made concrete by the reality of a law which makes her totally dependent upon her spouse and gives the spouse the legal means to enforce his domination.

The impact of the battering of alien women by their spouses extends beyond the extensive harm to the abused women. Battering behavior takes a toll on society. Police and social services are needed to deal with the immediate consequences of battering.[189] Studies have shown the great impact of wife abuse in the provision of medical services. One conservative study with low estimates of assaults still presented a sobering analysis of the annual morbidity associated

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ter in New York City.

186. L. OKUN, *supra* note 166, at 68.

187. *See* J. Lum, *Battered Asian Women*, RICE 50 (March 1988).

188. A. BROWNE, *supra* note 169, at 111.

189. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17, at 12, 17.

with domestic violence: 21,000 hospitalizations, 99,800 days of hospitalization, 28,700 emergency department visits, 39,900 visits to physicians, and a total direct health care cost of $44,393,700.[190] A more recent study which used a protocol to identify injuries caused by abuse found that thirty percent of the trauma patients treated in an emergency room were battered women.[191] Battering behavior now also results in future societal harm. Witnessing violence is a factor in the inter-generational transmission of violence.[192] Furthermore, the battering of women has an impact on those in the society who are not battered by reinforcing the message that this subordination of women is the cultural norm.[193]

The impact of the spousal domination inherent in the immigration law on abused alien spouses must be confronted by legislative and administrative policy makers. The law should not give a United States spouse the power to entrap his spouse in an abusive relationship with the threat of illegal immigration status.

C. The Harm to Citizen and Alien Children

The spouse-based immigration laws harm both citizen and alien children. One of the premises of coverture was that a married woman's children belonged to her husband. She had no power to protect them or to provide for their best interests. She had to watch helplessly as her husband controlled the children's living arrangements, education, and discipline. The legacies of this premise are contained in the current immigration law. By controlling an alien spouse's immigration status, a citizen or resident spouse controls her ability to live with and support her children in the United States. An alien spouse's children may lose their legal immigration status if she loses her status.[194] A citizen child could lose the ability to live with her primary caretaker or be subject to *de facto* deportation.

The relationship of an alien parent to a minor United States citizen child forms no basis for the parent's immigration status.[195] Fur-

190. McLeer & Anwar, *A Study of Battered Women Presenting in an Emergency Department*, 79 AMERICAN JOURNAL OF PUBLIC HEALTH 65 (1989) (reporting results of the National Crime Survey).

191. *Id.* at 66.

192. Walker & Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 151 (D. Sonkin ed. 1986).

193. *Cf.* Breines & Gordon, *The New Scholarship on Family Violence*, SIGNS 515 (Spring 1983); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMENS' L.J. 83 (1980).

194. *See supra* notes 105-06 and accompanying text.

195. 8 U.S.C. § 1151(b) (1988). *See* Piatt, *Born As Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988) (discussion of the plight of the citizen children of undocumented parents imposed by current immigration policies and the courts' unwillingness to protect these children).

thermore, courts have held that a United States citizen child's constitutional rights are not violated when the child's parent is deported from the United States, even when that parent is the child's caretaker and support, or when the deportation of the parent would force the *de facto* deportation of the citizen child.[196] An alien mother forced to be in an illegal status by the control of her citizen or resident spouse is subject to deportation. She would then have to confront either abandoning her citizen child in the United States, or, if she can gain custody, taking the child to live in a place where the child's education, economic opportunity, or even physical safety may be severely limited.

If there is a custody dispute, the alien parent who has been forced into illegality by the non-cooperation of her citizen or alien spouse is at a severe disadvantage, even if she is the child's primary caretaker and the child's best interests are in jeopardy. A court deciding child custody is forced to choose between two alternatives, both of which may be disastrous for the child. Custody could be awarded to the alien parent who could be forced to take the citizen child from the United States, perhaps to a war-torn or economically-deprived country, or custody could be denied to the alien parent, thereby depriving the child of primary emotional support.

The situation is particularly alarming when a United States citizen or resident abuses his spouse or child. Children suffer from the abuse of their mothers by their fathers. Children who see their fathers beat their mothers suffer serious emotional trauma.[197] A number of children are beaten by wife-battering fathers in connection with the beating of their mothers or separately.[198] One study found that seventy percent of men who assaulted their wives also physically abused their children.[199]

An alien mother who has been beaten herself, or whose husband

196. Acosta v. Gaffney, 558 F.2d 1153 (3rd Cir. 1977); Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969); Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985).

197. D. MARTIN, BATTERED WIVES 23 (1981); *see also* NATIONAL CENTER ON WOMEN AND FAMILY LAW, CUSTODY LITIGATION ON BEHALF OF BATTERED WOMEN, 1988 Supplement 13-18 (overview of the psychological research on the effects of domestic violence on children).

198. M. PAGELOW, CHILDREN IN VIOLENT FAMILIES: DIRECT AND INDIRECT VICTIMS (1981); S. HILL & B.J. BARNES, YOUNG CHILDREN AND THEIR FAMILIES (1982); L. WALKER, THE BATTERED WOMAN SYNDROME (1984) (especially Chapter 6, *Impact of Violence in the Home on Children*).

199. Kurz, *supra* note 140, at 499 (citing Bowker, Arbitell and McFerron, *On the Relationship Between Wife Beating and Child Abuse*, FEMINIST PERSPECTIVE ON WIFE ABUSE 158-74 (Yllo & Bograd ed. 1988)).

abuses their child, is limited in her ability to protect her child by her spouse's control over her immigration status. If the alien spouse never obtains or loses her legal immigration status, she cannot work and provide for her child. She is also subject to deportation with the consequence that the child will be left with an abusive parent, become a ward of the state, or be forced to leave the United States.

V. Legislative and Adminsitrative Changes Needed to Mitigate the Legacies of Coverture

Changes in legislation and administrative interpretation are needed to remove the legacies of coverture from the immigration law.[200] The current immigration law perpetuates the premises of coverture and chastisement in two ways. First, the law affords citizen or resident spouses total control over whether their alien spouses ever gain resident status. Second, with some limited exceptions, the conditional resident scheme gives the citizen or resident spouse control over the continuation of the alien spouse's legal status. Removal of spousal control from the immigration laws would require change in two aspects of the law: the initial process through which a spouse gains resident status and the conditional resident scheme.

