1-1-2014

# Bride and Prejudice: How U.S. Immigration Law Discriminates against Spousal Visa Holders

Sabrina Balgamwalla
*Wayne State University*



## Recommended Citation

Sabrina Balgamwalla, Bride and Prejudice: How U.S. Immigration Law Discriminates against Spousal Visa Holders, 29 Berkeley J. Gender L. & Just. 25, 71 (2014)

# Bride and Prejudice:

## *How U.S. Immigration Law Discriminates Against Spousal Visa Holders*

**Sabrina Balgamwalla**[†]

**ABSTRACT**

*Each year, several thousand women immigrate to the United States in their capacity as spouses, only to find their rights compromised by the constraints of their visa status. When a wife enters the United States on a dependent spouse visa, she enters at the wish of her husband. Until the day she is eligible for a green card, her dependent immigration status allows her husband to control her ability to live in the United States and all rights that stem from that status. The inherent power differential within these relationships resembles those experienced by married women generations earlier, who relinquished control of their legal personhood under the laws of coverture. The mechanism of coverture, which extinguished a married woman's independent identity in the eyes of the law, had far-reaching effects, including giving a male head of household the right to determine his family's domicile. In spite of reforms that have attempted to address antiquated gender norms and make immigration laws "gender neutral," most spousal immigrants are still female, and the historical precedent of coverture remains evident in U.S. immigration laws affecting the family, including dependent spouse visa provisions.*

*This article examines the various ways U.S. immigration regulations perpetuate the disparate treatment of dependent H-4 visa holders. The dependent spouse visa category imposes restrictions on the ability of these women to control their immigration status, work outside the home, obtain a divorce, retain*

---

[†] J.D. American University Washington College of Law, Clinical Teaching Fellow, University of Baltimore School of Law. This article benefitted from the feedback of participants at the Hofstra Immigration Law Workshop, AALS Clinical Writing Workshop, and the Albany Law School Scholarship and Teaching Development Workshop. I am especially grateful to Kerry Abrams, Michele Alexandre, Patience Crowder, Gilda Daniels, Leigh Goodmark, Cassandra Havard, Elizabeth Keyes, Margaret Johnson, Jaime Lee, Audrey McFarlane, Odeana Neal, and Erika Wilson for their feedback at critical stages of this article's development, and to Lauren Harper, whose support and encouragement I could never do without. Thanks also to Sophie Le for her research assistance, and to the editorial staff of the Berkeley Journal of Gender, Law & Justice for their astute comments and suggestions.

*custody of their children, and escape domestic violence. In spite of compelling evidence that the existing visa hierarchy fosters economic and legal dependency, and has devastating consequences for the day-to-day lives of H-4 spouses, these regulations have not been subject to any meaningful reform.*

*To the extent that legislation has created meaningful forms of immigration relief for immigrant women, these provisions primarily address the situation of victims of domestic violence. Not only are most H-4 visa holders not eligible for these forms of relief on account of their particular visa status, but the current system also fails to address inherent inequity in the law that facilitates domestic abuse and systemically subordinates women. Immigration laws shifted from family-based and labor-based immigration without concern for the rights of trailing spouses of skilled immigrants, allowing H-4 visa holders to fall through the cracks of immigration reform. This article posits that such reform should provide meaningful relief for spousal visa holders, and should address the longstanding inequities between husbands and wives that the current law perpetuates. True reform would not only contemplate H-4 visa holders as potential victims of domestic violence, but rather, would adopt more expansive rules that do not perpetuate the subordination of immigrant spouses within families and society at large.*

## INTRODUCTION

*Amina*[1] *knew her husband for two days before they married. He was visiting her hometown of Hyderabad, India on leave from his information technology job in the United States, and Amina's relatives introduced them. Amina had recently graduated with a degree in Computer and Information Sciences from the University of Hyderabad, and although she had her fears about leaving her country and her family, she hoped that she would find her dream job as well as marital happiness in the United States. When she received her H-4 visa and joined her husband in Boston, she was dismayed to learn that her visa status did not grant her the right to work. Furthermore, she was without any money of her own because her dowry was placed in a bank account in her husband's name, which he prohibited her from accessing. Initially her husband ignored her, which exacerbated her feelings of homesickness. Within a few months, he prohibited her from making weekly calls to her family in Hyderabad. He began to call her names when she did not perform housework or cook meals to his liking. Amina hoped that having a child would calm her husband and bind them as a family, but when her husband discovered she was pregnant, he demanded that she have an abortion; she did not. Days after their child was born, her husband filed a petition for divorce, telling Amina that not only would she lose her H-4 visa, but she would have to leave her newborn child—a U.S. citizen—in her husband's custody when she returned to India.*

The H1-B visa program, known for bringing programmers and other technically skilled professionals to economically vital zones like Silicon Valley, has been a focal point of immigration policy debates, particularly as immigration reform seeks to expand skilled professional immigration to the United States.[2] Lost in the shadows of these debates are the spouses, usually wives, of these workers—derivative visa holders, like Amina, who also enter the United States by the thousands each year on H-4 visas.[3]

Upon arriving in the United States, H-4 visa holders face a number of

---

1. "Amina" is a hybrid individual based on clients I represented during my years of immigration practice with the Asian Pacific American Legal Resource Center and the Center for Immigration Law and Practice, both based in Washington, D.C.
2. *See, e.g.*, Anna Fifield, *Silicon Valley in Immigration Reform Call*, FIN. TIMES, Feb. 25, 2013, http://edition.cnn.com/2013/02/24/business/silicon-valley-immigration-reform; Lauren Hepler, *Microsoft, Intel, Facebook Lead Tech Charge for Immigration Reform*, SILICON VALLEY BUS. J., Jan. 30, 2013, http://www.bizjournals.com/sanjose/news/2013/01/22/microsoft-intel-facebook-lead-tech.html; Vivek Wadhwa, *Immigration Reform's Giant Leap for Valley Kind*, WASH. POST INNOVATIONS BLOG, (June 28, 2013, 1:47 PM), http://www.washingtonpost.com/blogs/innovations/wp/2013/06/28/immigration-reforms-giant-leap-for-valley-kind.
3. Throughout this article, I frequently use male pronouns when referring to H1-B principal visa holders and female pronouns when referring to H-4 spousal visa holders. Though these visa holder categories are not gender-specific, the gender distinction is inherent in the structure and historical precedent for these categories, and reflects reality in the overwhelming number of cases. *See infra* note 41.

challenges. Unlike the spouses of many other visa holders, H-4 visa holders are not authorized to work in the United States.[4] In addition, when and if their H1-B spouses are sponsored to become legal permanent residents in the United States, the H1-B visa holder alone has the power to file for immigration status for his family. Except under certain rare circumstances, H-4 spouses do not have the ability to file their own applications for legal permanent residence status.[5] Finally, should the marriage dissolve in the waiting period between the H-4 visa holder's arrival in the United States and her obtainment of legal permanent residence—a process that can take several years—the H-4 spouse will find herself without recourse to lawfully remain in the United States.[6] This last scenario is particularly devastating for H-4 visa holders who face the prospect of being separated from children who have lawful status, whether through petition or by birth, as well as women who are survivors of domestic violence.[7]

Dependent spouse visa holders have received little attention from scholars and advocates alike. To the extent that their stories emerge in legislative reports and scholarship, it is primarily in the context of domestic violence. Studies do reveal that immigrant women, especially those with dependent status, are particularly vulnerable to domestic abuse.[8] At the same time, the focus on these women as victims has taken away from a larger concern; whether or not a dependent spouse visa holder experiences violence at the hands of her husband, the state continues to systematically subordinate her through her visa status by introducing elements of forced dependency into her marital relationship. Even in the context of healthy marriages, these women may find that they are isolated, with their lives on hold, while their husbands act as the de facto gatekeepers of their rights. When these women immigrate in their capacity as spouses, the law confines them to the home—this has been the fate of generations of immigrating wives since the first immigration and nationality laws were promulgated.[9]

The experiences of dependent spouses challenge the contemporary understanding of citizenship as not only formal legal status, but also as the enjoyment of rights such as social participation and equality, which are not the exclusive privilege of the naturalized and native-born.[10] At the same time,

---

4. 8 C.F.R. § 214.2(h)(9)(iv) (2012). *See* discussion *infra* Part II.B.
5. *See* discussion *infra* Part II.A.
6. *See* discussion *infra* Part II.C.1.
7. *See infra* Part II.C.2-D for a discussion of barriers to immigration relief for H-4 visa holders in this situation.
8. *See* PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 27 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf. *See also* 146 CONG. REC. S10, 195 (daily ed. Oct. 11, 2000) (statement of Sen. Abraham).
9. *See* discussion *infra* Part II.A.
10. *See, e.g.*, LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 38 (2006) ("In the United States, as in most other liberal democratic states, a great many of the rights commonly associated with equal citizenship and economic citizenship are not confined to status citizens but are available to territorially present

immigration law reflects the larger sociopolitical framework in which it is forged.[11] Historically, female immigrants have been charges of sponsoring male family members,[12] and to this day most women immigrate based on family relationships.[13] The major exceptions to this historical rule have come in response to greater awareness of violence against women. Through remedies such as the Violence Against Women Act and the U visa, the state has justified intervention on behalf of immigrant survivors of domestic violence—overwhelmingly women—when they are not cared for by spouses as a matter of abuse or neglect.[14] These forms of immigration relief are well-intentioned and have provided life-saving assistance to many, but also have justified intervention on behalf of these women because of their status as victims. In this way, the state acts paternalistically, "covering" women in much the same way their husbands would absent a breakdown of the marital relationship.

These remedies are insufficient. This is due in part to the fact that H-4 visa holders frequently do not qualify for relief based on domestic violence.[15] But more importantly, these forms of relief attribute a woman's experience of subordination only to her relationship with her husband, rather than examining and addressing the role of the state in creating and reinforcing power hierarchies within the family unit. Rethinking the status of spouses as a whole within the immigration system would have significant effects, not only on the lives of dependent spouse visa holders, but also on other female immigrants who come to the United States based on familial relationships.[16] Addressing the subordination inherent in the visa system could potentially have far-reaching, beneficial effects for these women and their families in terms of promoting equality within marriages and upholding the rights of H-4 spouses.

Part I of this article examines the origins of the spousal visa program, both

---

persons. . . . It is also true that someone need not be a status citizen in order to engage in various political activities and practices we conventionally associate with democratic citizenship."); SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY 23 (1998) ("Immigrants in accumulating social and civil rights and even some political rights in countries of residence have diluted the meaning of citizenship and the specialness of the claims citizens can make on the state.").

11. *See, e.g.*, MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965 1-8 (2003). *See also* Olivia Salcido & Cecilia Menjívar, *Gendered Paths to Legal Citizenship: The Case of Latin-American Immigrants in Phoenix, Arizona*, 46 LAW & SOC'Y REV. 335, 343 (2012); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 411-49 (2005).
12. *See* Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991).
13. *See* Min Zhou, *Contemporary Female Immigration to the United States: A Demographic Profile*, *in* WOMEN IMMIGRANTS IN THE UNITED STATES 23, 27 tbl.1 (Philippa Strum & Danielle Tarantolo eds., 2003).
14. *See* Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95 (2002).
15. *See* discussion *infra* Part III.B.
16. *See* Zhou, *supra* note 13.

in the context of historical spousal immigration to the United States and the modern wave of skills-based immigration. It argues that the contemporary H-4 program is a product of the original spousal immigration regulations, which were promulgated under the doctrine of coverture, and are marked by its influence.

Part II analyzes specific aspects of the H-4 dependent visa program and considers how coverture-based laws shape the program by governing immigration petitions, married women's employment, domestic violence, divorce, and child custody. This section builds on the work of Professor Janet Calvo, who observes that although statutory reforms repealed many of the laws based on coverture, immigrant women did not obtain the full benefit of these domestic reforms.[17] Accordingly, the rights of immigrant women, including dependent spouses, are still limited by regulations that uphold antiquated gender norms.

Part III analyzes immigration law reforms that have affected the standing of H1-B principal visa holders, and the extent to which reforms have passed over H-4 dependent visa holders. This section draws on the work of Professor Reva Siegel and her theory of "preservation through transformation"—the notion that legal regimes shift their rhetoric over time, but preserve the same underlying social hierarchies.[18] This section argues that the prioritization of principal visa holders is a form of preserving the norms of coverture in family-based immigration, and that this carries over to the labor-based immigration context. Although the underlying rationale for denying H-4 visa holders the full exercise of their rights has shifted since the inception of the H1-B program, the interests of dependent spouses are still subordinate to those of principal visa holders, who are valued under existing law for their education, expertise, and employability.

Part IV explores potential state responses to the situation faced by dependent visa holders in general, and H-4 visa holders in particular. This section contemplates both short-term solutions that are largely compatible with current immigration law, and long-term solutions that address the heart of the spousal visa construct—an area ripe for comprehensive immigration reform, and one that could influence the lives of many immigrant women.

## I. DEPENDENT VISAS AS A RELIC OF COVERTURE

### A. A History of Spousal Visas

Coverture, a mechanism by which a husband may establish power and control over his spouse,[19] has significantly shaped the rights of women in the

---

17. Calvo, *supra* note 12. *See also* Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not Its Demise*, 24 N. ILL. U. L. REV. 153 (2004) [Hereinafter Calvo, *A Decade of Spouse-Based Immigration Laws*].
18. Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2175 (1996).
19. *See* Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A*

United States, immigrant and native-born, for the past three centuries. English Jurist William Blackstone defined "coverture" as a legal construct in which "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[20] In this arrangement, a wife is under her husband's "cover" or protection.[21]

Under the doctrine of coverture, a woman's marriage resulted in the extinguishment of her independent legal identity, self-determined interests, and autonomous rights. Accordingly, male heads of household had the ability to determine the domicile of their families.[22] As an Oregon court explained in 1890, an immigrant merchant who had come to live in the United States was entitled to bring his wife and child with him because "[t]he company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either."[23]

Aspects of coverture were eliminated from domestic law through a series of statutes in the mid-nineteenth century, but such reforms were never fully extended to immigrant women.[24] The present-day Immigration and Nationality Act specifically states that the status of qualifying relatives, such as spouses and children, "derives" from the person with the visa,[25] in a sense, "covering" the spouse with the visa holder's lawful status. Although the INA provisions are now gender-neutral on their face, most family-based immigrants are still women.[26] Dependent spouses—a category that includes individuals married to students, employees of transnational companies and international organizations, and diplomats—are also predominately female.[27]

### B. The H-1B and H-4 Visa Programs

Decades after the civil reform movement that rolled back the laws of

---

*Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002).

