

## A WOMAN'S PLACE: DEPENDENT SPOUSE VISA HOLDERS AND THE LEGACY OF COVERTURE

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### *Abstract*

*Each year, several thousand women come to the United States in their capacity as spouses, only to find their rights compromised by the constraints of their visa status. The U.S. immigration system, influenced by the doctrine of coverture, prohibits dependent spouse visa holders from working or independently regularizing their legal status, and inhibits their ability to escape domestic violence or obtain a divorce or custody in U.S. courts. The alternative to family patriarchy is state patriarchy, also reinforced by the U.S. immigration system, which requires women to classify themselves as victims of violence*

*This article specifically focuses on H-4 visa holders—spouses of a certain class of professional immigrant workers. This been overlooked repeatedly in immigration reform, without any advocates from the corporate lobby that supports their husbands, or advocates from the domestic violence community. Comprehensive immigration reform should provide meaningful relief for spousal visa holders, addressing 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*

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*violence, but rather adopting more expansive rules that eliminate the subordination of immigrant spouses within families and society at large.*

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## INTRODUCTION

*Amina<sup>1</sup> knew her husband for two days before they married. He was visiting her hometown of Hyderabad on leave from his IT job in the United States, and they were introduced by relatives of Amina's. Amina had recently graduated with a degree in Computer and Information Sciences from the University of Hyderabad, and though 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—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. 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 programming and other technical skills to economically vital zones like Silicon Valley, has been a focal point of the policy debate over immigration, particularly as immigration reform seeks to expand skilled professional immigration to the United States. Lost in the shadows are the spouses of these workers, derivative visa holders like Amina, who also enter the United States by the thousands each year on H-4 visas.

Upon arriving in the United States, H-4 visa holders face a number of challenges. Unlike the spouses of other visa holders, they are not authorized

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<sup>1</sup> “Amina” is a hybrid individual based on clients represented by the author during her years of immigration practice with the Asian Pacific American Legal Resource Center and the Center for Immigration Law and Practice, both based in Washington, DC.

to work in the United States.<sup>2</sup> In addition, when and if their H1-B spouses are sponsored to become legal permanent residents, the H1-B alone has the power to file for immigration status for his family; outside of a few rare exceptions, H-4 spouses do not have the ability to file their own applications.<sup>3</sup> Finally, should the marriage dissolve in the waiting period between the H-4 visa holder's arrival in the U.S. and her obtaining 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.<sup>4</sup> 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 seeking to escape domestic violence in their relationships.

These experiences of dependent visa holders are at odds with widespread notions of the rights subject to guarantee and protection for all individuals living in the United States. To reflect more nuanced societal understandings of membership and belonging, scholars have adopted a more expansive notion of citizenship. This contemporary understanding of citizenship addresses not only formal legal status, but also rights such as social participation and equality—values that are not exclusively for the enjoyment of the naturalized and native-born.<sup>5</sup> The difficulties inherent in H-4 status are also inconsistent with existing provisions in immigration law that protect survivors of domestic violence and guarantee the right to work for dependent visa holders. At the same time, immigration law reflects the larger sociopolitical framework in which it is forged.<sup>6</sup> Notably, female

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<sup>2</sup> 8 C.F.R. § 214.2(h)(9)(iv) (2006). See discussion *infra* Section I.B.

<sup>3</sup> See discussion *infra* Section I.A.

<sup>4</sup> See discussion *infra* Section I.C.

<sup>5</sup> See, e.g. Saskia Sassen, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* 23 (New York 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.”); Linda Bosniak *LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 117 (Princeton 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 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.”)