In other areas, laws which established the control of husband over wife and gave legitimacy to battering have been renounced.[201] The spousal domination in the immigration laws should be similarly rejected. This would be in keeping with the provision of the immigration law that prohibits sex discrimination in the issuance of immigrant visas[202] and would finally meet the Congressional objective of sexual equality in the immigration laws.[203]

Some may argue that since both male and female immigrant spouses have been subject to spousal control, the law is sex neutral. However, in reality, the law perpetuates discrimination against

200. This article attempts to demonstrate the errors of legislative judgment about spouse-based immigration and suggest legislative and administrative changes. It is not focused on constructing a theory that would support a court determination of the unconstitutionality of the spouse-based immigration laws on the ground that they are sex discriminatory. However, the theoretical approach in the Supreme Court's opinion in Planned Parenthood of Southeastern Pa. v. Casey parallels the approach to legislation and administrative rule making suggested here. In *Casey,* the Court assessed the constitutional validity of a statute requiring spousal notification before a woman could have an abortion. In holding the statute unconstitutional, the court rejected the notions of coverture and took the factual realities of spousal abuse into account. *Casey,* 60 U.S.L.W. at 4810-13. This article does not address reforms outside of the current spouse-based system. *See, e.g.,* Comment, *Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts the Marriage Fraud Act,* 15 Pepperdine L. Rev. 181, 203 (1988) (suggestion that immigration benefits should be extended to relationships based on affinity such as couples who live together, but are not married, and same sex couples).

201. *See supra* Section II C.

202. 8 U.S.C. § 1152(a) (1988).

203. *See supra* notes 78 and 90 and accompanying text.

women. Factually, the majority of alien spouses are women. Socially, in good part because of laws that made inequality and subordination of wives the cultural norm, it is generally husbands, not wives, who subject their spouses to domination and abuse. Gender equality cannot be achieved with a law that purports to be neutral but in reality perpetuates the premises of past gender discrimination and disproportionately impacts on women. Sexual equality can be achieved when the law confronts and rejects the premises of its historical sex discrimination and gives women the ability to live equally with men in a society that still has remnants of that discrimination. Sexual equality is not freedom to be treated without regard to sex. It is freedom from subordination because of gender.[204]

Congressional response to the harm to women perpetuated by the immigration law need not be gender specific, i.e., give benefits to women over men. But the legislature must take into account the basis for and the impact of the immigration law's historical sex discrimination. Instead of allowing both men and women to be subject to spouse control, the law should reject the notion of spousal domination.

A. Changes Needed to the Initial Process Through Which a Spouse Becomes a Permanent Resident

The current initial process through which an alien spouse becomes a permanent residence involves coverture-like spousal control. Only the citizen or resident spouse can file the initial petition that would entitle the alien spouse to legal status.[205] The citizen or resident spouse can withdraw this petition and is the only person allowed to appeal its denial.[206] This is true despite the continuing validity of the marriage, the good faith of the alien spouse, or even the existence and well being of citizen children of the marriage.

Proposals to change this process by eliminating spousal control are likely to draw two main objections. The first is the concern about fraud. The Marriage Fraud Amendments of 1986 were passed because Congress and the INS were convinced that marriage fraud to

204. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1395 (1986); *see also* Schneider, *supra* note 31, at 629, 645, stating that equality requires social reconstruction of gender roles and freedom from sexual subordination and violence.

205. 8 U.S.C.A. § 1154(a) (Supp. 1991).

206. 8 C.F.R. §§ 204.1(a)(4), 205.1(a)(1) (1991).

achieve immigration status was rampant.[207] Subsequent analysis of the data that purportedly supported such a conclusion shows serious flaws with the data.[208] Yet, concern about fraud persists.[209] A second objection would be based on the contention that since the purpose of the spouse-based immigration laws is family unification for citizens and residents, the right to choose to be unified or not unified with a spouse belongs to the citizen or resident.[210]

The response to these contentions is that concerns about fraud and the choices of citizens or residents have been and must be balanced with other important social objectives. The immigration law already contains provisions that overcome concerns about fraud. These provisions limit a United States citizen's ability to choose which relatives will become permanent residents and allow certain relatives to self-petition. These provisions demonstrate an acknowledgement that there can be social policy reasons for allowing an alien to self-petition when her United States relative does not petition for her to become a permanent resident.

There is precedence in the immigration laws for allowing an alien, in a familial relationship with a United States citizen who does not petition for her, to petition for herself. The surviving alien spouses of United States citizens are allowed to self-petition for immigrant status when, during their lifetimes, their United States citizen spouses had not chosen to petition for them.[211] Also, certain children of United States citizens are allowed to self-petition when the citizen parent chooses not to. An alien who was fathered by a United States citizen and born in Korea, Vietnam, Laos, Kampuchea, or Thailand after 1950 and before October 1982 can file a petition on his or her own to be classified as an immediate relative or preference immigrant entitled to live in the United States as a legal permanent resi-

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207. *Fraudulent Marriage and Fiance Arrangements*, *supra* note 95.

208. *INS Reveals Basis for Fraud Claims*, 65 INTERPRETER RELEASES 26-27 (1988).

209. The fraud Congress focused on, however, was of two kinds: fraud by an alien who deceives a citizen or resident into marriage solely to achieve immigration status, and collusive fraud in which an alien and a citizen or resident agree (sometimes for money) to enter a marriage solely so that the alien can achieve immigrant status. Congress did not look at situations in which the alien married a citizen or resident in good faith intending to establish a loving, long term relationship, only to discover she had been lured into an abusive relationship. *Immigration Marriage Fraud Hearing Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 18 (1985) (Statement of INS Commissioner Alan Nelson).

210. Senator Alan K. Simpson has been quoted as saying, "The basis [for the current law] is to assist the American citizen" and also, "the original intent was not to help the alien but the American citizen." Wall St. J., August 28, 1989, at A10, col. 1.

211. 8 U.S.C.A. § 1151(b)(2)(A)(i) (West Supp. 1991). The widow or widower must have been married to the citizen for at least two years, must not have been legally separated from the citizen at the time of the citizen's death, and must file the petition within two years of the citizen's death. The petition cannot be filed after the surviving alien spouse remarries.

dent.[212] Vietnamese children fathered by United States citizens and born between 1962 and 1976 were given a special two year opportunity to immigrate to the United States. In addition to gaining permanent resident status for themselves, they were allowed to be accompanied by their spouses, children, and mothers or persons who had acted as their principal parents.[213]

These laws were passed because of Congressional realization of the hardship imposed on children and spouses by uncaring United States relatives.[214] They provide an opportunity for legal immigrant status for aliens whose United States relatives had abandoned their familial responsibilities and did not cooperate in establishing a status for their relatives. These provisions overrode the concern for a United States citizen's choice of which relatives should immigrate with humanitarian concerns for the children and spouses the citizens ignored or abandoned.

Changes in the initial process through which a spouse becomes a permanent resident are supported by similar humanitarian concerns and strong social policy objectives. The legislature must rid the law of the discriminatory outmoded notion of spouse domination. Particularly, in the face of serious social problems like spouse abuse and child abuse and abandonment, the law should not enforce power relationships that promote behavior destructive to individuals and society.