20. *Id.* at 460 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *442).
21. *Id.*
22. *See* Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, 1228-29 (1907) (declaring that American women who married foreign men effectively lost their American citizenship).
23. *In re Chung Toy Ho*, 42 F. 398, 400 (D. Or. 1890), *quoted in* Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 10 (2013) [hereinafter Abrams, *What Makes the Family Special?*].
24. *See* Calvo, *A Decade of Spouse-Based Immigration Law*, *supra* note 17, at 155.
25. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 203(d), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1153(d) (2012)).
26. *See, e.g.*, Silvia Pedraza, *Women and Migration: The Social Consequences of Gender*, 17 ANN. REV. SOC. 303 (1991) (summarizing literature attributing global female migration, including to the United States, to family relationships).
27. *See* discussion *infra* note 39. This inference is based on the fact that most principal visa holders in this category are male; however, since the Supreme Court found Section 3 of the Defense of Marriage Act to be unconstitutional, same-sex spouses are now eligible for dependent spouse visas as well. *See* Press Release, Secretary of Homeland Security Janet Napolitano, Statement on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court.

coverture, Congress passed the Immigration Act of 1990 and created the H1-B visa program to allow for the increased immigration of foreign skilled workers to the United States.[28] Although there was historical precedent for skills-based labor immigration in the United States,[29] the 1990 Act was the first to designate visa categories based on particular, high-level skill sets and education.[30] The H1-B program is one such visa category; it includes multiple types of skilled and university-educated professionals, many of whom are specialty occupation workers.[31] The program is closely associated with the information technology and engineering fields.[32] In recent years, 85,000 new H1-B visa holders have come to the United States annually to work.[33]

The H1-B program, while technically a nonimmigrant visa category, allows employers to bring their employees to live in the United States and later sponsor them for permanent residence.[34] The program is emblematic of the shift in U.S. immigration policy toward a preference for skilled immigrant labor.[35] When H1-B "principal" visa holders obtain visas to come to the United States, they are permitted to obtain "derivative" or "dependent" visa status for their spouses and minor children so the family can live together in the United States.[36] The ability of a laborer who is considered "valuable" to the United States[37] to

---

28. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.
29. *See* Ayelet Shachar & Ran Hirschl, *Recruiting "Super Talent": The New World of Selective Migration Regimes*, 20 IND. J. GLOBAL LEGAL STUD. 71, 80 (2013) (detailing the history of skills-based admissions categories beginning in 1965).
30. Immigration Act § 1153.
31. U.S. CITIZENSHIP & IMMIGRATION SERVS., CHARACTERISTICS OF H1-B SPECIALTY OCCUPATION WORKERS: FISCAL YEAR 2011 2 (2012), *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-11-characteristics.pdf. An H-1B visa requires a baccalaureate or higher degree or its equivalent, whether as a matter of the nature of an industry, the complexity or uniqueness of the position, or employer requirements. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A) (2013).
32. Approximately 51 percent of H1-B visa holders work in computer-related occupations. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 31, at 11.
33. This number includes the number of visas issued under the H1-B cap (65,000 in Fiscal Year 2014), with an additional 20,000 H1-B visa holders exempt from the cap. *H-1B Fiscal Year (FY) 2014 Cap Season*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4b7cdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD (last visited Jan. 7, 2014).
34. The U.S. immigration system divides newcomers into two significant categories: immigrants and nonimmigrants; immigrants manifest intent to stay in the United States, whereas nonimmigrants are accorded a stay of limited duration for a limited purpose. 8 U.S.C. § 1101(a)(15) (2012). *See also* 3 C.J.S. *Aliens* § 383 (2006).
35. *See, e.g.*, Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006).
36. 8 U.S.C. § 1101(a)(15)(H) (2012).
37. Certain visa holders are not entitled to apply for derivatives, including D (crewmembers), and F-3 and M-3 (border commuter students). 8 U.S.C. § 1184(f) (2012); Border Commuter Student Act of 2002, Pub. L. No. 107-274, 116 Stat. 1923 (codified at 8 U.S.C. § 1101(a)(15)(F) (2012), § 1101(a)(15)(M) (2012)). In addition, while H2-A (temporary agricultural) workers are theoretically permitted to include family members as derivatives, they would likely face denial of a petition based on the limited income associated with their

bring his spouse and children to the U.S. reflects both the traditional notion of family reunification and the new shift toward incentivizing immigration for high-skilled professionals.[38]

The United States collects demographic data on H1-B visa holders but does not track the characteristics of dependent visa holders, so what little we know about H-4 visa holders and other nonimmigrant spouses comes from anecdotal evidence. The number of H-4 visa holders who arrive in the U.S. each year is relatively small compared to the number of H1-B visa holders;[39] it is also relatively small when compared to the number of other family-based immigrant categories, such as spouses and children of U.S. citizens and permanent residents.[40] Like many trailing spouses, most H-4 spouses are women.[41]

Because H1-B visa holders, and by extension their H-4 spouses and children, have a designated path to citizenship, they may be considered part of a theoretical group Professor Hiroshi Motomura refers to as "Americans-in-waiting." These individuals, who, with the passage of time, can be expected to obtain permanent immigration status and eventually citizenship, have historically been considered suitable for early vesting of the rights associated with citizenship because there is a social interest in their participation and integration.[42] This theoretical distinction is notable in the United States' efforts

---

position, which would render beneficiaries public charges. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., IMMIGRATION VISA ISSUANCES AND GROUNDS FOR EXCLUSION: POLICY AND TRENDS 14 (2010) (finding that most petitions are rejected based on public charge grounds).

38. *See* Shachar, *supra* note 35. *See also* Shachar & Hirschl, *supra* note 29, at 86.

39. H-4 dependent visas may also be granted to spouses and minor children of H-2 (temporary and seasonal workers) and H-3 (nonimmigrant trainee) visa holders. Data from the U.S. Department of Homeland Security from 2002 to 2006 shows an average of only about 75,000 H-4 visas are issued per year, with many of those going to the "followers to join" of high-skilled anchor spouses. *See* U.S. DEP'T OF STATE, NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION FISCAL YEARS 2002-2006 tbl.XVI(B) (2006), *available at* www.travel.state.gov/pdf/FY06AnnualReportTableXVIB.pdf.

40. For example, in 2012 at foreign service posts, 189,128 family sponsored visas were issued, compared to 19,137 employment-based visas. *See* U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2012, tbl.I (2012), *available at* http://www.travel.state.gov/pdf/FY12AnnualReport-TableI.pdf.

41. Statistics from U.S. Citizenship and Immigration Services indicate that, on average, the total number of H-4 dependents admitted each year is less than half the number of H1-Bs admitted (494,565 H1-Bs compared to 155,936 H-4s in 2011; 454,763 H1-Bs compared to 141,575 H-4s in 2010). U.S. DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 63 tbl.25 (2012), *available at* http://www.dhs.gov/sites/default files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf. The H-4 category includes both spouses and children; USCIS does not disaggregate these groups, nor does it track principal and derivative categories according to sex. However, in countries where "principals" and "dependents" are disaggregated by sex for tracking purposes, it is clear that the first category is predominately male and the second predominately female. *See* Catherine Dauvergne, *Globalizing Fragmentation: New Pressures on Women Caught in the Immigration Law-Citizenship Law Dichotomy*, *in* MIGRATION AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 333, 355 (Seyla Benhahib & Judith Resnick eds., 2009).

42. *See* discussion *infra* Part IV.A.

to attract and retain highly skilled immigrants, and to offer them a path to citizenship as part of what Professor Ayelet Shachar refers to as "the global race for talent."[43] There is, however, a stark difference between the rights enjoyed by H1-B principals and those of their dependent spouses.[44] In South Asian expatriate communities, where such visas are common,[45] the H-4 program is known as the "involuntary housewife visa" because holders are more or less confined to the home, unable to work.[46] The H1-B visa holder, in a sense, exercises his right to work at the expense of his spouse. The spousal visa holder is "covered" by her husband's exercise of these rights, and is forced to relinquish her own opportunities for broader social and economic participation. The H-4 visa, while relatively new, has been shaped by the gendered historical precedent of spousal immigration in the age of coverture.

## II. COVERTURE AS APPLIED TO THE MODERN-DAY SPOUSAL IMMIGRANT

The present incarnation of the spousal visa cannot be separated from its historical context, which was largely influenced by the doctrine of coverture and prevailing notions of traditional gender roles. Specifically, coverture had far-reaching effects on married women in terms of their control over their own immigration status, their right to work outside the home, their subjection to domestic violence as a mechanism of chastisement, and their rights to divorce and seek custody of their children.[47] While some aspects of the doctrine became subject to reform starting in the 1830s, the effect of the doctrine persisted in legal matters affecting the family,[48] including immigration law. Coverture continues to affect immigrant women, particularly those who are legally

---

43. *See* Shachar, *supra* note 35, at 153. *See also* Jens Hainmueller & Michael J. Hiscox, *Attitudes Toward Highly Skilled and Low-Skilled Immigration: Evidence from a Survey Experiment*, 104 AM. POL. SCI. REV. 61, 70-72 (2010) (assessing a more favorable public perception of high-skilled immigrants than low-skilled immigrants).

44. As Magdalena Bragun states, "[t]he law treats [H-4 visa holders] as benign byproducts of their husbands' economic potential—a necessary evil accepted only in light of the enormous contribution that the foreign skilled professionals make to the U.S. economy. But equity demands that the burden of growing the American economy be distributed evenly among all the interested parties: the companies, the government, and the nonimmigrant foreigners. Currently, however, the brunt of this burden is born by the spouses who sacrifice everything to make the mutually beneficial exchange between the U.S. employer and a foreign employee possible." Magdalena Bragun, Comment, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 SEATTLE U. L. REV. 937, 955 (2008). *See also* discussion *infra* Part II.

45. India has consistently been the leading country of origin for H1-B visa holders. In 2011, 147,290 of the 494,565 H1-B visa holders admitted were from India; the second most popular country of origin was Canada, with 88,236. U.S. DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 84 tbl.32 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

46. Bragun, *supra* note 44, at 938.

47. Calvo, *supra* note 12, at 596-601.

48. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 841-49 (2004).

dependent on their husbands as a matter of immigration policy, such as spousal visa holders.

### A. Coverture and Family Immigration

Since the inception of citizenship and nationality regulations, coverture has influenced dependent immigrants' rights in the United States. The Naturalization Act of 1855 conceptualized citizenship as the domain of the husband, requiring a wife to assume U.S. citizenship if she married a U.S. citizen.[49] The first formal immigration laws governing families, enacted in the 1920s, gave male citizens and permanent residents exclusive control over the legal status of their immigrant wives and children, while denying female citizens and permanent residents the right to petition for their foreign-born husbands.[50] While norms of derivative domicile influenced the concept of family reunification, the influence of coverture is notable because the right to family unity was perceived as belonging to male heads of household alone.[51] Women did not obtain the right to petition for their foreign-born spouses until 1952, when the gender-specific language of the statute was removed.[52] Even so, the visa system set forth in the 1965 Immigration Act perpetuated this control over the beneficiary of a petition immigrant by vesting the unilateral power of petition in the citizen or resident spouse.[53] In addition, the 1965 Act was shaped by prevailing notions of family and masculinity at the time—nuclear families headed by male breadwinners.[54]

Though gender-neutral on its face, the sponsorship system continues to be dominated by male petitioners and female beneficiaries of these petitions.[55] This early precedent, based in coverture, established the extent of the husband's control over his wife's immigration status, effectively ceding control over a dependent spouse's right to live, work, and maintain ties to the United States to the petitioner or principal visa holder.[56] Despite the gender-neutral language of

---

49. Naturalization Act of 1855, 10 Stat. 604 (reenacted as 1 Rev. Stat. 350, § 1994 (1878)). For a greater discussion of the derivative domicile rule as pertaining to citizenship, *see* Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 413-20 (2013) [hereinafter Abrams, *Citizen Spouse*]; Abrams, *What Makes the Family Special?*, *supra* note 23. Indeed, the presumption of derivative citizenship was so strong that before World War II married women frequently traveled on their husbands' passports. *See* Linda K. Kerber, *The Stateless as the Citizen's Other: A View from the United States*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 76, 96 (Seyla Benhabib & Judith Resnick eds., 2009).
50. Orloff & Kaguyutan, *supra* note 14, at 100 (citing Act of May 29, 1921, Pub. L. No. 5, § 2(a), 42 Stat. 5).
51. GARDNER, *supra* note 11, at 18.
52. Immigration Act of 1952, Pub. L. No. 82-414, § 15(G)(i), 66 Stat. 163 (codified at 8 U.S.C. § 1101(a)(35) (2012)).
53. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified at 8 U.S.C. §§ 1153(b), 1153(d) (2012)).
54. *See* Jamie R. Abrams, *Enforcing Masculinities at the Borders*, 13 NEV. L.J. 564, 577-78 (2013).
55. *See* discussion *supra* note 41.
56. Calvo, *A Decade of Spouse-Based Immigration Law*, *supra* note 17, at 155.

the amended Immigration and Nationality Act, the fact remains that most sponsors and principal visa holders are men and most trailing spouses are women.[57] At its best, the power to petition allows couples and families to be united—an important principle in modern immigration law, and one with significant historical precedent.[58] At its worst, however, the law allows the petitioner to withdraw sponsorship at any time before his spouse obtains permanent residence, thus abruptly terminating her legal status and subjecting her to removal from the United States.[59]

By limiting the rights of dependent family members according to their relationship with the principal visa holder, the law reinforces the roles men and women play within traditional families. As with other laws based in coverture, these immigration regulations define married women according to their role in the domestic sphere, without evaluating the potential for their independent public contributions to a newly adopted country. By contrast, their husbands—the principal visa holders—are defined by their labor outside the home. In this way, immigration law replicates the antiquated gender norms of coverture, attempting to recreate a traditional conception of the family; one that is headed by a husband who "performs as the head of the household, providing economic support and discipline for the dependent wife and children, who correspondingly owe him duties of obedience and respect."[60] These family roles are closely tied to the rationales for family visas, therefore, whether intentionally or not, immigration law has the effect of replicating and re-entrenching these norms of role definition and behavior.[61]

As with early immigration laws, a dependent's lawful status and accompanying rights largely hinge upon the existence of her marriage. When there is a right to petition for adjustment of status for an H1-B, that right belongs to the principal visa holder alone, and not his spouse. Janet Calvo observes that, although both male and female immigrants are theoretically affected by the coverture-based provisions regarding dependent spouses, women are affected to a far greater degree: first, because those obtaining immigration status as dependents have mostly been women, and second, because "wives have legally and socially been the historical target of subordination in marriage."[62]

In the case of H-4 visa holders, the emphasis on the principal visa holder in immigration law is tantamount to an assumption that this person is "the man" of