<sup>6</sup> See Olivia Salcido and Cecilia Menjivar, “Gendered Paths to Legal Citizenship: The Case of Latin-American Immigrants in Phoenix, Arizona,” 46 *Law & Soc’y Rev.* 335 at 343 (“Immigration laws have not existed, nor do they exist today, in a vacuum apart from

immigration is rooted in traditional conceptions of women as wives and domestic caretakers who follow and support their husbands.<sup>7</sup> Spousal immigration laws, in particular, are rooted in the era of early family migration to the United States, and reflect the doctrine of coverture that governed spousal relations at the time. As this article will discuss, these assumptions have shaped derivative visa holder programs since their earliest incarnations, and presently prevent H-4 visa holders and other dependents from fully exercising their rights upon arrival in the United States.<sup>8</sup>

Part of the narrow conception of women in the immigration system is the perception that, where they are not cared for by spouses as a matter of abuse or neglect, the state only should intervene on their behalf account of their victimhood. Scholars have criticized both this “victim essentialism” and the limited remedies made available to survivors of domestic violence, noting that the law has responded incompletely and under shifting rationales.<sup>9</sup> Studies reveal that immigrant women, particularly those with dependent status, are particularly vulnerable to domestic violence.<sup>10</sup> Yet existing laws only provide relief in a limited number of cases, and these alternatives hinge on proof of domestic violence and require the applicant to be evaluated as a victim. Little attention has been paid to the situation of other women in the immigration system, much less means of preventing family violence and independently addressing rights of spouses.

This article analyzes the derivative (or “dependent”) visa system as a product of immigration laws grounded in the doctrine of coverture, which do not recognize independent rights for immigrating female spouses. The

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the social milieu (and hierarchies of power) within which they are enacted and administered.”)

<sup>7</sup> See discussion *infra* Section I.A.

<sup>8</sup> See discussion *infra* Section II.

<sup>9</sup> See, e.g. Leslye Orloff, “Women Immigrants and Domestic Violence,” WOMEN IMMIGRANTS IN THE UNITED STATES, ed. Philippa Strum and Danielle Tarantolo 49 at 52 (Woodrow Wilson International Center for Scholars, 2003). See also Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, “Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 7 Geo. J. on Poverty L. & Pol’y 245, 293-96; Michelle Decasas, Comment, Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy, 24 Chicano-Latino L. Rev., Spring 2003, at 56, 77-79.

<sup>10</sup> Patricia Tjaden and Nancy Thoennes, “Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey,” National Institute of Justice and Centers for Disease Control and Prevention, 2000 at iii. See also 146 Cong. Rec. S10, 195 (daily ed. Oct. 11, 2000).

role of employers in the H1-B process and sponsorship for employment visas focuses on the principal visa holder as an employee, thus reinforcing subordination of dependents' rights. The current visa system thereby prevents H-4 visa holders and other dependents from fully realizing and enacting their economic and social citizenship as participants in the labor market and equal members of a family before the law.

Part I examines the origins of the spousal visa program in the context of historical spousal immigration to the United States, which was informed by the doctrine of coverture.

Part II analyzes specific aspects of the H-4 dependent visa program and how they are shaped by coverture-based laws governing immigration petitions, married women's employment, domestic violence, and divorce and child custody. This section builds on the work of Professor Janet Calvo, who observes that although civil laws were the subject of statutory reforms that repealed the laws of coverture, immigrant women did not obtain the full benefit of these domestic reforms, and thus their rights are still limited by these antiquated gender norms.<sup>11</sup>

Part III analyzes the changes made to immigration law that affected the standing of H1-B principal visa holders, and the extent to which reforms have passed over H-4 visa holders. Professor Reva Siegel originated the theory of "preservation through transformation"—the notion that legal regimes shift their rhetoric over time, but preserve the same underlying social hierarchies.<sup>12</sup> This section analyzes the prioritization of principal visa holders as preservation of the norms of coverture. Although the underlying rationale for denying H-4 visa holders a full extent of exercise of their rights has shifted since the program's inception, their interests are subordinate to those of the 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, 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 conceptualize the

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<sup>11</sup> See Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 *San Diego L. Rev.* 538; Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Dimishment, But Not Its Demise*, 24 *NILULR* 593.

<sup>12</sup> See Reva Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *YALE L.J.* 2117, 2175 (1996).

spousal visa construct—an area ripe for comprehensive immigration reform.