A simple solution to the removal of spouse domination in the initial process would be to allow the alien spouse to petition for her own immigrant status upon proof of a good faith marriage to a citizen or resident. This proposal, however, may be unrealistic in light of the legislative and administrative concerns about marriage fraud expressed in the 1986 Marriage Fraud Act. The following, therefore, proposes that spousal control be removed in certain circumstances where the humanitarian need is high and the potential for fraud low.

Certain alien spouses and children of citizens or residents should be able to initiate a process to gain resident status without the permission of their United States spouses or parents. Alien spouses who are living in the United States and can demonstrate that they en-

212. 8 U.S.C.A. § 1154(f) (West Supp. 1991).

213. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 202, § 101e, 101 Stat. 1329-183 (1987).

214. *See* Mermelstein, *Welcoming Home Our Children: An Analysis of the New Amerasian Immigration Law*, 2 B. U. INT'L L. J. 299 (1983); DeMonaco, *Disorderly Departure: An Analysis of the United States Policy Toward Amerasian Immigration*, 15 BROOKLYN J. INT'L L. 641 (1989).

tered into their marriages in good faith should be able to petition for legal status on their own in three circumstances. The first is when an alien spouse or her child is abused by her citizen or resident spouse. The second is when the alien spouse has had a United States citizen child with her citizen or resident spouse and the alien spouse lives with and cares for her citizen child. The third is when the alien can demonstrate that she would suffer substantial hardship caused by lack of legal status. Additionally, an alien child living in the United States who has been abused or abandoned by her citizen or resident parent should have the ability to apply for legal status without that abusive parent's participation.

Providing access to legal status for these groups would address important general social policy concerns that would override particular concerns about detection of fraud or citizen or resident choice. An abused alien spouse or child should not suffer the additional harms of illegal status or deportation. The legislature needs to make it clear to abusive citizens and residents that they cannot perpetuate their abuse by using the immigration law to threaten alien spouses with inability to work, deportation, and loss of child custody. Similarly, a United States citizen child of a citizen or resident parent living with and cared for by her alien parent should not be harmed by being deprived of living in the country of her citizenship with a caretaker parent. This is particularly important when the citizen or resident parent has abused, abandoned, or abdicated responsibility for his child. Furthermore, a provision that takes substantial hardship into account would allow for consideration of individually meritorious situations that cannot be foreseen by general legislation.

Providing access to legal status for these alien spouses and children without the permission of their United States relatives could be accomplished in two alternative ways. The first alternative would allow an alien spouse or child who fit into one of the categories described above to file an initial relative petition herself. If the petition is approved, she would then have the same opportunity to demonstrate her eligibility for permanent resident status as any other spouse or child for whom a relative petition was approved.[215]

However, alien spouses in these special circumstances should not be put into conditional status even if their marriage is less than two years old. There would be no need for a conditional period to assure that the marriage was not fraudulent because the alien spouse would have already met the burden of demonstrating that she entered into her marriage in good faith before her petition for resident status was

215. Aliens who are the beneficiaries of approved petitions must demonstrate that they are not excludable on various grounds, such as conviction of crimes, particular health problems, participation in terrorist activities. 8 U.S.C.A. § 1182 (Supp. 1991).

approved.

This approach would have the advantage of requiring only minor modification of the current statutory scheme. The statute would only need to be changed to add categories of persons who could file a relative petition. However, the current statutory scheme has some practical disadvantages. One disadvantage would be the limitations under the current scheme on the ability of some alien spouses to adjust their status to permanent resident status in the United States.[216] Aliens unable to adjust status in the United States must usually return to their countries of origin to apply for permanent resident status. Leaving the United States could impose substantial hardship on some alien spoues or subject them to danger. For example, a battered spouse who has received an order of protection against her abuser from a United States court would not have that protection while she was out of the country.

A second alternative would establish a protected status for these spouses and children. This protected status would allow them to apply expeditiously for an interim status and work authorization. This status could then form the basis for a subsequent application for permanent status. This approach would have the advantage of a self contained addition to the statute that could be closely tailored to meet the needs of these groups and the policy objectives of the legislation.

An interim protected status has precedence in the immigration law. Under the legalization program, aliens first applied for temporary resident status and then subsequently applied to adjust their status to permanent resident.[217] Also, persons seeking protection from persecution are first given the status of asylee and subsequently allowed to apply for adjustment to permanent resident status.[218]

B. Changes Needed in the Conditional Resident Scheme

Under current law, an alien spouse whose United States spouse has petitioned for her and who has demonstrated her eligibility for permanent resident status is given that status subject to condition if

216. *See* 8 U.S.C. 1254 (1988).
217. 8 U.S.C. 1255a (1988).
218. 8 U.S.C. 1159 (1988). The law also provides for temporary protected status for aliens from certain designated countries because of conditions in their home countries, 8 U.S.C.A. 1254a, and protection against deportation and work authorization for spouses and children of legalized aliens. Immigration Act of 1990, Pub. L. 101-649, 301, 8 U.S.C.A. 1255a, Note (Supp. 1991).

her marriage is less than two years old. The condition, with some limited exceptions, is that after a two year time period, she must obtain the cooperation of her spouse in filing a joint petition and attending an interview to demonstrate to INS officials that her marriage was not a fraud. The conditional resident scheme thus allows a United States spouse to transform his resident spouse, who has legally lived in the United States for at least two years, into an illegal alien.

The simple way to remove this spousal domination is to abandon a conditional resident system. This simple approach, however, is likely to be met with much resistance. The INS and Congress strongly believe that there is sufficient immigration-based marriage fraud to warrant a conditional resident system. The government does not believe it has sufficient resources to ferret out fraud[219] and believes it must rely on the passage of time to identify fraud.[220] Therefore, in a concession to this political reality, the following proposals are made to mitigate the spousal domination in the context of a conditional resident scheme. Suggestions are made for changes in both legislation and administrative regulation.

1. Elimination of Conditional Period When There is a Citizen Child of the Marriage

Congress should amend the law to remove the conditions attached to an alien spouse's residency if she has a child with her U.S. spouse and she cares for the child. If a child of the marriage is born after a spouse petition is filed, but before the alien spouse is granted resident status, the conditional resident scheme should not apply. The alien spouse should become a legal permanent resident if she is otherwise qualified, and not a conditional resident, even if the marriage is less than two years old. If the child is born during the period of the alien spouse's conditional residency and she demonstrates she cares for the child, that alien spouse should be able to independently file a petition to transform her conditional status to a permanent one.