---

57. *See* Zhou, *supra* note 13, at 27 tbl.1; *see also* Dauvergne, *supra* note 41, at 355.
58. *See* Abrams, *What Makes the Family Special?*, *supra* note 23.
59. Applications for permanent residence based on marriage to a U.S. citizen can be filed only by the petitioner. 8 U.S.C. § 1154(a)(1)(A)(i) (2012).
60. Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2182 (2004). *See also* Volpp, *supra* note 11, at 450-52 (describing gendered citizenship, including the concept of "Republican motherhood," in which women were confined to the private sphere and only permitted political participation by proxy as mothers to sons).
61. *See* Abrams, *What Makes the Family Special?*, *supra* note 23, at 10-15.
62. Calvo, *supra* note 12, at 613-14.

the family—the Husband-Father, family leader, and breadwinner.[63] This role also appears to justify why he is the party entrusted with the right to decide where the family will live, what work he will do, and whether to petition for other members of his family.[64] It is his qualifications that are evaluated as a basis for immigration, and his public contributions that are valued under immigration regulations and visa quotas. Conversely, the derivative spouse's rights are limited in such a way as to define her according to a domestic role and devalue her other bases of worth. Shivali Shah specifically addresses H-4 visa holders in the trailer to Meghna Damani's documentary film "Hearts Suspended," but she also speaks to the situation of many other dependent spouses when she says that the law provides for their immigration to the United States according to the "most base functions of women: housewives, baby-makers, and sex partners."[65]

The law places few limitations on the ability of principals to dominate their spouses. As Janet Calvo points out, coverture established a regime that subordinated one human to another,[66] and immigration law "continues to sanction the domination of husbands over wives and the underlying gender inequality that it promotes."[67] Essentially, the state cedes control over a dependent's immigration status to the principal visa holder, who controls the marriage; the state will only consider the dependent's rights independent of the principal in a limited range of circumstances, most notably when there is abuse.[68] Though an H-4 may theoretically change to an independent visa status, to do so she must frequently access information about her immigration case to prove that she is in lawful status—information that may be solely in the hands of the principal. Thus, the H-4 visa holder requires cooperation from her spouse or his attorney in order to prove the validity of the principal's status as well as her own. Shivali Shah notes that this often means furnishing the spouse's immigration and employer information, upon which her own status also relies. In this sense, she concludes, the law essentially forces a woman to obtain the consent of her husband in order to change her status.[69]

Without a claim to permanent legal status or an autonomous means to obtain independent status, the law forces derivative visa holders into a household dynamic of dependency. Affording rights to the principal without creating comparable independent rights for the dependent, essentially gives the principal the authority to regulate the immigration status of his spouse. The unintended

---

63. Fineman, *supra* note 60, at 2187.
64. Abrams, *Citizen Spouse, supra* note 49, at 409-10.
65. Meghna Damani, *Hearts Suspended – Trailer*, YOUTUBE (May 6, 2009), http://www.youtube.com/watch?v=vNtBasj8etg.
66. Calvo, *A Decade of Spouse-Based Immigration Laws, supra* note 17, at 160-61.
67. *Id.* at 155.
68. *See* discussion *infra* Part III.
69. Shivali Shah, *Middle Class, Documented, and Helpless: The H-4 Visa Bind*, *in* BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA 195, 203 (Shamita Das Dasgupta ed., 2007) [hereinafter Shah, *The H-4 Visa Bind*].

consequence is to make the principal visa holder the gatekeeper for all rights enjoyed by his spouse, including whether she can remain in the United States, whether she can access or claim custody of her children, and whether she can, in fact, become a permanent resident and have the option to obtain U.S. citizenship.[70]

This is not to say that all H-4 visa holders personally experience their situation as dependency. The limitations placed on an H-4's rights are not necessarily an extension of her personal relationship with her husband, but rather a reflection of the way the law regards and manages her marital relationship. Though dependent spouses may enjoy derivative immigration status in the United States, they are separated by a degree from the economic and social forces that drive migration, and while they are indeed "potential new citizens," it is only on account of their legal dependence on their spouses.[71]

### B. Coverture and Women's Labor

Under the doctrine of coverture, a marriage contract effectively resulted in the dissolution of a married woman's legal personhood and her accompanying property interests; thus, wives were effectively barred from selling their labor outside the home.[72] This rationale was used to restrict the immigration of wives of Chinese and Japanese merchants in the United States in the early 1900s. If these women were housewives, they would be permitted to enter because their husbands had already been admitted, but if they worked outside the home they were classified as laborers and barred under the Chinese Exclusion Act.[73]

Like married women in the age of coverture, H-4 visa holders lack the legal option to work outside the home.[74] This represents an anomaly in immigration law, as dependent visa holders in other visa categories, including spouses of intra-company transferees, treaty investors, employees of international organizations, and exchange visitors, are permitted to work.[75] Because the H1-B program essentially forces families into the single-breadwinner model—the family structure shaped and perpetuated by the law of coverture—an H-4 visa holder experiences a situation of economic and legal dependence comparable to that of a married woman in the age of coverture.[76]

---

70. *See* Calvo, *A Decade of Spouse-Based Immigration Laws, supra* note 17, at 167.
71. Dauvergne, *supra* note 41, at 345-46.
72. *See* Cristina Gallo, *Marrying Poor: Women's Citizenship, Race, and TANF Policies*, 19 UCLA WOMEN'S L.J. 61, 69 (2012).
73. *See* Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58, 59 (1882) (repealed 1943). *See also* GARDNER, *supra* note 11, at 21-24.
74. *See supra* note 49 and accompanying text.
75. *See, e.g.*, 8 C.F.R. § 214.2(j)(1)(v)(A) (2013). Spouses of exchange visitors are not automatically granted work authorization, but they may apply for it provided the "[i]ncome from the spouse's or dependent's employment [is] used to support the family's customary recreational and cultural activities and related travel, among other things[.]" *Id.*
76. *See* Abrams, *What Makes the Family Special?*, *supra* note 23, at 10-11.

Though H-4 visa holders are eligible for work authorization when their spouses file for green cards, there is frequently an extensive waiting period before that process begins.[77] In addition, the principal visa holder has exclusive control over the process, as he is the only party authorized to file the green card applications for himself and his derivatives;[78] this illustrates, yet again, how legal and economic dependence are correlated as defining features of this visa program.

While this dependency dynamic affects each couple differently, it potentially carries psychological implications for the spousal visa holder. For example, some H-4 spouses, who marry during their husband's brief visit to the wife's country of origin,[79] may find themselves completely reliant on someone they hardly know when they travel to the United States. Others may have longstanding marriages but find the shift in the dynamic of their relationship to have its own challenges. For those women accustomed to contributing to the household income, the loss of wages and the lack of independent income may be particularly difficult. Although dependency is not uncommon in marital relationships, the structure of the visa program ensures that such dependency is "imposed by law and essentially inescapable;"[80] it also introduces potentially problematic power dynamics into even the strongest marital relationships.

To some H-4 visa holders, the work authorization policy represents not only a loss of independence, but also a loss of both economic and personal development opportunities. Evidence suggests that a number of these dependent visa holders are highly educated, though they are unable to put their knowledge and experience to use in their adopted country.[81] Many H-4 visa holders have university degrees and other professional qualifications that are comparable to those of their husbands.[82] Some H-4 visa holders are not even aware, until after they arrive in the United States, that their visa status prohibits them from working; they are dismayed to discover that they have arrived in the proverbial "land of opportunity" only to find their professional options limited.[83] It is

---

77. H1-B visa holders are eligible for adjustment of status during the three-year stay of their visas, but employers also have the option to file applications for permanent residence during the three-year extension period. *See* American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 105(a), 114 Stat. 1251; Act of Oct. 17, 2000, Pub. L. No. 106-311, 114 Stat. 1247.

78. 8 U.S.C. §§ 1154(a)(1)(A)(i), 1154(a)(1)(B)(i) (2012).

79. *See, e.g.*, Shah, *The H-4 Visa Bind*, *supra* note 69, at 209.

80. Bragun, *supra* note 44, at 952.

81. *See* Shivali Shah, *Involuntary Housewife Status: The H-4 Visa*, IMMIGRATION DAILY (Aug. 26, 2005), http://www.ilw.com/articles/2005,0826-Shah.shtm. [hereinafter Shah, *Involuntary Housewife Status*]. *See also* Shivali Shah, *Desperate Housewives,* INDIA ABROAD, Sept. 2, 2005, at M2, http://web.archive.org/web/20070103041715/http://www.hvisasurvey.org/Art-Desperate%20Housewives.htm [hereinafter Shah, *Desperate Housewives*].

82. *See* S. Mitra Kalita, *Immigrant Wives' Visa Status Keeps Them Out of Workplace*, WASH. POST, Oct. 3, 2005, at A1, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/02/AR2005100201377.html?sub=new/.

83. *See, e.g.*, Bragun, *supra* note 44, at 937-38 ("Like hundreds of thousands of other women, I came to the United States as a spouse of a foreign professional and immediately became trapped by a law prohibiting individuals like me from working. Although I didn't know it at

theoretically possible for both spouses to obtain and work on H1-B visas, if they have the requisite qualifications, but the challenges of obtaining sponsorship[84] and finding placements in the same city,[85] and limitations on the total number of H1-B visas granted each year,[86] effectively prevent most couples from being able to live together and work.

For professionals with accomplished careers in their home countries, this may not only be a period of compromised independence, but also one of stagnation. By the time an H-4 visa holder can obtain work authorization through a green card, a process that can take more than six years,[87] she may have gaps in her resume and, aside from volunteer work, may have had limited opportunities to keep her professional knowledge current.[88] This indefinite period, the time spent waiting for a green card and the accompanying ability to work, is something many H-4 visa holders come to dread. With limited opportunity to build social connections, a dependent spouse may feel isolated and homesick; a significant number report suffering from depression.[89] Though it is possible for an H-4 visa holder to attend school pursuant to her status, and even change her status to a student visa, tuition is often cost-prohibitive for these single-earner households, particularly because an H-4 visa holder is not eligible for in-state tuition or student loans. [90] This matter is made worse when the family has childcare needs.[91]

The problems arising from the lack of work authorization for H-4 visa holders are more extensive than simply the inability to work. As with coverture, the larger issues are the implications for a married woman's public standing and personhood. For example, without work authorization, an H-4 visa holder cannot

---

the time, a single-sentence regulation would completely strip me of my independence for years to come." (citation omitted)).

84. Shah, *The H-4 Visa Bind*, *supra* note 79, at 203 ("Women who are eligible must apply for jobs, interview, receive a job offer, and wait for the work visa to be approved. At an optimistic minimum, this process would take six months to complete. With the fall of the tech industry, women may find that it takes them up to two to three years to find a job with visa sponsorship." (citation omitted)).

85. Shah, *Involuntary Housewife Status*, *supra* note 81 ("When [my husband] Amar was looking for job, he had the whole of America to choose from. Now that we are in Burlington, Vermont, I am stuck looking here only." (citation omitted)).

86. In the 2011 fiscal year, 129,134 H1-B visas were issued. *See* U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2011 tbl. XVI(B), *available at* http://www.travel.state.gov/pdf/FY11AnnualReport-Table%20XVI(B).pdf.

87. An H1-B visa is valid for three years, and can be extended an additional three years while waiting for approval on an application for legal permanent residence. *See* 8 U.S.C. § 1184(g)(4) (2012).

88. There is evidence that some H-4 visa holders are actually exploited in volunteer work, mistakenly believing that they will be eventually sponsored for a visa. *See* Bragun, *supra* note 44, at 955-56.

89. *See, e.g.*, Videotape: Hearts Suspended (Meghna Damani 2007).

90. Shah, *The H-4 Visa Bind*, *supra* note 69, at 203.

91. *Id. See also* Shah, *Involuntary Housewife Status*, *supra* note 81 (explaining in one interview, "[w]ith only $50,000 salary, and having to support family back in India, we cannot afford [tuition]." (citation omitted)).

obtain a social security number, making it more difficult to obtain a driver license, open a bank account, and establish credit history.[92] She can obtain an individual tax identification number for the purpose of filing joint taxes,[93] but because she does not have her own income, all reported earnings will be those of her spouse. This makes it difficult for her to prove her identity, her net worth, and the nature of her status within the United States beyond her role as a wife.

The constraints that immigration law places on the rights of aliens generally, and the constraint on the right to work in particular, are not necessarily illegitimate.[94] However, the current immigration system, which is tailored to the needs of employers and their principal visa holder employees, sacrifices the liberty interests of H-4 spouses in the process of bringing skilled labor to the United States. Simply stated, an H-4 can't work because her husband—an H1-B—can. At the same time, the domestic duties performed by these H-4 wives have an economic effect. These economic contributions, however, come with neither the freedom of choice and benefits associated with full economic participation, nor the more expansive benefits of self-actualization and belonging.[95] The employer-centric and principal-centric employment visa system neither acknowledges spousal contributions, nor the potential economic contributions of these spouses. The lack of attention paid to H-4 rights is particularly ironic given the public's ostensible interest in the social integration and economic contribution of arriving immigrants, especially those who are likely to permanently reside and raise families in the United States.[96]

### C. Coverture and Women's Rights in Divorce and Custody Proceedings

As many scholars have noted, family law has been shaped by traditional conceptions of gender roles, particularly notions of patriarchy.[97] The state has a

---

92. Bragun, *supra* note 44, at 953.
93. In 1996, the U.S. Department of the Treasury issued regulations introducing the Individual Tax Identification Number (ITIN) as a means of allowing those who do not have immigration status to file federal tax returns. *See* T.D. 8671, 1996-1 C.B.314.
94. *See* Robert Wiebe, *Framing U.S. History: Democracy, Nationalism, and Socialism, in* RETHINKING AMERICAN HISTORY IN A GLOBAL AGE 239 (Thomas Bender ed., 2002); *see also* JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 4-10 (2000).
95. For an in-depth discussion of the relationship between labor, citizenship, and participation, *see* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1185-1201 (2008).
96. For a discussion of immigrant integration as an aspect of a successful immigration policy, *see, e.g.*, U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 26-29 (1997), *available at* http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf; *see also* SPENCER ABRAHAM ET AL., MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER xix-xx (2006), *available at* http://www.migrationpolicy.org/itfiaf/finalreport.pdf.
97. *See, e.g.*, Zvi Triger, *Introducing the Political Family: A New Road Map for Critical Family Law*, 13 THEORETICAL INQUIRIES IN L. 361, 366-68 (2012); Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 271-73 (2009); Allison Anna Tait, *A Tale of Three Families:*

tendency to replicate and uphold this preference for the traditional family,[98] one that is comprised of the patriarch, his wife, and their biological children.[99] Based on this preference, throughout the legal system there is a cultural and political bias against the dissolution of these relationships. This bias is apparent in any legislation that attempts to regulate domestic relations and marital roles.[100] Immigrant women experience this bias in favor of traditional, "intact" families when attempting to obtain divorces and child custody in U.S. courts. When a dependent spouse visa holder is forced to confront the dissolution of her family unit in court, she stands to lose her immigration status, marital property, and access to her children because all of these rights hinge on her marriage to the principal visa holder.