## 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 a spouse,<sup>13</sup> significantly shaped the rights of women—immigrant and native-born—in the United States over 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.”<sup>14</sup> In this arrangement, she is under his “cover,” or protection.<sup>15</sup> Under the doctrine of coverture, a woman’s marriage resulted in the extinguishment of her independent legal identity, self-determined interests, and autonomous rights.

Although aspects of coverture were eliminated from domestic law through a series of statutes in the mid-19<sup>th</sup> century,<sup>16</sup> such reforms were never extended to immigrant women. Indeed, as scholars have noted, coverture continues to affect the rights of spousal and female immigrants in the United States today. With respect to spouses, the Immigration and Nationality Act specifically states that the status of the spouse and children “derives” from the person with the visa,<sup>17</sup> in a sense, “covering” the spouse with her husband’s lawful status.

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

Decades after the reform movement that changed the rights of married women under the law, Congress passed the Immigration Act of 1990 and

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<sup>13</sup> See Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 *Law Libr. J.* 459.

<sup>14</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*442, cited in Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 *Law Libr. J.* 459 (2002) at 460.

<sup>15</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*442, cited in Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 *Law Libr. J.* 459 (2002) at 460.

<sup>16</sup> Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 24 *NILULR* 153 at 155.

<sup>17</sup> Pub. L. 82-414 (1952) at §203(d), 8 U.S.C. § 1153(d) (1999).



created the H1-B visa program to allow for the increased immigration of foreign skilled workers to the United States.<sup>18</sup> Though the H1-B program includes multiple types of skilled and university-educated professionals,<sup>19</sup> many of those who receive H1-B visas are specialty occupation workers,<sup>20</sup> and the program is closely associated with the information technology and engineering fields. Each year, over 100,000 H1-B visa holders come to the United States to work.<sup>21</sup>

By way of background, the U.S. immigration system divides newcomers into two significant categories—immigrants and nonimmigrants.<sup>22</sup> Immigrants manifest intent to stay in the United States, whereas nonimmigrants are accorded a stay of limited duration for a limited purpose. The H1-B program was designed as something as a hybrid; the visa allows employers to bring their employees to live in the United States while waiting for adjustment of status. When they obtain visas to come to the United States, H1-Bs—the “principal” visa holders—are permitted to obtain “derivatives” or “dependent” visa status for their spouses and minor children, so the family can live together in the United States.<sup>23</sup> In this sense, H1-B and H-4 visa holders are part of a theoretical group Hiroshi Motomura calls “Americans-in-waiting”—that is, individuals who can be expected to obtain permanent immigration status and eventually citizenship with the passage of time.<sup>24</sup>

The U.S. collects demographic data on H1-B visa holders, but does not track the demographics 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 each year is

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<sup>18</sup> Pub.L. 101-649, 104 Stat. 4978, enacted November 29, 1990.

<sup>19</sup> 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, employer requirements. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A).

<sup>20</sup> *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H1-B): FISCAL YEAR 2011, available at <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-11-characteristics.pdf>.

<sup>21</sup> This number includes the number of visas issued under the H1-B cap (65,000 in FY2012), with an additional H1-B visa holders exempt from the cap. *See* H-1B Fiscal Year (FY) 2013 Cap.

<sup>22</sup> 8 U.S.C. § 1101(a)(15). *See also* 3 C.J.S. *Aliens* § 383 (2006).

<sup>23</sup> 8 U.S.C. § 1101(a)(15)(H).

<sup>24</sup> *See* discussion *infra* Section IV.A.

relatively small compared to the number of H1-B visa holders,<sup>25</sup> or even the number of other family-based immigrant categories.<sup>26</sup> More importantly in understanding the dynamics of this immigration policy, most H-4 spouses are women.<sup>27</sup>

Though the H1-B program has been appropriately criticized for its commodification of immigrant labor,<sup>28</sup> in some ways the derivative visa is a benefit of the program.<sup>29</sup> There is, however, a stark difference between the rights enjoyed by H1-B principals and those of their dependent spouses.<sup>30</sup>

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<sup>25</sup> H-4 dependent visas may also be granted to spouses and minor children of H-2 and H-3 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 per year, with many of those going to the “followers to join” of high-skilled anchor spouses. *See* Dep’t of Homeland Sec., Nonimmigrant Visas Issued by Classification Fiscal Years 2002-2006 tbl.XVI(B).