These proposals would remove the legacy of the coverture premise that prevents a married woman from protecting her child. It would allow for the child's best interests to be served. These two important objectives would be achieved without undermining the Marriage Fraud Amendments' goal of preventing the gaining of immigration status based on a marriage entered into for immigration fraud purposes. The existence of a child of a marriage demonstrates that the marriage was not entered into solely for the purpose of gaining an

219. *See Fraudulent Marriage and Fiance Arrangements, supra* note 95, at 11-12 and 18.

220. *See Fraudulent Marriage and Fiance Arrangements, supra* note 95, at 18.

immigration status.

2. *Modification of Waivers for Continuation of Resident Status*

Under the current statute there are three waivers of the requirement of citizen or spouse participation in the continuation of legal status for the alien spouse: the good faith, termination waiver, the abused spouse or child waiver, and the extreme hardship waiver. Each waiver is subject to the Attorney General's discretion.

a. Good Faith, Termination Waiver

Until 1990, the "good faith" waiver required that an alien spouse had entered into her marriage in good faith and had terminated the marriage for good cause.[221] The requirement that the alien spouse terminate the marriage for good cause led to situations in which the alien spouse had to rush to the courthouse to be the moving party in a divorce. Further, the alien living in states having no fault divorces had difficulty satisfying the waiver's requirements.[222]

In 1990, Congress removed the requirement that the alien spouse terminate her marriage for "good cause" from the good faith waiver. This change allows "the alien to file independently for a waiver, if the marriage was entered into in good faith" but still requires that "the marriage has been terminated or termination proceedings have commenced."[223] Congress should also remove the "termination" requirement.

The statute should allow an alien spouse who is attempting to maintain her marriage to request a waiver of the joint petition, joint interview process, if she can meet the burden of demonstrating that she entered into her marriage in good faith and not for the purposes of immigration fraud. The statute does not allow a conditional resident to demonstrate those facts unless the citizen or resident spouse is willing to sign a joint petition and attend an INS interview. In order to request the change from conditional to permanent status on her own by showing she married in good faith, an alien spouse must first terminate the marriage.[224]

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221. 8 U.S.C. § 1186a(c)(4)(B) (1988).
222. H. R. REP. No. 723, 101st Cong. 2d Sess., pt. 1, at 54 (1990) [hereinafter REPORT].
223. *Id.* at 79.
224. 8 U.S.C.A. § 1186a(c)(4)(B) (West Supp. 1991).

This approach does not make sense in deterring fraud. The alien who is trying to maintain a marriage is no more likely, and probably less likely, to have engaged in marriage fraud than an alien spouse who has terminated the marriage. Instead of deterring fraud, the statute allows the citizen or resident spouse to use the threat of illegal status and deportation to control his alien spouse. Furthermore, because of residency requirements for divorce in some states[225] the option to terminate a marriage within a two year period is foreclosed. It does not make sense to hinge a good faith waiver on whether an alien can initiate the termination of her marriage.

Changes also need to be made in the INS's interpretation of "good faith." The statute requires only that the alien entered into the marriage in good faith. Yet the INS's interpretation attempts to hinge the alien's good faith on her citizen or resident spouse's good faith. Furthermore, the INS does not give sufficient weight to the birth of a child of the marriage in determining good faith.

To determine whether an alien entered into a marriage in "good faith," the INS regulations direct the consideration of evidence relating to the amount of commitment to the marital relationship by both spouses including proof of the length of time the parties cohabited, the grounds on which the marriage was terminated, and documentation demonstrating the degree to which the spouses' financial assets and liabilities were combined.[226] While length of time of the relationship and sharing of resources may be some evidence of an alien's good faith, by focusing on length of cohabitation and intermingling of funds, the INS puts the control over whether the alien spouse could show she entered into the marriage in good faith in the citizen or resident spouse's hands. An alien spouse may have little control over whether her citizen or resident spouse includes her in a joint bank account or puts her name on a joint credit card or a lease. She may also have little control over the length of time she lives with her citizen or resident spouse. He may abandon her or engage in behavior such as battering or drug abuse that forces her to leave the marital home. It is the alien's good faith that is required by the statute, not her citizen or resident spouse's commitment to the marriage. Good faith on the alien spouse's part should be ascertained by focusing on her intent and behavior.

An INS interim regulation issued in 1991 adds birth certificates of children born to the marriage as an example of evidence that the marriage was entered into in good faith.[227] However, proof of the existence of a child born of the marriage should not just be a factor,

225. *See, e.g.*, N.Y. DOM. REL. LAW § 230 (McKinney 1986).
226. 8 C.F.R. § 216.5(e)(2) (1991).
227. 56 Fed Reg. 22637 (1991) (to be codified at 8 C.F.R. § 216.5(e)(2)(iii)).

but should preclude any finding that the alien spouse did not enter the marriage in good faith.

b. The Abused Spouse Waiver

The legislative history of the 1990 changes expressed the Congressional objectives in enacting the abused spouse waiver. The House Judiciary Committee Report stated that the purpose of the waiver was to "ensure" that neither a spouse nor a child would be "entrapped in the abusive relationship by the threat of losing their legal resident status."[228] The House Judiciary Committee recognized the particular vulnerability of victims of domestic abuse by acknowledging that in some circumstances the good faith termination waiver would not be sufficient to meet the objective of preventing the use of immigration law as a tool for abuse. The Committee stated that in many cases there are obstacles to prevent a victim of domestic violence from initiating a divorce, such as fear of further physical violence or lack of resources to pay a lawyer.[229] On May 16, 1991, the INS issued an interim rule that did not completely fulfill Congressional intent in enacting this provision.[230]

This rule first describes who is eligible for the waiver. Under the rule the waiver may be granted to a conditional resident if she entered into her marriage in good faith and she or her alien or citizen child was battered by, or was the subject of extreme cruelty by, her citizen or resident spouse.[231] The conditional resident spouse may apply for the waiver whether she is divorced, separated, or living with the citizen or permanent resident spouse.[232] This comports with legislative intent to prevent the entrapment of a spouse or child in abuse. A main proponent of the legislation, Congresswoman Slaughter, stated that the waiver would be granted to an abused conditional resident spouse, an abused conditional resident child, or a conditional resident spouse seeking to protect an alien or citizen child from abuse by the citizen or resident spouse.[233]

The rule next discusses the meaning of "battered" and "extreme cruelty." It describes these terms together to include, but not be lim-

228. REPORT, *supra* note 222, at 51, 78.
229. *Id.* at 51.
230. *See INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES 665-70 (1991).
231. 56 Fed. Reg. 22637 (1991) (to be codified at 8 C.F.R. § 216.5(e)(3)).
232. 56 Fed. Reg. 22637 (1991) (to be codified at 8 C.F.R. § 216.5(e)(3)(ii)).
233. 136 CONG. REC. H8642 (daily ed., Oct. 2, 1990) (statement of Rep. Slaughter).

ited 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 prostitution" will be considered "acts of violence."[234] Absent from this definition of abuse are neglect and deprivation which are criminal offenses in many states.[235] These should be included in the definition of abuse. Conditional resident spouses and their children should be able to escape from serious economic or medical deprivation without risking deportation.