### 1. Divorce

Historically, marriage was perceived as a legal instrument of both contract and status; a wife's dependency on her husband and a husband's responsibility for his wife were inherent in the social institution of matrimony.[101] In this traditional arrangement, duties of men "included the duty to support a wife, and, for women, these included the duty to obey a husband, which might entail . . . an abdication of her choice of domicile and management of her property, and control over her own wages."[102] In this conception of marriage, the institution was viewed as permanent—a contract that could not be breached.[103] This model has regularly influenced courts in their interpretation of matters concerning the family,[104] and also serves as a foundation for the immigration mechanisms that allow individuals with immigration status or citizenship to petition for their non-citizen spouses.[105]

At the same time, the law and its interpretation have expanded to address the circumstances under which these marital unions dissolve. As divorce became

---

*Historical Households, Earned Belonging, and Natural Connections*, 63 HASTINGS L.J. 1345, 1351-52 (2012). *See also* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1252-55 (outlining the "clear preference for the marital nuclear family" in constitutional doctrine and emphasizing the connection between paternal rights and the model family).

98. *See* Ristroph & Murray, *supra* note 97, at 1252 (asserting that "a national, federalized understanding of the family" informs government regulation of domestic relations matters).

99. *See, e.g.*, Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 290 (2003).

100. *See, e.g.*, Jessica Feinberg, *Exposing the Traditional Marriage Agenda*, 7 NW. J.L. & SOC. POL'Y 301, 306-12 (2012) (describing the passage of "covenant marriage" bills in response to the growing prevalence of no-fault divorce); *see also* Gustafson, *supra* note 97, at 273-77.

101. Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 10 (2012) [hereinafter Abrams, *Marriage Fraud*].

102. *Id.* at 12.

103. *Id.* at 10.

104. *See* Ristroph & Murray, *supra* note 98, at 1252-55.

105. *See generally* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010).

more socially acceptable, legal provisions emerged in various fields to respond to concerns of marriage fraud being perpetrated by those seeking to obtain the benefits of the institution under false pretenses.[106] Because marriage is arguably the easiest and most common means to acquire visa or resident status in the United States, immigrant marriages have been the regular subject of Congressional regulation and agency review.[107] In this vein, Congress enacted the Immigration Marriage Fraud Amendments of 1986 (IMFA) in response to concern about "aliens seeking permanent residence in the U.S. on the basis of marriage to a citizen or permanent resident . . . for the sole purpose of obtaining permanent residence."[108] Though the current law provides exceptions in cases of divorce or domestic violence,[109] these regulations require the beneficiary of a petition to provide extensive proof of domestic violence when the petitioner refuses to file jointly to adjust the immigrant's status.[110] At the heart of IMFA are two key assumptions—that fraudulent marriages are common, thus requiring extensive agency review and narrowly tailored exceptions, and that the threat immigration fraud poses to the state is significant enough to warrant close regulation.[111]

Domestic relations law reflects courts' anxieties concerning marriage as a means of acquiring immigration status and accessing social benefits. This may affect the ability of a dependent spouse to obtain a divorce, a favorable division of marital property, or judicial acknowledgement of abuse. For example, in *Lee v. Kim*, a judge in a California court focused on the immigrant wife's ability to obtain benefits rather than on her allegations of domestic violence against her husband.[112] According to the Court of Appeals, "the court . . . asked Lee if she had instituted any proceedings to remain in the country based on her claims of domestic violence. Lee stated that she was in the process of discussing it with an attorney. The court denied Lee's application for lack of proof and lack of necessity."[113]

A dependent spouse visa holder seeking to assert her rights in court may

---

106. Abrams, *Marriage Fraud*, *supra* note 101, at 5.

107. *See, e.g.*, 132 CONG. REC. H8587 (daily ed. Sept. 29, 1986) (statement of Rep. Romano L. Mazzoli) ("Because spouses of U.S. citizens are . . . given special consideration under our immigration laws, many aliens who would not otherwise be allowed to live in the United States find it expedient to enter into a fraudulent marriage.").

108. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL ch. 25.1(a) (2012), http://www.uscis.gov/laws/afm.

109. 8 USC § 1186a(c)(4) (2012).

110. *See* Calvo, *supra* note 12, at 167.

111. *See* Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99, 107-08 (1996).

112. Transcript of Proceedings at 13-14, Lee v. Kim, No. F0105876 (Ca. Sup. Ct. Oct. 23, 2009), *cited in* David P. Weber, *(Unfair) Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 MARQ. L. REV. 613, 628 (2010) ("Even though the wife was previously referred to a domestic violence restraining order clinic and a mental health worker, the judge refrained from asking any questions as to the allegations of physical and sexual abuse.").

113. Lee v. Kim, No. A127393, 2010 WL 3736764, at *2 (Cal. Ct. App. Sept. 27, 2010).

encounter particular challenges because she lacks a clear path to lawful status. When the marriage is terminated, the dependent spouse loses the basis for her visa, and is therefore subject to removal from the United States, unless she is independently eligible for another status.[114] If the petitioner has filed a green card application on her behalf, the application will be revoked.[115] Even if the dependent spouse visa holder wishes to pursue other visa options, she runs the risk of being placed in deportation proceedings in the interim, as well as accruing "unlawful presence," which might prevent her from being able to reenter the United States if she is somehow able leave and then attempts to return.[116] Furthermore, the lack of immigration relief for a spousal visa holder may undermine her claim for a share of the marital property or alimony, since she may be forced to leave the country once the divorce has been completed, and decisions concerning assets are unlikely to be enforceable if she is removed from the country.[117]

Divorce may also present personal difficulties for an H-4 visa holder. Mandeep Grewal notes, for example, many Indian women are unwilling to leave their marriages due to cultural perspectives on divorce.[118] For this reason, a spousal visa holder may fear returning to her home country as a divorced woman, knowing that she will be treated differently and may have difficulty remarrying.[119] She may blame herself for the failure of the relationship, or may be blamed by others for her failure to keep the marriage together for the sake of her extended family and her children.[120] In spite of the challenges a divorced

---

114. 8 U.S.C. § 1101(a)(15)(H) (2012) provides that H visas are available to "the alien spouse . . . if accompanying [the principal visa holder] or following to join" the principal visa holder. When the spousal relationship is terminated, the H-4 visa holder is no longer eligible for status as a dependent; this interpretation is consistent with the rule pertaining to the effect of termination of marriage on a family-sponsored immigrant classification. *See* 8 C.F.R. § 205.1 (a)(3)(i)(D) (2013).

115. 8 C.F.R. § 205.1 (a)(3)(i)(D) (2013).

116. Amendments passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act created a bar to reentry for individuals who have stayed in the United States without authorization. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1182(a)(9)(B) (2012)). If in the country unlawfully for 6-12 months, they are prohibited from reentering for 3 years; if the period is more than 12 months, they are prohibited from reentering for 10 years, unless they qualify for a waiver. *Id.*

117. There are no multilateral treaties pertaining to recognition and enforcement of marital property orders, and few countries will recognize these judgments based on comity. *See* Ann Laquer Estin, *International Divorce: Litigating Marital Property and Support Rights,* 45 FAM. L.Q. 293, 324 (2011).

118. *See* Nadeep Grewal, *A Communicative Perspective on Assisting Battered Asian Indian Immigrant Women, in* BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA 164, 168-69 (Shamita Das Dasgupta ed., 2007).

119. *See* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 681-82 (1998).

120. For a discussion of expectations of South Asian women concerning marriage, *see, e.g.*, MARGARET ABRAHAM, SPEAKING THE UNSPEAKABLE: MARITAL VIOLENCE AMONG SOUTH ASIAN IMMIGRANTS IN THE UNITED STATES 17-43 (2000); *see also* Anitha Venkataramani-Kothari, *Understanding Experiences of Violence, in* BODY EVIDENCE: INTIMATE VIOLENCE

spousal visa holder may face in her home country, immigration law does not present any alternative options that would allow her to stay in the United States.[121]

### 2. Child Custody

Under the doctrine of coverture, children were considered marital property, and control over them belonged to fathers, not mothers.[122] Though this is no longer the rule in family court, custody proceedings remain yet another venue where immigration status can be exploited, and where the principal visa holder or documented husband can exert control over a spouse who is undocumented or in danger of losing her immigration status. In a series of interviews with ten undocumented women, Margot Mendelson found that "all regarded the courts and custody laws as adversarial to their interests . . . . The women shared an overriding sense of their own vulnerability in the legal setting."[123] The women also "unanimously accepted their [documented] husbands' threats to separate them from their children."[124] The tendency of courts to privilege the rights of individuals with more permanent immigration status reinforces the control of the spouse with lawful status, legitimizing the fears of women who are without a path to citizenship.

An important tenet underlying the U.S. immigration system is family unity. Family immigration accounts for about half of the total immigrants who gain permanent residency each year,[125] and the principle of keeping families together has remained a constant, and arguably desirable, facet of U.S. immigration policy.[126] The extent to which an imminent loss of immigration status affects a spousal visa holder's access to her children not only represents a violation of her parental rights, but also may defeat the purpose of child custody regulations intended to resolve disputes "in the best interest of the child."[127]

Once a custody proceeding is initiated, an H-4 visa holder will be unable to

---

AGAINST SOUTH ASIAN WOMEN IN AMERICA 11, 14-16 (Shamita Das Dasgupta ed., 2007).

121. *See* discussion *infra* Part III.B.

122. *See generally* Calvo, *supra* note 12; Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 561 (2000).

123. Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 182 (2004).

124. *Id.*

125. *Role of Family-Based Immigration in the U.S. Immigration System: Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of Rep. Zoe Lofgren).

126. *Id.* at 4 (statements of Professor Harriet Duleep and Professor Bill Ong Hing).

127. Leslye Orloff et al., *Immigration Status and Family Court Jurisdiction, in* LEGAL MOMENTUM, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 7 (Leslye E. Orloff & Kathleen Sullivan eds., 2004).

take her children out of the country.[128] There is also a significant chance that a dependent spouse's custody rights will be limited or terminated if she loses her status. Though not all courts consider parents' immigration status when assessing the best interests of the child, there are cases where parents have lost custody because they are undocumented,[129] whether from initial lack of or imminent loss of immigration status.[130] There may be an implicit assumption that it is in the child's best interest not to relocate, particularly overseas.[131] Even where another party is not seeking custody, courts have pushed back against undocumented parents removing a U.S. citizen child from the country.[132] To this

---

128. Removing a child from the United States when a custody process is underway could be considered a federal crime under the International Parental Kidnapping Crime Act. International Parental Kidnapping Crime Act of 1993, Pub. L. No. 103-173, 127 Stat. 521 (codified at 18 U.S.C. § 1204 (2012)).

129. *See, e.g.*, Ramirez v. Ramirez, Nos. 2005-CA-002554-ME, 2006-CA-000010-ME, 2007 WL 1192587, at *1 (Ky. Ct. App. Apr. 13, 2007) (finding that father's likely status as undocumented was properly considered, as the danger of deportation was related to his ability to serve as custodian); Rico v. Rodriguez, 120 P.3d 812, 818-19 (2005) (finding that "[t]he district court has the discretion to consider a parent's immigration status to determine its derivative effects on the children."). *See also* MiaLisa McFarland & Evon M. Spangler, *A Parent's Undocumented Immigration Status Should Not Be Considered Under the Best Interest of the Child Standard*, 35 WM. MITCHELL L. REV. 247 (2008) (analyzing in part the court's decision in *Olupo v. Olupo*, No. C8-02-109, 2002 WL 1902892 (Minn. Ct. App. Aug. 20, 2002), in which the court made detailed findings supporting the strong probability of an undocumented mother posing a flight risk, including her ability to falsify documents, failure to relinquish her passport to the court, frequent moves with the children without notifying the father of their location, unclear immigration status, problematic eligibility for political asylum, and lack of ties to the state other than her children).

130. *See* Weber, *supra* note 112, at 625-26 ("If the parties or counsel are committed to bringing immigration status into the proceedings, but do not wish to be seen as clearly attempting to seek advantage based on that status, there are other ways to obliquely bring immigration status into proceedings. One way is through the issue of employment (or lack thereof). Either the parent is unemployed (a negative factor in the best interest analysis), or the parent is employed, and as a result of immigration status is therefore in violation of the law (also a potential negative factor)."). *See also* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TX. HISP. J.L. & POL'Y 45, 54-55 (2005) ("Judges who discriminate on the basis of immigration status reflect acceptance, consciously or otherwise, of a pervasive societal narrative that constructs an expanding notion of unworthiness and 'illegality' regarding undocumented immigrants and a diminished popular sense regarding availability of protection from prejudice and discrimination.").

131. *See, e.g.*, William G. Austin, *Relocation, Research, and Forensic Evaluation, Part I: Effects of Residential Mobility on Children of Divorce*, 46 FAM. CT. REV. 137, 146 (2008) ("In disputes, courts obviously are going to put the facts and circumstances of the proposed move in proper context. There are sound theoretical reasons to assume long-distance interstate moves, or even international moves, are going to qualitatively affect the nonresidential-parent-child relationship more and place the child at more risk to lose out on receiving free-flowing social capital from one parent. Distance makes it more difficult to craft a parenting time plan that keeps the nonmoving parent involved and requires the evaluator and court to have a harm-mitigation mindset when there is going to be a long-distance parenting plan put into place.").

132. *See, e.g.*, *In re M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (stating that a father without immigration status "would face deportation, [and] the child could then be returned to protective custody or taken with her father to 'an unknown future in Mexico'"); *In re Sanjivini K.*, 63 A.D.2d 1021, 1021 (N.Y. App. Div. 1978), *rev'd*, 391 N.E.2d 1316 (N.Y.

end, David Thronson has observed that, even in cases where the immigrant parent does not intend leave the United States by choice, courts have interpreted the possibility of their departure as an indication of parental unfitness.[133] As a result, courts have continued to override the rights of parents who are without legal immigration status because of the possibility that these parents will be deported or will leave the United States on their own accord, ignoring the potential impact on both the child and the mother who is deprived of access to her children.