The rule further specifies the type of evidence necessary to support the waiver. In discussing the evidence the rule separates what would be accepted to demonstrate "physical abuse" from evidence required to demonstrate "extreme mental cruelty." The evidence specified by the rule as acceptable to prove physical abuse includes, but is not limited to, reports and affidavits from police, judges, medical personnel, school officials, and social service agency personnel.[236] The rule's requirement about evidence to demonstrate extreme cruelty is much more restrictive. The rule requires that a waiver application based on extreme cruelty must be supported by an evaluation by a licensed clinical social worker, psychologist, or psychiatrist.[237] This limitation is not supported by the legislative history of the statute, misinterprets the objective of the statute, and has very serious negative consequences for an alien spouse seeking a waiver based on extreme cruelty.

The House Report made it clear that a wide variety of types of evidence should be accepted to support the waiver application, and that the waiver should be liberally granted. The Report gave examples of evidence that could be submitted, such as reports from police, medical personnel, school officials, psychologists, and social service agencies, but made it clear that it was not Congress's intent to limit the types of evidence that could support the waiver.[238] The Report further stated the Congressional intent that the waiver be granted when battering or cruelty is demonstrated and that the Attorney General's discretion to deny waiver requests be limited to rare and exceptional circumstances.[239]

The requirement of proof from a mental health professional to support a waiver based on extreme cruelty misinterprets the statute.

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234. 56 Fed. Reg. 22637 (1991) (to be codified at 8 C.F.R. § 216.5(e)(3)(i)).
235. *E.g.*, N.Y. PENAL LAW §§ 260.00, 260.05, 260.10 (McKinney 1989).
236. 56 Fed. Reg. 22637 (1991) (to be codified at 8 C.F.R. § 216.5(e)(3)(iii)).
237. 56 Fed. Reg. 22637 (1991) (to be codified at 8 C.F.R. § 216.5(e)(iv), (vi), (vii)).
238. REPORT, *supra* note 222, at 78-79.
239. *Id.*

The statute focuses on the behavior of the citizen or resident spouse; i.e., whether he engaged in extremely cruel behavior. The rule focuses on the alien spouse's response to her spouse's behavior and the alien spouse's emotional stability. It is the United States spouse's objective behavior that is the statutory criteria, not whether the alien spouse was so disturbed by the behavior that she sought assistance from a mental health professional. The administrative approach penalizes an emotionally strong person who is able to withstand cruel behavior and remain mentally and emotionally stable.

The INS's rationale for imposing such a restrictive proof requirement was that its officers were not qualified "to make reliable evaluations of an abused applicant's mental or emotional state."[240] As explained above, this focuses on the wrong issue. The relevant determination, whether the spouse's behavior constitutes extreme cruelty, is the type of determination INS officers are called upon to make.[241] For example, INS officers determine whether "extreme hardship" will result from deportation of a conditional resident[242] or whether an asylum applicant has a "well founded fear of persecution."[243]

The administrative interpretation also imposes an impossible practical hurdle for many women subject to extreme cruelty. An abused woman is not likely to have resources to pay for counseling from a mental health professional. Furthermore, at least at the initial stages of her escape from an abusive situation, her focus is likely to be on immediate life sustaining objectives, e.g., finding a place to stay, getting a job, getting her children in school, etc.

The rule also undermines the statutory direction that confidentiality be preserved for the abused.[244] The rule only states that the waiver application shall not be released without a court order or written consent of the applicant. There are no directions about administrative procedures to preserve the confidentiality of the applications. The rule additionally allows the release of information contained in the application to an officer of the Department of Justice or any federal or state law enforcement agency.[245] There is no requirement that need be shown for the information.

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240. 56 Fed. Reg. 22636 (May 16, 1991).
241. *INS Interim Rule Diminishes Protection For Abused Spouses And Children*, 68 INTERPRETER RELEASES No. 21, at 669 (June 3, 1991).
242. 8 C.F.R. § 216.5(a)(1)(1991).
243. 8 C.F.R. §§ 208.9, 208.13, 208.14 (1991).
244. 8 U.S.C.A. § 1186a(c)(4)(C) (West 1991).
245. 56 Fed. Reg. 22636 (1991) (to be codified at 8 C.F.R. § 216.5(e)(vii)).

Congress recognized that abused spouses and children need to know that if they come forward, their whereabouts will be secure from their abusers. The INS rule, at a minimum, should specify that under no circumstances will information be given to the abuser, that special security measures will be taken with the application files, and that the access of law enforcement, as well as other government officials, will be limited to those circumstances in which a need for a specific law enforcement purpose is shown.

c. The Extreme Hardship Waiver

The INS has refused to give any direction about how it will interpret "extreme hardship." The INS has stated that it will rely on everyday meaning.[246] This position conflicts with expressed Congressional intent that the extreme hardship waiver be interpreted liberally,[247] particularly in circumstances involving citizen children. Furthermore, the INS position is disingenuous in light of the conflicts between INS and the courts about the meaning of extreme hardship in the suspension context.

The legislative history of the Marriage Fraud Act shows Congressional concern for the harm to a citizen child from the conditional residency scheme. In discussing the extreme hardship waiver, the Senate Judiciary Committee stated that "of special concern" were cases which involved children. The Committee stated that "[i]n establishing the conditional residency provision, the Committee did not intend to separate parents and minor children, nor did the Committee want an alien parent's resident status to be an issue in a court decision on a custody question."[248] While the Committee states that there might be some cases in which no hardship would result from the deportation of a parent, it clearly viewed such a situation as an exception. "[B]ecause of the potential difficulties inherent in family relations" when there is a citizen child, the Committee viewed the extreme hardship waiver provision as the "safety mechanism to ensure that cases in which there is genuine humanitarian need will not be without recourse."[249]

This strong Congressional intent has been ignored by the INS. The INS has failed to specify that the extreme hardship waiver will be granted in situations in which the interests of a citizen child are involved. Furthermore, the Attorney General, through his designee, the Board of Immigration Appeals, has interpreted the words "extreme hardship" in the context of suspension of deportation very nar-

246. 53 Fed. Reg. 30,015 (Aug. 10, 1988).
247. S. REP. 491, 99th Cong., 2d Sess. at 8 (1986).
248. *Id.*
249. *Id.*

rowly even in situations in which the interests of a citizen child are involved.[250]

The deportation of an alien of good moral character who has lived in the United States for seven years can be suspended if the alien can demonstrate that her deportation would "in the opinion of the Attorney General" result in "extreme hardship" to the alien or her citizen or resident spouse, parent, or child.[251] The Board of Immigration Appeals has taken advantage of the language in the suspension statute, which requires the demonstration of extreme hardship "in the opinion of the Attorney General," to interpret extreme hardship very restrictively.[252]

Several courts initially reversed the Board of Immigration Appeals determinations of "no extreme hardship," asserting that the statute required a broader interpretation of extreme hardship than the Board of Immigration Appeals had given it.[253] In *INS v. Wang*, the United States Supreme Court acknowledged that the Attorney General's delegates had interpreted "extreme hardship" narrowly.[254] However, the Court held that because, in the suspension context, the statute committed the definition of extreme hardship in the first instance to the Attorney General's opinion, his interpretation could not be overturned by a reviewing court because the court preferred another interpretation of the statute.[255]

The controversy over extreme hardship has continued in post *Wang* cases. Courts have reversed and remanded Board of Immigration Appeals decisions on the grounds that the Board of Immigration Appeals did not consider all the evidence an alien presented or that the Board did not consider all the adverse consequences of deporta-

250. For example, see INS v. Wang, 450 U.S. 139 (1981); Hernandez Cordero v. INS, 819 F.2d 558 (5th Cir. 1987). The fact that a citizen child would be forced to leave the United States and be subject to a difficult adjustment and diminished educational opportunities has not been considered extreme hardship for suspension.

251. 8 U.S.C. § 1254 (a)(1) (1988).

252. For example, the Board of Immigration Appeals has stated that establishing that deportation would result in severe economic detriment to the alien or her family is not sufficient. *See* Comment, *Judicial Review of 'Extreme Hardship' in Suspension of Deportation Cases*, 34 AM. U.L. REV. 175, 198 (1984); *In re* Gibson, 16 I. & N. Dec. 58, 59; *In re* Sangster, 11 I. & N. Dec. 309, 313; *In re* Uy, 11 I. & N. 1 Dec. 159; *In re* Hwang, 10 I. & N. Dec. 448.

253. *See, e.g.*, Wang v. INS, 622 F.2d 1341 (9th Cir. 1980); Barrera-Leyva v. INS, 637 F.2d 640 (9th Cir. 1980).

254. INS v. Wang, 450 U.S. 139 (1981).

255. *Id. See* Feldman, *Scope of Judicial Review: Extreme Hardship and the Whipsaw of Illegal Aliens*, 36 ADMIN. L. REV. 27 (1984); Loue, *What Went Wrong With Wang?: An Examination of Immigration and Naturalization Service v. Wang*, 20 SAN DIEGO L. REV. 59 (1982).

tion cumulatively in determining whether extreme hardship existed.[256]

In the face of the controversy between the Board of Immigration Appeals and the courts about the meaning of extreme hardship in the suspension context, the INS's refusal to define extreme hardship in the conditional resident context is disingenuous. Relying on "every day meaning"[257] gives no meaningful guidance. As the dispute between the courts and the Board of Immigration Appeals has indicated, and as the United States Supreme Court has stated, the words "extreme hardship" are not self-explanatory.[258]

The INS's refusal to define what extreme hardship means in the conditional residency context leads to the suspicion that the INS will, on a case by case basis, interpret extreme hardship in the conditional residency context as narrowly as extreme hardship is interpreted in the suspension context. Such an interpretation would violate Congressional intent.

The waiver provision of the statute does not give the Attorney General the same kind of authority to define extreme hardship found in the suspension provision. The waiver provision requires that the alien demonstrate extreme hardship, while the suspension provision requires that the deportation would result in extreme hardship in the Attorney General's opinion.[259]

There are additional good reasons for the interpretation of extreme hardship in the waiver context not to follow the narrow suspension approach. Aliens requesting suspension are either in illegal status or are permanent residents who have participated in activity that makes them deportable. Granting suspension necessitates foregoing the enforcement objectives of the immigration laws. In contrast, persons requesting extreme hardship waivers under the Marriage Fraud Act are aliens who obtained legal status, but whose marriages did not last for two years, or whose spouse is using his power over immigration status as a means of control. Granting a waiver merely allows the alien to continue in her lawful status.

To comport with legislative history and give clear guidance about the meaning of extreme hardship the INS must do two things. First, the INS should explicitly state that the extreme hardship waiver will generally be granted when a conditional resident parent demonstrates she has a relationship with her citizen child and the child will suffer harm if the parent is deported. Second, in its regulations interpreting the extreme hardship waiver the INS should list a non-exclu-

256. *See, e.g.*, Prapavat v. INS, 662 F.2d 561 (9th Cir. 1981); Bavanchgo v. INS, 658 F.2d 169 (3rd Cir. 1981); Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984).
257. 53 Fed. Reg. 30,015 (Aug. 10, 1988).
258. INS v. Wang, 450 U.S. 139 (1981).
259. *Compare* 8 U.S.C. § 1186a(c)(4)(A) *with* 8 U.S.C. § 1254(a)(1) (1988).

sive, but substantial, list of factors that will be taken into consideration in the determination of the extreme hardship waiver. These factors should include: family ties; need for medical care; advanced or tender age; the political conditions in the alien's home country that may cause difficulty for the alien or her family; the life the alien has lived in the United States, including service of the alien to her community;[260] a substantial decrease in standard of living because of the alien's deportation; the unavailability of suitable employment for the alien in her country of origin; the alien's loss of a substantial investment in the United States;[261] and social stigma or physical danger faced by an alien if deported. The regulation should further make it clear that the INS will look at the factors presented in support of a waiver claim cumulatively, to ascertain the total picture of the hardship an alien and her family would suffer from the alien's deportation.

If the INS refuses to so clarify when the extreme hardship waiver will apply, Congress should act. It should change the language "extreme" to "substantial" to indicate that the INS may not interpret "extreme hardship" as narrowly in the waiver context as it has been in the suspension context. Congress should further specify that the waiver would be generally granted in cases of harm to citizen children.

d. The Attorney General's Discretion to Deny Waivers

The current statute requires that the citizen or alien spouse join in a petition and appear at an interview to avoid the termination of the alien spouse's legal status. The granting of the extreme hardship, good faith or abuse waivers to this requirement is within the Attorney General's discretion. As originally proposed, the abused spouse waiver directed that the Attorney General "shall" grant the waiver if the alien spouse demonstrates that she meets the waiver's requisites,[262] thereby removing the possibility that the INS could refuse the waiver to a person who is fully qualified for it. This approach should apply to all waivers. Alien spouses who meet the requisites of the waivers of the citizen or resident spouse's required participation should be granted those waivers. Aliens who can demonstrate they

260. H.R. REP. No. 506, 94th Cong., 1st Sess. 17 (1975).

261. *See, e.g.*, Wang v. INS 622 F.2d 1341 (9th Cir. 1980); Hernandez-Cordero v. INS, 783 F.2d 1266 (5th Cir. 1986); Loue, *What Went Wrong With Wang*, *supra* note 255, at 75.