Abusers may use child custody as an aspect of coercive control against a spouse or intimate partner.[134] When one party has a more permanent form of immigration status, that hierarchy may be exploited to undermine the claims of the other parent.[135] There is limited recourse available for a parent who is deported and wishes to be reunited with her children. For those H-4 wives who give birth to U.S. citizen children, a divorce or withdrawal of her green card application may mean that she is forced to choose between leaving her children and living in the United States without status. If she stays in the United States for more than one year without lawful status and then is forced to leave, she will be barred from reentering the United States for ten years.[136]

To the extent she is able to obtain representation and access the court system, a dependent visa holder may be granted more protection and greater legal access to her children in an American court than in divorce proceedings in her home country. Because H-4 visa holders do not have the ability to work, they are likely to require free legal services. Legal aid organizations, however, face resource constraints that limit their ability to provide representation in divorce proceedings.[137] The increased costs of providing interpreters and other

---

1979) (stating that "the uncertainty of [the mother's] immigration status" was a primary factor in finding neglect).

133. Thronson, *supra* note 130, at 68.

134. Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 53 (1994); Barbara Hart, *Family Violence and Custody Orders*, 43 JUV. & FAM. CT. J. 29, 33-34 (1992). *See also* HOWARD DAVIDSON, ABA CTR. ON CHILDREN & THE LAW, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 20 (1994) (noting that abusers whose victims are immigrant parents often use threats of deportation to shift the focus of family court proceedings away from their own violent acts).

135. David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 455 (2008) (citing David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 HISP. J.L. & POL'Y 45, 53 (2005)).

136. *See* 8 U.S.C. § 1182(a)(9) (2012). There is a possibility that an individual may qualify for discretionary relief in the form of a waiver based on a showing of extreme hardship. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (2012).

137. *See* Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149, 183-92 (2010) (outlining restrictions imposed by government grant funding, particularly for survivors of domestic violence); *see generally* Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619 (2011) (discussing the impact of Legal Services Corporation restrictions on low-cost legal services provision to immigrants).

specialized services to those who are struggling with immigration issues mean that H-4 spouses are unlikely to have their legal needs met by a provider.[138]

### D. Coverture and Domestic Violence

"Domestic violence" is a broad term, referring to "the abuse of power and control in an intimate relationship."[139] Historically, the doctrine of chastisement—sometimes known as the "rule of thumb" or, more plainly, "wife beating"—was linked to the law of coverture. "As master of the household," Reva Siegel writes, "a husband could command his wife's obedience, and subject her to corporal punishment . . . if she defied his authority."[140] Blackstone explained a husband's need to "give his wife moderate correction," because "as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or his children."[141] This aspect of coverture has lingered in laws pertaining to domestic violence. For example, until the latter part of the twentieth century, many states followed the common law doctrine of interspousal immunity, which barred a civil suit between spouses based on the fact that, under the rule of coverture, a wife bringing a case against her husband would be tantamount to the man bringing a case against himself.[142]

Although often physical in nature, domestic violence also encompasses psychological abuse. For a dependent spouse visa holder, this psychological abuse may include exploitation of the economic and legal dependence inherent in her visa status.[143] This dependence presents a challenge to women who must decide whether to stay in a violent marital relationship, or leave and risk the consequences—including loss of immigration status and child custody.[144]

Economic dependence is a major obstacle preventing immigrant women

---

138. *See* Olivares, *supra* note 137, at 185-86. *See also id.* at 158 (discussing language barriers in accessing legal and supportive services).

139. LETI VOLPP, FAMILY VIOLENCE PREVENTION FUND, WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES AVAILABLE 3 (Leni Marin ed., 1995).

140. Siegel, *supra* note 18, at 2123.

141. 1 WILLIAM BLACKSTONE, COMMENTARIES *444, *cited in* Siegel, *supra* note 18, at 2123.

142. *See* Douglas Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 561-63 (1992); *see also id.* at n.154 (listing the thirty-four states that have eliminated the doctrine of interspousal immunity and in what legal contexts).

143. *See* Lauren Gilbert, *Family Violence and U.S. Immigration Law: New Developments*, *in* 1 IMMIGR. BRIEFINGS 2 (2001) (citing the Family Violence Prevention Fund of San Francisco's Power and Control Wheel).

144. *See, e.g.*, Grewal, *supra* note 118, at 168 (stating that during interviews with South Asian immigrant survivors of domestic violence, "when [immigrant women were] asked about sociocultural factors influencing their help-seeking behavior and their processes of obtaining assistance . . . almost all of them mentioned the dependence of immigrant women on their sponsors (read: husband) for legal status . . . .").

from leaving violent relationships.[145] There is also a strong correlation between economic dependence and the severity of abuse in an intimate relationship.[146] Anitha Venkataramani-Kothari observed that "loss of financial control . . . [is] likely to leave women feeling helpless and insecure . . . [and] a woman may develop a helpless and distorted view of the self" in response to her dependence on her husband.[147]

An abuser may also exploit his control over his spouse's immigration status by refusing to file paperwork pertaining to the spouse's immigration status, giving misinformation or denying access to information about the spouse's immigration status, or threatening deportation.[148] In interviews with South Asian immigrant women, Anita Raj found that deportation threats and refusal to file for change of status were also significantly correlated with physical and sexual abuse, and that batterers frequently prevented access to immigration documents as part of a strategy to control their spouses.[149] Derivative visa holders face additional complications in obtaining access to their immigration information because, although the employer's immigration attorney ostensibly represents multiple parties, including the principal visa holder and his derivatives, the principal is frequently the point of contact after arriving in the United States.[150] Principal visa holders may exploit this fact. Shivali Shah writes

---

145. *Id.* ("The women elaborated that such dependence is debilitating because, if withdrawn, it makes immigrant survivors not only extremely vulnerable to deportation, but also ineligible to work, get a driving permit, or otherwise acquire an independent status."). *See also* Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 295-96 (2000).

146. Leslye Orloff, *Women Immigrants and Domestic Violence, in* WOMEN IMMIGRANTS IN THE UNITED STATES 49, 52 (Philippa Strum & Danielle Tarantolo eds., 2003). *See also* Michael J. Strube & Linda S. Barbour, *The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. MARRIAGE & FAM. 785, 790-92 (1983); Grewal, *supra* note 118, at 170 ("[A survey respondent's] husband threatened that she would have to find a job, daycare for the children, and housing on her own or without any access to public services or his finances.").

147. Venkataramani-Kothari, *supra* note 120, at 18.

148. Orloff & Kaguyutan, *supra* note 14, at 98 ("The battered immigrant's ability to obtain or maintain lawful immigration status may depend on her relationship to her United States citizen or lawful permanent resident spouse and his willingness to file an immigrant relative position on her behalf. The same dynamic occurs any time immigration law gives an abusive spouse total control over the immigration status of his spouse and children."). *See also* Shivali Shah, *Trapped on a H-4*, THE HINDU, Nov. 28, 2004, http://www.hindu.com/mag/2004/11/28/stories/2004112800380300.htm.

149. Anita Raj et al., *Immigration Policies Increase South Asian Immigrant Women's Vulnerability to Intimate Partner Violence*, 60 J. AM. MED. WOMEN'S ASSOC. 26 (2005).

150. With regard to conflicts of interest between current clients, the American Bar Association's Model Rules of Professional Conduct provide: "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013). Despite this guidance, immigration attorneys do

that a number of immigration attorneys reported "irate calls from H-1B clients forbidding them from further contact with their wives. One attorney tells me that she has received files at her firm with covers stating: 'DO NOT TALK TO WIFE.'"[151]

The particular vulnerability of spousal visa holders cannot be discussed independently from provisions in the U.S. immigration system that systematically subordinate and facilitate spousal visa holders' susceptibility to abuse. Dependence on a spouse for both financial support and immigration status creates systemic problems with severe consequences for H-4 spouses. A study of 189 married immigrant South Asian women found that individuals with partner-dependent visas, regardless of income and education, were more likely to suffer physical and sexual violence from their husbands than those with other immigration statuses, including women with work visas, green cards, and U.S. citizenship.[152] Furthermore, a survey of organizations in the United States that serve the South Asian community revealed that up to 75 percent of their domestic violence clients were H-4 visa holders,[153] and there is reason to believe that domestic violence rates among dependent visa holders are underreported. H-4 visa holders may face obstacles to accessing services, given the potential compounded factors of social isolation, lack of awareness about legal rights, limited language proficiency, and stigma associated with domestic violence.[154]

The nature of the dependent spouse visa creates a disincentive to report domestic violence. Many scholars and advocates have written about the reluctance of immigrant women to contact the police with respect to domestic violence cases.[155] H-4 visa holders face additional pressure in the form of psychological abuse, including threats that the principal or his spouse will be deported if police respond to a domestic violence call. Domestic violence is indeed a deportable offense,[156] and generally, if the principal is subject to removal, so is the rest of his family. Critics have also pointed out that it is not uncommon for a victim to be arrested alongside or instead of the perpetrator, whether as the result of dual arrest policies or in response to reciprocal accusations.[157] An arrest might cost the H-4 her visa status, but it could also cost

---

represent employers without considering possible conflicts of interest between the employer and employee, and between the employee and his spouse. *See* discussion *infra* Part IV.B.4.

151. Shah, *supra* note 148.

152. Raj et al., *supra* note 149, at 26-32.

153. Shah, *The H-4 Visa Bind*, *supra* note 69, at 200-01.

154. *See, e.g.*, Susan Girardo Roy, Note, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263, 271 (1995).

155. *See, e.g.*, Elizabeth Shor, Note, *Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility*, 9 CORNELL J.L. & PUB. POL'Y 697, 706-8 (2008); Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 308-15 (1997).

156. Specifically, domestic violence is considered a crime pursuant to 8 U.S.C. § 1227(a)(2)(E) (2012) or an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(F) (2012), as defined in 18 U.S.C. § 16(a) (2006).

157. *See* Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28

the visa holder her safety because a visit from the police or an arrest may provoke the abuser and jeopardize the spouse's physical and financial security.

## III. "UNCOVERED" WOMEN AS VICTIMS

Rather than addressing the inherent inequality in the dependent visa system, immigration reform has replicated and re-entrenched the gender norms surrounding trailing spouses. The notable exceptions have been legislative developments to address violence against women, which, though laudable, force domestic violence survivors to cast themselves as victims in order to be eligible for independent immigration relief. These women are "uncovered" in the sense that their spouses and intimate partners have neglected, abused, and otherwise failed to provide for them. The state response has been to treat these relationships as anomalies and intervene on the survivor's behalf, classifying her as a victim of her relationship without addressing the law's role in creating and perpetuating inequalities within that relationship.

### A. Passing Over Immigrant Women's Rights as an Area of Reform

The perseverance of traditional gender roles within immigration law is deeply at odds with the gender equity movement that eliminated coverture provisions from U.S. law nearly two centuries ago.[158] Despite waves of immigration reform, initiatives have repeatedly failed to address the fundamental inequality of dependent spouses in the U.S. visa system. As U.S. immigration policy gradually shifted away from a family-based immigration system toward a preference for admitting individuals based on university education and specialized skills,[159] greater emphasis was placed on recruitment of professional immigrants without necessary consideration for the rights of their spouses.

The highly politicized discussion around the H1-B program has obfuscated the reform of the H-4 program. The focus on the breadwinner is reinforced by the central role of employers, who not only control the hiring, sponsorship, and application processes for H1-B visa holders, but also play a significant role in lobbying on behalf of the H1-B program.[160] Dependent visa holders as a whole

---

CLEARINGHOUSE REV. 383, 387 (1994). Under the Secure Communities Program, law enforcement offices are required to send fingerprint information of an arrested individual to U.S. Department of Homeland Security, and to transfer custody of that individual to the agency if she is undocumented or out of status. *See generally* Radha Vishnuvajjala, Note, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185 (2012) (detailing the effects of the Secure Communities program on help-seeking behavior of domestic violence survivors).

158. *See* Calvo, *supra* note 12, at 598-600.

159. *See* Shachar & Hirschl, *supra* note 29.

160. Large corporations regularly send speakers to congressional hearings on matters affecting business immigration. *See Examining Strengthening American Competitiveness for the Twenty-First Century: Hearing Before the S. Comm. On Health, Educ., Labor, and Pensions*, 110th Cong. 11-19 (2007) (statement of Bill Gates, Chairman, Microsoft Corporation). *See also Comprehensive Immigration Reform: Business Community Perspectives: Hearing*

do not have a represented voice at the congressional level.[161] Senate hearings and congressional debates highlight the tension between proponents of H1-B visa holders, such as employers who believe the United States should be drawing more talent from overseas to be competitive and strengthen the national economy,[162] and individuals who believe immigration regulations should be tightened to protect employment opportunities for American workers.[163]

Comprehensive immigration reform has also focused on attracting and retaining immigrants who have education and specialized knowledge, and thus are perceived as valuable and desirable.[164] By contrast, immigration reform efforts have either excluded H-4 visa holders from their scope, or failed to highlight them as a priority. A striking example is a recent USCIS fact sheet about proposed changes to regulations for certain employment visa holders, including a change that would allow certain H-4 visa holders to apply for work authorization. Though there were a few provisions in the fact sheet pertaining to spouses, many were focused on principal visa holders, and the document appeared under the title "DHS Reforms To Attract And Retain Highly Skilled Immigrants"—suggesting that principals are the priority of these proposed reforms, and that spousal work authorization is more about incentive for H1-B

---

*Before the Subcomm. On Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 8-15 (2007) (statement of Laszlo Bock, Vice President, People Operations, Google, Inc.); Eric Lipton & Somini Sengupta, *Latest Product of Tech Firms: Immigrant Bill*, N.Y. TIMES, May 5, 2013, at A1 (discussing the fwd.us initiative). There is little comparable representation and legislative influence for nonimmigrant spouse visa holders, even in the context of domestic violence prevention.

161. Shah, *The H-4 Visa Bind*, *supra* note 79, at 205 ("Those that advocate for battered or indigent immigrants dismiss the [H-4] issue, stating that organizations working with large numbers of employment-based immigration attorneys such as the American Immigration Lawyers Association (AILA) should be the ones advocating for this population. When AILA representatives were asked about advocacy for battered H-4 women, they declared that it is not in their scope of responsibilities, but that battered immigrant women's organizations should be advocating for the group."). The most vocal proponents of H-4 rights have actually been H-4 visa holders themselves; they have created online forums to advise each other, founded organizations to support women in similar situations, and, recently, submitted a petition to Congress to demand work authorization as part of their visa status. *See* Shah Peerally, *Give More Rights to H4 Visa Holders*, CHANGE.ORG,. http://www.change.org/petitions/give-more-rights-to-h4-visa-holders (last visited Jan. 9, 2014).

162. *See, e.g.*, NAT'L FOUND. FOR AM. POL'Y, H1-B VISAS AND JOB CREATION POLICY BRIEF (2008), *available at* http://www.nfap.com/pdf/080311h1b.pdf.

163. *See, e.g.*, Norman Matloff, *On the Need for Reform of the H1-B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 906-13 (2003).

164. *See* THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM 11-13 (2011), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf (listing immigration reform priorities, including: "Strengthening the H-1B visa program to fill the need for high-skilled workers when American employees are not available" and "[e]ncouraging foreign students to stay in the U.S. and contribute to our economy by stapling a green card to the diplomas of science, technology, engineering and mathematics (STEM), PhDs and select STEM Masters Degrees students so that they will stay, contribute to the American economy, and become Americans over time.").

visa holders than about equal rights for their spouses.[165]

Those in favor of strict regulation of employment-based immigration might argue that there are independent justifications for the distinction between the rights of principals and derivatives with respect to their immigration status; for example, that nations have a right to regulate immigration. Many critics of the growth of the H1-B and other employment visa programs emphasize the importance of protecting job opportunities for U.S. citizens and the need to closely regulate the influx of foreign workers.[166] Giving work opportunities to spouses, in addition to immigrating professionals, may produce additional anxieties among an electorate focused on the employment needs of individuals already residing in the United States.

These lines of reasoning around employment do not, however, mean that these immigration laws are free of other dynamics of power, including the influence of coverture and gender inequality that permeate immigration law. Though the result may not be a conscious perpetuation of the norms of coverture, the constant focus on principals is an example of a phenomenon Reva Siegel calls "preservation through transformation": though the rhetoric surrounding a status regime may shift, the underlying power relationships within it remain unchanged and are justified through new means.[167] Siegel observes that "when the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend."[168] Similarly, the law's traditional focus on the principal is frequently presented in a neutral fashion—as a matter of an employer's need for skilled workers and the state's need to regulate immigration—rather than as a systemic perpetuation of coverture and a means of reinforcing patriarchal notions of family.

In the instance of dependent spouse visa holders, the stereotypes about trailing spouses, and the prioritization of the principal visa holder's rights in the immigration process, reinforce traditional notions of the family and preserve antiquated gender norms. The veneer of gender-blind language, including the terms "principal visa holders" and "derivative visa holders," does not disguise the fact that these roles are cast according to the doctrine of coverture and the traditional role of women as wives. In many ways, debates over immigration reform have been about conceptualizing female immigrants beyond their role as wives (or, later on, as victims). Although these women share the same liberty

---

165. *DHS Reforms To Attract and Retain Highly Skilled Immigrants*, U.S. DEP'T OF HOMELAND SEC. (Jan. 31, 2012), http://www.dhs.gov/news/2012/01/31/dhs-reforms-attract-and-retain-highly-skilled-immigrants.

166. *See, e.g.*, Simone M. Schiller, *Does the United States Need Additional High-Tech Work Visas or Not? A Critical Look at the So-Called H1-B Visa Debate*, 23 LOY. L.A. INT'L & COMP. L. REV. 645, 650 (2001).

167. Siegel, *supra* note 18, at 2119.

168. *Id.*

interests as their husbands—the same desire for choice in terms of work, travel, and access to family—immigration law only considers these interests for principal visa holders. It is worth noting that very few visa categories do not permit the accordance of status to dependents,[169] which indicates that the principal visa holder is entitled to some right of family unity. It seems, however, that the interests of family derivatives do not extend beyond the principal visa holder; family unity is in his interest, and therefore the power of petition is his to exercise. Once his family is in the United States, however, no further attention is given to the family members' rights or quality of life.

### B. State "Covering" of Women as Battered Spouses

The theory of preservation through transformation offers a possible explanation for the failure of employment visa reforms to extend equal rights to H-4 spouses. To the extent that the interests of H-4 visa holders have been raised in immigration reform debates, it has been largely in the context of domestic violence. However, many dependent spouse visa holders have not been able to take advantage of these various forms of relief because this context only includes them insofar as they are victims.

Janet Calvo observes that, while reform around domestic violence was originally grounded in the context of gender inequality, it has since been separated from this larger issue for purposes of legislative advocacy.[170] To address spousal visa provisions the state needs not only to intervene in cases of domestic violence, but also to address the larger issues of subordination that are inherent in the narrow conception of spousal roles within the traditional family model that is the building block of dependent spouse visa programs.

Since the premise of family unity is difficult to decouple from the concept of the power to petition, at least as a matter of viable policy, immigration legislation has instead focused narrowly on cases of spousal misconduct in the form of domestic violence.[171] In this way, women must suffer domestic violence and cast themselves as victims in order to obtain relief. Only in these scenarios does the state deem it permissible to intervene and "cover" these spouses, granting them some modicum of protection—just as their husbands would have covered them in the absence of abuse. This form of state paternalism is the sole alternative for relief under current law, and it is made available through Violence Against Women Act self-petitions and the U visa.

---

169. *See* discussion *supra* note 37.

170. Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not Its Demise*, 24 N. ILL. U. L. REV. 153, 190 (citing in part to Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römkens & Marianne Wesson*, 10 J.L. & POL'Y 313, 322 (2002)).

171. *See, e.g.*, Orloff & Kaguyutan, *supra* note 14.

### 1. The Violence Against Women Act

The Violence Against Women Act (VAWA), which was passed in 1994, created a special process whereby spouses of abusive U.S. citizens and permanent residents could petition for green cards themselves.[172] Through the enactment of VAWA, Congress recognized that marriages between those with immigration status and those without created power differentials that made undocumented spouses more vulnerable to abuse.[173] Congress specifically stated that one of the purposes of enacting VAWA was to allow "battered immigrant women to leave their batterers without fearing deportation."[174]

The provisions of VAWA allow a spouse of a citizen or permanent resident to self-petition if he or she is abused and otherwise eligible to adjust status based on marriage.[175] Subsequent amendments permit VAWA self-petitions to be filed within two years of a divorce, so that immigrant spouses need not feel pressured to stay in an abusive relationship in order to maintain their immigration status.[176] Prior to the passage of VAWA, spouses could be abandoned at immigration interviews or have their green card applications revoked by their abuser.[177] VAWA provisions are based on a more comprehensive definition of abuse that includes psychological and economic abuse, as well as physical violence.[178] The right of self-petition is therefore a highly significant development for survivors of domestic violence who are seeking to escape a relationship of dependence on their spouses for immigration status.

Notwithstanding these positive aspects, VAWA does not address the situation of H-4 visa holders who may ultimately be eligible for their green cards, but for whom that status may also be speculative due to extensive waiting periods or intervention by abusive spouses.[179] The 2005 Violence Against Women Reauthorization Act created an option for H-4 visa holders who have

---

172. VAWA was passed as Title IV, §§ 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of the United States Code). VAWA immigration-related provisions reside in the Immigration and Nationality Act (INA), Title 8 of the United States Code.

173. H.R. REP. NO. 103-395, at 26-27 (1993).

174. *Id.* at 25.

175. 8 U.S.C. § 1154(a)(1)(A)(v)(I)(cc) (2012).

176. 8 U.S.C. §§ 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 1154(B)(ii)(II)(aa)(CC)(bbb) (2012).

177. *See* discussion *supra* Part II.C.1.

178. 8 C.F.R. § 204.2(c)(1)(vi) (2000) ("For the purpose of this chapter, the phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse . . . shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence."). This suggests that failure to file immigration documents, for example, may be considered part of a pattern of abuse, but may not alone serve as a basis for a self-petition. *See* Calvo, *supra* note 170, at 189.

179. For example, if the H1-B files a petition for legal permanent residence for his spouse and then later withdraws that petition, the H-4 visa holder would lose her option for adjustment of status. *See* Shah, *supra* note 69, at 203.

experienced domestic violence to obtain work authorization.[180] These provisions, however, failed to take effect; as a result, immigrant advocacy organizations expressed concerns about the narrow reading of the bill's provisions and its failure to expand relief to include other categories of visa holders, including H-4s.[181] For the last eight years, women that could have benefitted from these provisions have had their right to work put on hold.[182] But ultimately, the VAWA work authorization provision only addresses the situation of domestic violence survivors.

The Violence Against Women Act does not address the imminent loss of status faced by a dependent spouse in divorce proceedings. An H-4 visa holder will still lose her status in the event that she becomes divorced or her husband changes status without petitioning for her. If that divorce occurs more than two years before the principal obtains a green card, she cannot self-petition for an independent path to citizenship under VAWA, and the wait times for permanent residence for H1-B visa holders make that scenario virtually impossible.[183] VAWA also does not address other categories of nonimmigrant dependent visa holders, such as spouses of diplomats and spouses of students, who may also be subject to abuse.

Furthermore, the self-petition process does not fully address the underlying power and control dynamic of coverture. The legislative predecessors of VAWA did address the fundamentally disparate power dynamic between petitioners and beneficiaries. The first of such bills, introduced in July 1992, actually would have permitted spouses of permanent residents and citizens to file their petitions independently.[184] Janet Calvo observes that this approach was preferable to the legislation that was ultimately passed because it "did not require the escalation of power domination in the marital relationship to reach [the] level of physical

---

180. Pub. L. No. 106-162, § 814(c), 108 Stat. 1902 (codified at 8 U.S.C. §1105(a) (2012)).

181. *See* Letter from Americans for Immigrant Justice, et al., to Alejandro Mayorkas, Dir. of U.S. Citizenship and Immigration Servs. (Jan. 10, 2013), *available at* http://www.asistahelp.org/documents/news/Comments_on_USCIS_VAWA_EAD_Guidance_3C87287ADCDEB.pdf ("As legal service providers, immigration attorneys, and victim advocates, we welcome the issuance of the VAWA EAD [Employment Authorization Documents] Guidance to clarify these provisions [set forth in VAWA § 814(c)]. Indeed, for the past seven years, these immigrant survivors have waited for such procedures to be developed to assist them in leading more secure lives.").

182. *See id.*

183. As of August 2013, those H1-Bs from India and China who filed applications for permanent residence on or before January 1, 2008 and August 8, 2008, respectively, and met certain employment-based preferences, are eligible to have their applications approved. *See* U.S. DEP'T OF STATE, VISA BULLETIN FOR AUGUST 2013 (2013), *available at* http://www.travel.state.gov/pdf/visabulletin/visabulletin_august2013.pdf. As previously mentioned, India and China are major countries of origin for H1-B visa holders. *See* U.S. DEP'T OF HOMELAND SEC., CHARACTERISTICS OF H1-B SPECIALTY OCCUPATION WORKERS: FISCAL YEAR 2011 ANNUAL REPORT TO CONGRESS 11 (2012), *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-11-characteristics.pdf.

184. H.R. 5693, 102d Cong. §1(a) (1992).

harm or other abuse."[185] However, later versions of the bills required proof of abuse or extreme cruelty, requiring a spouse to not only suffer, but to prove the extent of her suffering in order to be eligible to self-petition.[186] In many ways, this legislation represents a missed opportunity for women who fall through the cracks of the current VAWA law.

### 2. U Visa

The U visa, part of the Trafficking Victims Protection Act of 2000, provides a path to citizenship for victims of certain crimes when the individual assists law enforcement in the investigation or prosecution of the crime.[187] The U visa provides interim immigration status and work authorization for four years,[188] and allows the visa holder to adjust status after three years, thereby creating a path to citizenship.[189] The U visa regulations offer a broader form of relief than the VAWA self-petition process insofar as they provide an option for survivors who are not eligible to self-petition based on their marital relationships, including dependent spouse visa holders.[190]

There are, however, a number of hurdles to obtaining a U visa that prevent many H-4 visa holders in abusive or otherwise failing marriages from accessing relief. Community and legal advocates have noted that many survivors are hesitant to report abuse for fear they will be deported.[191] For dependent visa holders, this fear may be compounded by the fact that an arrest or conviction on a domestic violence charge may affect the principal's immigration status and, by extension, the immigration status of dependent family members.[192] Prescribing the U visa as a form of relief for survivors also lends state sanction to a particular response to domestic violence—namely, the involvement of law enforcement—which may not holistically respond to a survivor's situation,[193] and may even

---

185. Calvo, *supra* note 12, at 169.
186. *Id.*
187. 8 C.F.R. § 214.14(b) (2013).
188. 8 C.F.R. § 214.14(g) (2013).
189. 8 C.F.R. § 245.24 (2013).
190. For example, so long as the harm suffered is a qualifying crime for U visa relief, then U visas would be available to survivors regardless of their immigration status or immigration status of their intimate partner, and whether or not they were married to that person or, in the case of same-sex couples, whether or not U.S. Citizenship and Immigration Services would consider them married for immigration purposes. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (2012).
191. Shor, *supra* note 155, at 706 (citing Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1421 (1993) ("When asked why they did not report their abuse, 64 percent of Latina and 57 percent of Filipina abuse victims said the primary reason was fear of deportation.").
192. *See* Orloff & Kaguyutan, *supra* note 14.
193. *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 37-38 (2009) ("Immigrant women, particularly those who are undocumented or whose partners are undocumented, may fear that involvement in the criminal system will lead to deportation, depriving them of economic, emotional, extended family or parenting support.").

place her at an increased risk of harm.[194] This combination of factors poses serious disincentives for reporting and may dissuade H-4 visa holders from involving law enforcement, ultimately undermining the eligibility of domestic violence survivors for the law enforcement certification requiredfor a U visa. Indeed, a study of 161 South Asian female immigrants in the Greater Boston area revealed a hesitance to engage with law enforcement and the courts—while approximately 40 percent of respondents had been abused, only two women obtained restraining orders.[195]

Additionally, the definition of domestic violence in the U visa statute, as well as the nature of prosecutions in domestic violence cases, increase the potential that these regulations will be interpreted to primarily include cases where there is substantive evidence of physical abuse, which frequently is limited to cases of extreme physical violence.[196] Survivors who experience economic or psychological harm, such as an abuser's refusal to provide financial support or file a green card application for the spouse or the children, may be unable to pursue criminal cases against their spouses that would qualify them for U visa certification.

The option of a U visa may provide little comfort to an individual who stands to lose her path to citizenship, her economic security, and her access to her children in the event that she reports her abuser. Elizabeth Shor observes that survivors of domestic violence often want to make their marriages work and to have stable family lives, and "they know there is no possibility of this happening if their husbands are deported. As a result, these battered women are reluctant to contact the police because to do so would be to abandon all hope that things could improve."[197]

Another problem inherent in the U visa regulations is that this relief is only available to individuals who suffer domestic violence or other qualifying crimes; this does not account for dynamics of dependency or psychological forms of domestic violence such as emotional or economic abuse. Like the VAWA self-petition, the U visa is a remedy grounded in the concept of victimhood—the petitioner is required to suffer harm in order to be eligible for relief.[198]

---

194. *See* S. Goldsmith, *Taking Abuse Beyond a Family Affair*, 17 LAW ENFORCEMENT NEWS 7 (1991) (noting that 30 percent of batterers assault their victims at some point during the pre-disposition stage of a case).