262. H.R. 2580, 101st Cong., 1st Sess. (1989).

meet the criteria for the granting of the waivers should be granted them without the INS's determining whether they "deserve" the waiver on unspecified grounds.[263]

e. Availability of Waivers to All Alien Spouses

In 1990 Congress passed an abused spouse waiver and removed the good cause requirement from the good faith, termination waiver. It directed that these changes be applied to marriages that were entered into before, as well as after, the law's enactment.[264] However, the INS's implementing regulation limits eligibility to conditional residents or former conditional residents who continue to live in the United States. Although the statute specifically applied to all marriages entered into before the statute was passed, the regulation states that the waiver will not be granted to conditional residents who departed from the United States either after their conditional resident status terminated or under an order of deportation.[265] The regulation should be changed to reflect the legislative intent for the 1990 changes to apply to all marriages.

3. The Adjustment of Status Provision

Under the Marriage Fraud Amendments, a conditional resident cannot remain in the United States and become a legal permanent resident other than through a change of the conditional resident status to a permanent status. The other provisions of the immigration law that would allow an alien in the United States who is qualified for permanent residence to adjust to that status are denied to conditional residents.[266] Such a preclusion gives the citizen or resident spouse extensive control over the immigration status of his alien spouse and sweeps too broadly to meet the goal of preventing fraudulent behavior. The conditional resident who seeks permanent residence on another basis should be given the opportunity to demonstrate that the marriage upon which the conditional residence is based was not fraudulent. The statute should be changed to allow conditional residents who can demonstrate that they did not enter into marriages for the purpose of immigration fraud and are eligible for permanent resident status on other bases to adjust their status to legal permanent residence.

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263. To protect citizen or resident spouses from abuse by alien spouses, battering by the alien spouse should be a disqualifying factor for waivers to the joint petition/joint interview requirements.

264. Immigration Act of 1990, Pub. L. No. 101-649, § 701(b), 104 Stat. 4978, 5086 (1990).

265. 56 Fed Reg 22637 (to be codified at 8 C.F.R. 216.5(e)(3)(ii)).

266. 8 U.S.C. §§ 1255(a), (d) (1988).

4. The Review Process

A conditional resident can lose her legal immigration status in a number of ways. The status will be terminated before the end of the two year conditional period if the INS finds the qualifying marriage improper.[267] The status will be terminated if the alien spouse and her citizen or resident spouse do not file a joint petition[268] or appear together at an interview.[269] If the alien spouse applies for a waiver of that requirement, her legal status will be terminated if the INS decision on the waiver is adverse.[270] If the alien and citizen spouse file a joint petition and attend the interview, but the INS decision is adverse, the alien's spouse's legal status will be terminated.[271]

Except in the situation of termination during the two year conditional period, the INS does not allow any direct administrative review of the termination of legal status. If the INS belives the marriage was improper and proposes to terminate the alien spouse's legal status during the two year conditional period, the alien is provided with an opportunity to review and rebut the evidence upon which that decision is based.[272] If the INS still decides to terminate the legal status, the alien spouse can request a review of that decision in any deportation proceeding brought against her.

INS determinations based on purported failure to file a joint petition or appear at an interview, denials of a waiver application, or an adverse determination on a joint petition result in termination of the alien spouse's legal status without any opportunity for direct administrative review.[273] In those circumstances, under INS regulation, the alien spouse will only be able to request review if and when the INS pursues deportation proceedings.[274] Deportation proceedings can last many years, for reasons not under the alien's control.[275] While waiting for the INS to initiate deportation proceedings, and during the course of the proceedings, the alien spouse is an illegal alien unable to legally work in the United States.[276]

This lack of administrative review is not mandated by the statute

267. 8 U.S.C. § 1186a(b) (1988); 8 C.F.R. § 216.3(a) (1991).
268. 8 U.S.C. § 1186a(c)(2) (1988); 8 C.F.R. § 216.4(a)(6) (1991).
269. 8 U.S.C. § 1186a(c)(2) (1988); 8 C.F.R. § 216.4(b)(3) (1991).
270. 8 C.F.R. § 216.5(f) (1991).
271. 8 U.S.C. § 1186a(c)(3)(6) (1988); 8 C.F.R. § 216.4(d)(2) (1991).
272. 8 C.F.R. § 216.3(a) (1991).
273. 8 C.F.R. §§ 216.4(a)(6); 216.4(b)(3), 216.5(f) (1991).
274. *Id.*
275. REPORT, *supra* note 222, at 51.
276. *See supra* note 94.

and denies due process to the alien spouse. The statute merely guarantees that before INS can deport an alien spouse, she will have an opportunity to challenge the termination of her legal status during or after the two year conditional period as the basis for deportation.[277] The statute does not, however, preclude a prior, direct, alien-initiated administrative review of the termination of her legal status. An alien spouse whose status is terminated should have the opportunity to request an expeditious hearing before an impartial hearing officer that focuses only on whether the status was correctly terminated.

As persons who have gained admission to the United States and developed the ties that go with permanent residence, conditional permanent residents are protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution.[278] The constitutional sufficiency of procedures is evaluated by examining the interest at stake for the individual, the risk or erroneous deprivation through current procedures, the value of additional procedural safeguards, and the interest of the governmental entity in using current procedures.[279] The interest at stake for a conditional resident is very weighty. If her status is terminated, the alien becomes an undocumented alien subject to arrest, detention, and deportation,[280] and loses her ability to work in the United States.[281] While she may raise the issue of loss of status in the context of any subsequent deportation hearing,[282] in the interim, which can be lengthy, she can be detained and is forced to live in an illegal status with no ability to support herself or her children.

The risk of erroneous determination and the benefit of alternative procedures is high since there is no opportunity for the applicant to present her position orally, confront any adverse information against her, and answer questions to clarify her claim before she is forced into illegal status. Applicants for continuation of status, particularly those seeking waivers, will frequently be *pro se*. Therefore, they generally will have little experience or skill in developing documentary support. Furthermore, the issues relevant to the administrative determination, e.g., whether abuse occurred, are frequently best supported by oral testimony, where the credibility of the witnesses can be assessed and questions asked to clarify the events.