195. Anita Raj & Jay Silverman, *Intimate Partner Violence Against South Asian Women in Greater Boston*, 75 J. AM. MED. WOMEN'S ASSOC. 111, 113 (2002). *See also* Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1311-26 (1991).

196. Requirements for law enforcement certification include petitioner's possession of information about a crime and helpfulness or likely helpfulness to law enforcement. *See* 8 U.S.C. § 1101(a)(15)(U)(i) (2012).

197. Shor, *supra* note 155, at 706.

198. Notably, the statute defines "physical or mental abuse" as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim." 8 C.F.R. §214.14(a)(8) (2013). With regard to the documentation required to

### 3. Limitations on Present Forms of Relief

As forms of relief, the VAWA self-petition and the U visa do not go far enough to fully protect the rights and interests of dependent visa holders. Even if the scope of the VAWA self-petition were expanded to include those who may potentially be eligible for permanent residence at a later date, these provisions can only be extended in cases where domestic violence occurs. Janet Calvo observes that these immigration regulations require women to not only be victims, but to be "good victims," providing ample evidence of their good moral character and helpfulness to law enforcement, as well as evidence of their abuse;[199] demands that are not placed on other spouses nor on principal visa holders.[200] These additional burdens make the VAWA self-petition and the U visa even more unappealing options for relief.

U.S. immigration law has made exceptions for immigrant women who are victims of domestic violence, as in the case of VAWA and U visa regulations, but it has not contemplated the larger context of gender subordination imposed by the state itself. In this case, for example, the law does not address the unequal relationship between husband and wife with respect to the nonimmigrant visa system: the forced dependency, the eclipsing of a spouse's independent interests, and the extent of control a principal has over the derivative—all of which may influence the dynamics of a couple's marital relationship.[201] A response to cases of domestic violence may be warranted, but limiting the state's response to those cases where a particular type of abuse has occurred distracts from the larger issue of gender inequality inherent in the visa system and the law's role in subordinating dependent spouses. Meaningful and comprehensive reform must include measures to eliminate the residue of coverture that continues to define the social role and legal standing of wives, and must allow immigrant women independent control over their status and rights in the United States.

## IV. SYSTEMIC RESPONSES TO PROMOTE EQUITABLE RIGHTS FOR DEPENDENT VISA HOLDERS

### A. The Unique Position of H-4 Visa Holders

Structural inequalities within the visa system have troubling implications for the exercise of citizenship by dependent spouse visa holders. Feminist

---

prove abuse, the U.S. Citizenship and Immigration Services Ombudsman has specified that protective orders and "documents such as a photograph of the visibly injured applicant" may be deemed relevant. U.S. DEP'T OF HOMELAND SEC., QUESTIONS & ANSWERS FROM CIS OMBUDSMAN'S TELECONFERENCES 6-7 (2008), *available at* www.aila.org/content/default.aspx?docid=26429.

199. Calvo, *supra* note 12, at 168 (citing Linda Kelly, *Republican Mothers, Bastards' Fathers, and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 580 (2000)).

200. *Id.*

201. *See* discussion *supra* Part II.

scholars, among others, have adopted a more expansive notion of citizenship, arguing that citizenship implicates both public and private life.[202] Just as citizenship represents formal equality before the state and under the law, private institutions and domestic power structures also reflect these principles. In this conception of citizenship, these rights extend to the realm of intra-family relations. Norms of household citizenship include principles such as equality of family members and non-subordination within marital relationships;[203] the expression of these principles includes the rights to live life free of domestic violence, to preserve ties between parents and their children, and to freely enter into and dissolve marital unions.

While this broader notion of citizenship can extend to those without formal status, H-4 visa holders do have a potential path to citizenship, albeit one conditioned on their marital relationship. The H1-B is a so-called "dual intent" visa, meaning that an individual may intend to obtain permanent status in the United States, and this does not interfere with a grant of a limited-term visa.[204] What sets H-1B and H-4 visa holders apart from other nonimmigrants is that their status allows for them to obtain permanent residence. An employer may sponsor an H1-B visa holder and derivative family members for green cards, [205] so unlike many nonimmigrants, there is a strong possibility that these particular individuals will remain in the United States. While H-1B and H-4 visa holders are technically nonimmigrants, it is clear from the creation and structure of the H1-B program that there is an interest—though a contested one—in drawing and retaining skilled immigrants through this program.[206] Many employers, as well as proponents of immigration law reform, believe that drawing and retaining these educated workers makes the United States' technology sector more competitive and strengthens the national economy, thus creating a rationale for investing in their employees as future citizens.[207]

While the law, and certainly the current conversation about comprehensive immigration reform, reflects a preference for a path to citizenship for highly-

---

202. *See, e.g.*, Susan Moller Okin, *Women, Equality, and Citizenship*, 99 QUEENS Q. 33 (1992).

203. *See* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage,* 104 COLUM. L. REV. 75, 91 (2004).

204. As such, while H-1Bs and their dependents are technically nonimmigrant visa holders, the law allows for "dual intent," which means that they may intend to reside permanently in the United States at the time they interview for their visas in their home country. Only four classes of nonimmigrants—H1-B, H1-C, L, and V visa holders—are permitted to have dual intent. *See* 8 C.F.R. § 214.2(h) (2013).

205. H1-B visa holders may work in the United States for no more than six years. *See* 8 USC § 1184(g)(4) (2012). During that time, they may opt to apply for legal permanent residence. Motomura specifically references permanent resident status as a way of designating "Americans-in-waiting." HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 140 (Oxford 2006) ("Looking at some other countries which do not confer precitizenship status upon initial admission makes clear that permanent resident in the United States reflects immigration as transition.").

206. *See* discussion *supra* Part I.B.

207. *See* Hainmueller & Hiscox, *supra* note 43, at 78-80.

skilled immigrants like H1-Bs, there is no comparable acknowledgement of the rights of derivative spouses. Though the Border Security, Economic Opportunity, and Immigration Modernization Act—the draft senate immigration bill introduced by Senator Charles Schumer and voted out of the Judiciary Committee in May 2013—contains a few provisions pertaining to H-4 visa holders, these provisions do not go far enough.[208] The bill's failure to provide immediate work authorization and other independent rights for H-4 visa holders are all the more peculiar because, although the current law provides a path for H-4 visa holders to potentially enter the labor market years down the road, the time spent before they are eligible is wasted without opportunities to work and exercise citizenship, rather than being confined to the household.[209] The United States has an interest in promoting the integration of H-4 visa holders as "Americans-in-waiting," and work authorization and an independent path to citizenship may be viewed as reflections of that preferred status. This is particularly relevant at a time when support for comprehensive immigration reform is bifurcated between family-based and labor-based immigration—H-4 dependents, based on their family relationships to skilled laborers, are in fact an embodiment of both.[210]

Increasingly, citizenship is conceived of in broader terms, encompassing concepts of social and economic participation.[211] Access to economic citizenship, argues feminist scholar Alice Kessler-Harris, "begins with self-support" and includes "customary and legal acknowledgement of personhood."[212] H1-B visa holders enjoy the right of economic citizenship from the time they are recruited and brought to the United States. There is an expectation that these immigrants with specialized education will be employed in their field and support themselves and their families. Under the current visa system, however, their H-4 spouses are prohibited from equal social and economic participation. Meaningful immigration reform must address this inequality.

### B. Short-Term Solutions

#### 1. Providing Work Authorization to Dependent Visa Holders

The most obvious and low-stakes means of granting more autonomy to

---

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

209. *See* Bragun, *supra* note 44; *see also Hearts Suspended*, *supra* note 65.

210. *See* Shachar & Hirschl, *supra* note 29, at 97.

211. *See, e.g.*, JUDITH SKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991) (discussing the "right to earn" as an aspect of American citizenship); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1928 (2000) (arguing that ensuring "everyone full and equal participation in decently-paid, life-sustaining, participatory forms of work" must serve as the "platform on which equal citizenship [is] built.").

212. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUALITY 283 (2003).

dependent visa holders is to grant all categories of dependent visa holders the authorization to work. This right already exists in theory for many dependent visa holders,[213] but may be conditional or otherwise difficult to obtain in practice. While a provision of the Violence Against Women Act of 2005 allows H-4 spouses who have suffered domestic violence by their H1-B principal to apply for work authorization,[214] regulations implementing this provision have not been promulgated.[215] Moreover, the provision is too narrow in scope, and thus fails to address or prevent the dynamic of dependency that is perpetuated by the visa hierarchy.

The two-tiered visa system for H1-B and H-4 visa holders may have larger national effects that alone would make the visa program worth revisiting. Pragmatically, these policies discourage the immigration of highly skilled professionals who are concerned about the career prospects of their spouses or the challenges of maintaining a family on a single income. Proponents of professional migration to the United States note that "other nations' policies are often more welcoming of HSIs [highly skilled immigrants] and less restrictive than those of the United States."[216] To the extent these prospective H1-B visa holders have opportunities elsewhere, they may opt to go where their spouses can also work.[217] Highly qualified individuals might choose to immigrate to places like Canada and the United Kingdom, where immigration policies grant work authorization to dependent spouses, rather than the United States.[218] Spouses of other high-skilled nonimmigrant visa categories, including E visas for treaty traders and investors,[219] and L visas for employees of international companies,[220] are permitted to work. In fact, the spousal work authorization in the creation of the E and L visas allowed U.S. employers to market these opportunities as "dual career" visas.[221] In addition to facing competition from

213. This includes J-2 spouses (spouses of exchange visitors who are in the US for 2 years), E1 and E2 spouses (spouses of treaty traders and treaty investors), and L1 spouses (spouses of intra-company transferee). *See, e.g.*, Andrea Elliot, *Global Immigration and the 'Trailing' Spouse: Barrier to Mobility or Stealth Competitive Advantage?*, MOBILITY MAG., March 2007, *available at* http://dev.worldwideerc.org/Resources/MOBILITYarticles/Pages/0307elliott.aspx (discussing countries that are "accompanying spouse-friendly" and alternatives to the H1-B and H-4 visas in the United States).

214. 8 U.S.C. § 1105a(a) (2006) (allowing a spouse of a principal H visa holder to apply for work authorization upon showing proof that she "has been battered or has been the subject of extreme cruelty perpetuated by the [principal visa holder]").

215. *See* discussion *supra* Part III.B.1.

216. Peter H. Schuck & John E. Tyler, *Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 FORDHAM URB. L.J. 327, 337 (2010).

217. In the European Union, for example, immediate family members of skilled labor-based immigrants are eligible to work immediately after arrival. *See* Shachar & Hirschl, *supra* note 29, at 97.

218. *Id.*

219. 8 U.S.C. § 1101(a)(15)(E)(i)-(ii) (2012).

220. 8 C.F.R. § 214.2(l)(3)(v) (2013).

221. The Committee on the Judiciary recommended that L visa dependents be allowed to work because, "working spouses are now becoming the rule rather than the exception in the U.S.

countries like Canada and Australia, the United States has also lost many qualified individuals to their home countries, where they have opted to return because there they face no restrictions on their status.[222]

As previously mentioned, visa quotas, work authorization restrictions, and geographic limitations present obstacles to dual-career couples in which husband and wife both wish to seek employment in the United States. At the same time, employers may face the prospect of choosing between two equally qualified candidates—husband and wife—because both cannot be hired due to the visa cap. Ostensibly, if the idea behind employment-based immigration is to draw the best and the brightest to the United States, it might be time to reconsider the rights of H-4 visa holders, and the rights of dependent visa holders in general.

For certain categories of visa holders—specifically Ls and E-2s—the right to work authorization for spouses was included in the initial conception of the visa category in order to provide incentive for dual-career couples.[223] Spousal work authorization for other dependent visa categories could provide a similar incentive. The option to work is particularly compelling for dual-intent visa holders, such as H-4 visa holders and any other category where there is a hope that individuals will remain in the United States long-term, because it facilitates the social integration and economic contribution of these families.

A provision of the Border Security, Economic Opportunity, and Immigration Modernization Act offers work authorization to all dependent spouses.[224] Though this provision is presented as a means of encouraging skilled labor, it is emblematic of the type of reform necessary to foster autonomy for dependent spouses because it is not conditioned on a pending green card application or proof of domestic violence. It is, however, conditioned upon reciprocity of work authorization provisions for spouses of nonimmigrant employment-based visa holders in the H-4 visa holders' country of origin.[225] This requirement, should the law be enacted with this provision intact, would de facto prevent many H-4 visa holders from qualifying. For example, in India, the leading country of origin for H1-B visa holders,[226] spouses of foreign employment-based visa holders are granted an entry visa (X-visa), which does

---

and many . . . corporations are finding it increasingly difficult to persuade their employees to relocate to the United States. Spouses hesitate to forgo their own career ambitions or a second income to accommodate an overseas assignment. This factor places an impediment in the way of these employers' use of the L visa program and their competitiveness in the international economy." H.R. REP. NO. 107-188, at 2-3 (2001), *reprinted in* 2001 U.S.C.C.A.N. 1789, 1790.

222. Schuck & Tyler, *supra* note 216, at 337-38.

223. *Id.*; 8 U.S.C. § 1184(a)(2)(E) (2012).

224. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 4102 (2013).

225. *Id.*

226. U.S. DEP'T OF HOMELAND SEC., 2011 U.S. CITIZENSHIP AND IMMIGRATION SERVICES STATISTICS YEARBOOK 84 tbl.32 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

not authorize employment.[227] A meaningful version of this work authorization provision would be free of such restrictions.

### 2. Requiring U.S. Consular Officers to Give Dependent Visa Holders IMBRA-Style Advisories

On account of their legal status, dependent spouse visa holders are at a greater risk of domestic violence than other immigrants. Because of this, lawmakers should consider preventative measures to ensure that dependent visa holders are aware of their rights in the United States. Due to challenges inherent in multi-party representation by corporate immigration lawyers in the H1-B process, spousal visa applicants could benefit from separate advisement before they make their way to the United States.

Under the International Marriage Brokers Regulation Act (IMBRA),[228] part of the VAWA 2005 Reauthorization Bill, U.S. consular officers are currently required to provide to prospective fiancées who use an international matchmaking service, information about domestic violence and the resources that are available to survivors.[229] This policy is based on the recognition that these individuals are particularly vulnerable to abuse because of their immigration status.[230] Mail-order brides tend to lack information about their prospective spouses, as well as information about the U.S. legal system and their rights.[231] The interview with a consular officer provides the only established opportunity to let these individuals know what to do if they are subjected to domestic violence, and what resources are available to them in the event of an emergency. These advisories were intended as a fail-safe in situations where the visa applicant could not reliably be advised of this information by her prospective spouse, his lawyer, the matchmaking service, or the family members who encouraged her to use the service.[232]

---

227. *Information for Foreigners Possessing Entry (X) Visa*, BUREAU OF IMMIGRATION, *at* http://www.boi.gov.in/content/information-foreigners-possessing-entry-x-visa-2 (last visited Dec. 31, 2013).