At the very least, the regulations should provide that when an INS field office believes the documentary evidence is insufficient to con-

277. 8 U.S.C. § 1186a(b)(2), (c)(2)(B), (c)(3)(D) (1988).

278. *See* Landon v. Plasencia, 459 U.S. 21 (1982); REPORT, *supra* note 222, at 78-79. This legislative history demonstrates that Congress wants the Attorney General to assure that victims of abuse receive this waiver.

279. Matthews v. Eldridge, 424 U.S. 319 (1976).

280. 8 U.S.C. § 1252 (1988).

281. *See* discussion *supra* note 94.

282. 8 U.S.C. § 1186a(c)(3)(D) (1988).

tinue the legal status, the alien spouse should have an opportunity to present her case orally to an appropraite official and confront any adverse information against her. She should be allowed to bring any witnesses or other forms of evidence to support her application.[283]

These procedures will impose little burden on the INS. The INS already provides interviews of conditional resident applicants in some circumstances[284] and has in place administrative review procedures.[285] Allowing the alien spouse to present her case orally when documents are insufficient and to participate in the review procedures will only assure more accurate determinations and avoid lengthy and expensive deportation proceedings.

VI. CONCLUSION

The spouse-based immigration laws initiated at the turn of this century incorporated the doctrine of coverture which gave control of a married woman's home, physical and mental well-being, livelihood, and children to her husband. Although there was an effort in 1952 to remove sex discrimination from the immigration laws, the result was the perpetuation of the notion of spousal domination which was substantially strengthened by the Immigration Marriage Fraud Amendments of 1986. A citizen or resident spouse has extensive power over the immigration status of his alien spouse and her children, thus controlling the alien's ability to live and work in the United States and impacting on her ability to care for her citizen or alien children.

The spousal domination perpetuated by the current immigration laws, while facially sex neutral, has the greatest impact on women because they are the majority of spouse-based immigrants and because, in the United States, women have historically been the target of subordination based on sex and the victims of spouse abuse. Furthermore, as is frequently the case, when women are harmed, children are harmed as well. Both citizen and alien children suffer from

283. A cable sent by the INS to field offices directed that denials by INS field offices of waivers based on battering or extreme cruelty be forwarded to the Central Office for review. However the cable made no provision for notice to, or comment by, the alien spouse denied the waiver. For all waivers, the applicant should be advised that a recommendation of denial has been made to the Central Office and the reasons for such recommendation. She should be given an opportunity to confront and rebut the recommendation and submit to the Central Office any additional evidence to support her application. *INS IMMACT Wire #45*, reproduced in 68 INTERPRETER RELEASES 435-39 (1991).

284. 8 C.F.R. § 216.5(d) (1991).

285. 8 C.F.R. §§ 3.1, 103.3 (1992).

the control the immigration law gives to one spouse.

Changes in legislation and administrative regulations are needed to confront the legacies of coverture in the immigration law. Legislative changes in the process through which an alien becomes a permanent resident based on marriage or parentage must be made. Changes must also be made in both the legislation and regulations that implement the current conditional resident scheme for alien spouses and their alien children.

The current immigration law which allows a spouse or child of a citizen or resident to gain legal status only when her citizen or resident chooses to file a relative petition must be changed to prevent the use of the power to petition to create harm to innocent people and society. Any interest in preserving a citizen or resident's right of choice of family relationship needs to be balanced with other countervailing social concerns.

An alien who has married a citizen or resident in good faith and is currently living in the United States should be able to gain legal status without the citizen or resident spouse's permission if she or her child is abused by her citizen or resident spouse, or she is the caretaker parent of a United States citizen child born of that marriage or she can meet the burden of showing she would suffer substantial hardship if deprived of legal status. Alien children abused or abandoned by their citizen or resident parent in the United States should have the ability to apply for legal status without the abusive parent's participation. Spouses and children who can prove they are in these circumstances should be granted permanent resident status and not be subjected to the conditional resident scheme.

There are two alternative procedures which the legislature could enact to allow these spouses and children to gain status without the citizen or resident relative's cooperation. The current petitioning process could be changed to allow these particular spouses and children to self petition. Alternatively, a protected family status that would allow for work authorization and eventual permanent residence could be created for these spouses and children.

A simple solution to the spouse domination in the conditional residency scheme would be to return the pre-1986 law, eliminate conditional resident status and allow an alien spouse to immigrate as a permanent resident. This solution, however, does not take into account the political reality of administrative and legislative concern about preventing fraud. The following reforms would mitigate the legacies of coveture while accounting for this concern.

First, when there is a child of the marriage between the alien and United States citizen or resident spouse, the law should be changed to allow the alien parent to protect her child. An alien parent who cares for her child should become a permanent resident and not a

conditional resident if the child was born before the parent's application for immigration status was completed. Also, a conditional resident should be allowed to self petition for the change from conditional to permanent status if the child was born during the conditional residency period. These changes would allow an alien parent the ability to protect her child. They would not raise concerns about fraud since the existence of a child of the marriage negates fradulent intent.

Second, changes need to be made to the three existing waivers of the requirement of citizen or resident control of the continuation of an alien spouse's resident status. The good faith waiver should not have a requirement that the marriage be terminated before the waiver can be granted. Conditional residents struggling to maintain their marriages, as well as those who have terminated them, should have the opportunity to demonstrate that they did not engage in marriage fraud to obtain permanent status. Also, whether the alien entered the marriage in good faith should be based on the immigrant's commitment to the marriage, not her spouse's commitment.

The legislative intent behind the abused spouse and child waiver, to prevent entrapment in abuse, should not be undermined by regulations that narrowly restrict the evidence that can be used to demonstrate abuse. The definition of abuse should include deprivation and neglect. Furthermore, as Congress directed, the confidentiality of the abused must be preserved.

The extreme hardship waiver should be interpreted liberally by the INS, or Congress should change the word "extreme" to "substantial." Also, the INS must recognize special Congressional concern about the well being of citizen children that Congress intended to be served by the waiver. Aliens who can demonstrate that they meet the criteria for the waivers should be granted them without the decision being subject to the Attorney General's discretion. The INS should recognize that the 1990 changes, which added an abused spouse waiver and removed the good cause requirement from the good faith termination requirement, apply to all marriages entered into before or after these changes. Conditional residents who qualify for permanent residence on some basis other than marriage should be able to adjust their status if they can show they did not engage in marriage fraud. Alien spouses whose status has been terminated should have access to an expeditious hearing to review such determinations.

These changes would communicate that spouse domination and

spouse abuse are not sanctioned in this society and that a parent has the right to protect and care for her children. They are necessary to confront the legacies of coverture in the immigration law and formulate laws that take into account the social situations that most frequently confront women.