228. Pub. L. No. 109–162, 119 Stat. 2960 (2006).

229. *Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States and Facts about Immigrating on a Marriage-Based Visa,* U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/news/fact-sheets/information-legal-rights-available-immigrant-victims-domestic-violence-united-states-and-facts-about-immigrating-marriage-based-visa-fact-sheet (last visited Dec. 31, 2013).

230. Sarah Rebecca Sullivan & Amy Cosentino, *Immigration, Domestic Violence, and What the Family Practitioner Should Know*, 81 FLA. B.J. 47, 50 (2007). *See also* TAHIRIH JUSTICE CTR., ILLUSTRATIVE CASES OF WOMEN AND THEIR CHILDREN EXPLOITED AND ABUSED THROUGH THE INTERNATIONAL MARRIAGE BROKER INDUSTRY (2009), *available at* http://www.tahirih.org/site/wp-content/uploads/2009/03/casestories.pdf (listing accounts from various states of abuse or murder of foreign women by partners they met through international matchmaking organizations).

231. *See* Kirsten M. Lindee, *To Love, Honor, and Control: Domestic Violence, Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry*, 16 COLUM. J. GENDER & L. 551, 558-62 (2007).

232. *See* John Conyers, Jr., *The 2005 Reauthorization of the Violence Against Women Act: Why*

The situation of women who use international matchmaking services is not so different from that of some H-4 visa holders. Though they may not have used a matchmaking service, some H-4 visa applicants may have married during their husbands' short visits home from the United States;[233] they may have met online or through family, and for many, may have known each other only briefly before the wedding. Thus H-4 spouses may also lack information about the person they are marrying and the life they are about to enter.[234] Dependent visa holders are also regularly overlooked when legal advice is given during the immigration process.[235] Though ostensibly they are represented by their husband's attorney, most will not be advised of their rights at the time a visa application is filed.[236] Like the fiancée visa applicants described above, many H-4 visa holders leave their social support networks behind and face critical barriers to accessing services should they be subjected to domestic violence in the United States. Although the IMBRA does not presently pertain to nonimmigrant spousal visa holders, requiring them to undergo a consular interview and advisory may allow dependent spouses the opportunity to obtain independent advice about their status and the resources that would be available to them in the United States.[237]

### 3. Creating a Self-Petition Process Based on the Structure of VAWA

Another option for dependent visa holders would be to expand the provisions of VAWA so that dependent spouse visa holders would be included among the categories of individuals eligible to self-petition. The ability to self-petition would allow H-4 visa holders to stay in the United States, obtain work permits, and eventually become permanent residents and citizens. A provision of the Border Security, Economic Opportunity, and Immigration Modernization Act does address the situation of abused dependent spouse visa holders and would make them eligible to self-petition under VAWA.[238] Furthermore, the bill would allow an individual to obtain legal permanent residence in certain instances.[239]

---

*Congress Acted to Expand Protections to Immigrant Victims*, 13 VIOLENCE AGAINST WOMEN 457 (2007).

233. *See, e.g.*, Marcela De Vivo, *Immigration to the U.S. on the H-4 Visa*, JUSTICE FOR WOMEN (Apr. 16, 2013), http://justiceforwomenindia.wordpress.com/2013/04/16/women-immigrants-on-the-h-4-visa.

234. *Id. Cf.* Lindee *supra* note 231, at 558-61 (describing the experience of mail-order brides).

235. For a discussion of the Indian Judiciary's response to this phenomenon, *see* Shamila Lodhia, *Brides Without Borders: New Topographies of Violence and the Future of Law in an Era of Transnational Citizen-Subjects*, 19 COLUM. J. GENDER & L. 703, 732-36 (2010).

236. *See* discussion *infra* Part IV.B.4.

237. For example, Sharmila Lodhia notes that the provision could be used to protect other categories of immigrants and nonimmigrants from transnational abandonment, an abusive phenomenon that has the potential to occur in binational relationships. *See* Lodhia, *supra* note 235, at 739-40.

238. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 4413 (2013).

239. *Id.*

While the passage of these provisions would make a difference in the lives of many women, such a response is still more reactive than proactive. This provision is geared toward survivors of domestic violence, and does not contemplate an independent status under other circumstances. A more comprehensive form of relief would be akin to that conceived in the early stages of VAWA legislation. Janet Calvo notes that early VAWA proposals sought to address the monopoly of principals over the petitioning process, allowing all immigrant spouses to self-petition regardless of whether they had experienced domestic violence.[240] This would have allowed individuals who had experienced divorce, but not necessarily domestic violence, to self-petition. This provision would have operated in much the same way as the waiver provision for conditional permanent residents, which allows beneficiaries to independently petition to remove conditions on their green cards in cases where there has been a divorce or legal separation, death of a spouse, or other hardship factors. A provision like this would allow U.S. Citizenship and Immigration Services (USCIS) officers to consider a range of circumstances, including dissolution of the marital relationship and the visa holder's need to remain in the United States, whether for reasons of economic necessity or family unity. A self-petition for dependent visa holders could therefore be helpful beyond instances of domestic violence.

### 4. Reforming Rules Governing Access to Documents and Clarifying the Attorney-Client Relationship

Among the factors complicating the status (or change of status) desired by H-4 visa holders is the lack of clarity as to which party the H-1B employer's immigration lawyer represents. Immigration lawyers representing corporations struggle with the problem of "dual representation" when they represent both the company and the prospective non-citizen employee.[241] This representation arrangement is further complicated when the rights of spousal visa holders are also considered. Shivali Shah suggests immigration attorneys should be required to provide the H1-B visa holder's immigration documents to the H-4, recognizing that "this solution may be difficult since it violates the longstanding principles of privacy and attorney-client privilege."[242] At the same time, there is clearly a need to address the multi-party representation issues that emerge in the corporate immigration context when filing for H1-B and other employment visas. The immigration bar should be aware that conflicts between parties may arise, and firms and attorneys should take this into consideration when they enter into retainer agreements, making all parties aware of their rights and responsibilities in the process.

---

240. Calvo, *A Decade of Spouse-Based Immigration Laws*, *supra* note 17, at 167.
241. *See* Bruce A. Hake, *Dual Representation in Immigration Practice: The Simple Solution is the Wrong Solution*, 5 GEO. IMMIGR. L.J. 581 (1991).
242. Shah, *The H-4 Visa Bind*, *supra* note 69, at 207.

Alternatively, Shah suggests that when a dependent visa holder requires access to her immigration information, USCIS should find alternative means for verifying the dependent visa holder's status, such as using the agency database to obtain the principal's information.[243] The agency addressed a similar issue with respect to the VAWA self-petition for petitioners who could not provide their abuser's information concerning permanent residence or citizenship; the form allows self-petitioners to provide the abuser's name, the agency can verifies that individual's status based on internal information.

Even if alternative means for verifying immigration status were made available, the immigration bar must consider the obligations owed to dependents and should consider verification from USCIS to be an emergency measure. The primary onus should be on immigration attorneys to provide derivative spouses with information about their own immigration cases. Immigration attorneys representing H1-B visa holders and their families, in particular, should consider the possible conflicts of interest that might arise between the employer, employee, and employee's dependents.[244] The dependent spouse's rights become the last priority in this process, and currently, laws and ethical rules do not sufficiently protect her interests. Shivali Shah notes "battered H-4 wives routinely cite failure to communicate and being stonewalled by their immigration attorneys."[245] This observation brings into focus the immigration bar's complicity in the plight of dependent spouse visa holders.

### C. Independent Status for Spouses Without Victimhood: A Long-Term Solution With Broader Implications for the Rights of Immigrant Women

A truly comprehensive state response is one that addresses the power disparity between principals and derivatives—and more fundamentally, between husbands and wives—without resorting to state paternalism and without branding the spouse as a victim.

As part of this approach, the immigration system should contemplate independent status for all family members. Such an option, notes Karyl Alice Davis, "would increase the control that women have over their own lives, while simultaneously decreasing the control of the state and their husbands."[246] Though dependent spouse visas do not inherently cause domestic violence or

---

243. *Id.*

244. *Id.* ("The employer usually retains the immigration attorney, who processes the paperwork; when not retained by the employer, the H1-B employer retains the attorney. The immigration attorney also represents the H-4 wife so long as there is no discord between the husband and wife. Once there is a conflict, legal ethics dictate that the immigration attorney withdraws from representing both parties. In practice, however, the attorney only ceases to represent the wife.").

245. *Id.*

246. Karyl Alice Davis, Comment, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, 573 (2004).

facilitate it in every dependent relationship, "[l]egacies of chastisement can not be removed without removing the power and control legacies of coverture, whether or not they result in provable violence or cruelty."[247]

This approach would address the fundamental issues of subordination in the state's casting of family roles, which are inherent in the petition process. Janet Calvo observes that allowing a derivative spouse to petition for herself autonomously would "remove the power and control vestige of coverture and make it clear that the law should not enforce, reinforce, or permit subordination of one person to another."[248] Opponents may argue that family unity is the sole basis of the derivative visa, and that those spouses who want out of a marriage or a situation of domestic violence should not be entitled to a special immigration benefit.[249] However, as Janet Calvo points out, this view is grounded in the belief that family reunification is only the right of the principal spouse, and "is analogous to the coverture notion that the objective of a marriage was to promote a husband's well being."[250] Furthermore, the spouse's status as an "American-in-waiting" is not irrelevant; her need to exercise independent rights at every stage of her life in the United States, based on her interest in citizenship, is clear. She benefits from escaping the dynamics of dependence within her relationship, and the state benefits from her full social and economic participation, which will serve both the immigrant and the country well as she progresses on the path to naturalization.

There is already a precedent for this in existing immigration law: the E-2 visa for treaty investors, which accords all family members—principals and dependents—primary visa holder status. This has appeal not only for spouses, but also for children who may "age out" as minors and no longer be eligible for dependent status. As previously mentioned, the U.S. visa system has allowed E-2 and L spousal visa holders to work,[251] thus incentivizing "dual career" couples to immigrate pursuant to these provisions.[252] While the E-2 visa is limited by a number of factors, as it pertains to entrants from specific countries, who have

---

247. Calvo, *A Decade of Spouse-Based Immigration Laws*, *supra* note 17, at 200.

248. *Id.* at 190.

249. *See, e.g.*, *INS, Senator Discuss Marriage Fraud Waivers*, INTERPRETER RELEASES, Dec. 19, 1988, at 1318 (citing one senator's views as follows: "[t]he only real purpose underlying the benefits that the immigration laws give to an alien spouse is to keep a family together, when a marriage fails, even if the alien spouse was not at fault, there is no longer a family to keep together. In other words, when the marriage no longer exists, there is no justification for the special immigration benefit to continue.").

250. Calvo, *A Decade of Spouse-Based Immigration Laws*, *supra* note 17, at 191.

251. This is particularly significant for the L visa, as the regulations closely mirror those of the H1-B program, and it is one of very few visas that permit dual intent. *See* Bragun, *supra* note 44, at 963-64. Under the L visa program, principal visa holders perform comparable work to that under the H1-B program, but the derivative visa permits work authorization for spouses. *Id.*

252. In fact, in 2002, Congress repealed the prohibition on work authorization for L-2s, dependents of L "intra-company transferee" visa holders. *See* 8 U.S.C. § 1184(c)(2) (2000), *amended by* 8 U.S.C. § 1184(c)(2)(E) (2006).

certain amounts of wealth, or are employed by a U.S.-based company, it is nonetheless instructive as an example. This visa structure could be replicated, not only for the benefit of derivatives, but also for the benefit of principal visa holders who want their spouses to be free of dependency, as well as employers who would be interested in hiring them.

As this article has observed, VAWA self-petitions and U visas are only available in limited circumstances.[253] Even with these remedies carved out for cases of abuse, many dependent visa holders are not free from domestic violence. Furthermore, these forms of relief attribute the suffering of survivors solely to the independent acts of abusers, without recognizing the psychological harm inherent in a life of state-enforced spousal dependency. The state's practice of restricting women in these relationships, and of appointing husbands as the gatekeepers of their wives' immigration status and accompanying rights, not only introduces power dynamics and subjugation into even healthy and otherwise happy marital relationships, but also has the potential to exacerbate a dynamic of violence.

Furthermore, legal reforms thus far have contemplated H-4 visa holders' right to work, but not to seek independent status before or after domestic violence transpires. Those who are not eligible for these forms of relief and are in dependent relationships out of legal or financial necessity lack another critical right—the right to freely leave a relationship. This is a fundamental right, not only for survivors of domestic violence, but also for those in failing or unhappy marriages of whatever kind. There is perhaps a tendency for legal reform to embrace the concept of independent status for survivors of domestic violence without sufficiently expanding to protect other important rights interests. Not only should women be free to enter into and leave their marriages, but they should also be able to do so without sacrificing their immigration status, access to their children, or the right to pursue a career. Immigration reform should consider women's rights outside the context of victimhood, and should seek to prevent violence and dependence as part of the visa system.

## CONCLUSION

Under the current visa system, H-4 visa holders suffer—to different extents—from relationships of forced economic and legal dependence. At the same time, dependent spouse visa holders also suffer state paternalism, not just in the legal entrenchment of these dependent relationships, but also in an alternative system where the state recognizes their independent rights only insofar as they are victims. The spousal visa construct allows the principal visa holder to serve as "cover" for his wife's public participation and the exercise of her rights. Under certain circumstances, the state will substitute itself as "cover" for a dependent spouse where she has proven that she falls within a particular

253. See discussion *supra* Part III.B.

category as a victim of abuse.

As Congress is poised to consider comprehensive immigration reform, there is an opportunity to rethink the spousal visa construct in a manner independent from its roots in coverture. The rights of dependent visa holders under the current system are not reflective of contemporary views on gender equity or access to the justice system. Nor are these rights consistent with the treatment of all spouses under immigration law, as in the case of L visa holders who have the right to work, or E-2 visa holders who have independent control over their visa status. An independent visa status for all nonimmigrant spouses would remove aspects of subordination from existing law, allowing principals and spouses to exercise their independent rights directly and free from encumbrances.

This potential reform has implications for all women who enter the U.S. immigration system in their capacity as spouses. Recognition of the residue of coverture within the current U.S. visa system, and contemplation of both short and long-term solutions that eliminate spousal dependency from immigration law, would allow women to access rights independently, without characterizing themselves as victims and relying on state paternalism.