<sup>26</sup> In 2012, for example, 189,128 family-based visas were issued at foreign service posts, compared to 19,137 employment-based visas. *See* Dep’t of State Report of the Visa Office 2012, *available at* [http://www.travel.state.gov/visa/statistics/statistics\\_5861.html](http://www.travel.state.gov/visa/statistics/statistics_5861.html).

<sup>27</sup> 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 of the number of H1-Bs admitted (494,565 H1-Bs compared to 155,336 H-4s in 2011; 454,763 H1-Bs compared to 141,575 H-4s in 2010). *See* 2011 U.S. Citizenship and Immigration Services Statistics Yearbook, Table 25, *available at* [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](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 categories separately for purposes of tracking, 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* (2009) at 355. Should also recap stats.

<sup>28</sup> *See, e.g.* Todd H. Goodsell, Note, On the Continued Need for H1-B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers, 21 *BYU J. Pub. L.* 153, 168 (2007).

<sup>29</sup> Certain visa holders are not entitled to apply for derivatives at all, including D (crewmembers), and F-3 and M-3 (border commuter students). *See* 8 U.S.C. § 1184(f), 68 FR 28129, 28130 (May 23, 2003). In addition, H2-A (temporary agricultural) workers are theoretically permitted to include family members as derivatives, but would likely face denial of a petition based on the limited income associated with the position, which would render beneficiaries public charges. *See* Ruth Ellen Wasem, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, Congressional Research Service, March 10, 2010 (finding that most petitions are rejected based on public charge grounds).

<sup>30</sup> As Magdalena Bragun states, “The 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

Indeed, in South Asian expatriate communities where such visas are common,<sup>31</sup> the H-4 program is known as the “involuntary housewife visa” because holders are more or less confined to the home, unable to work.<sup>32</sup> The H1-B visa holder, in a sense, exercises his right to work at the expense of his spouse, while the spousal visa holder is “covered” by his exercise of these rights, forced to relinquish her own opportunities for broader social and economic participation.

## 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 gender roles. Specifically, coverture had far-reaching effect on the control of husbands over the immigration status of their wives, the rights of married women to work, the accepted use of domestic violence as a mechanism of chastisement, and the rights of women to divorce and child custody.

### A. *Coverture and Family Immigration*

Coverture has influenced dependent immigrants’ rights in the United States since the earliest inception of citizenship and nationality regulations. Citizenship was conceptualized as the domain of the husband, requiring a wife to assume his nationality.<sup>33</sup> 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

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spouses who sacrifice everything to make the mutually beneficial exchange between the U.S. employer and a foreign employee possible.” Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 *Seattle U. L. Rev.* 937, 955. *See also* discussion *infra* Section II.

<sup>31</sup> 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). *See* 2011 U.S. Citizenship and Immigration Services Statistics Yearbook, Table 32.

<sup>32</sup> Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 *SEAULR* 937 at FN 4.

<sup>33</sup> Expatriation Act, ch. 2534, §3, 34 Stat. 1228, 1228-29 (1907). Indeed this assumption was so strong, that before World War II, married women frequently travelled on their husband’s 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* (2009) at 96.

right to petition for their foreign-born husbands.<sup>34</sup> 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.<sup>35</sup> 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 to the citizen or resident spouse.<sup>36</sup> The early precedent based in coverture established the extent 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.<sup>37</sup> At its best, this power to petition allows couples and families to be united—an important principal within immigration law. At its worst, however, the law permits the petition to be withdrawn at any time before the spouse naturalizes, thus abruptly terminating her legal status and leaving her subject to removal.

By narrowing the scope of rights for dependent family members in this way, according to their relationship with the principal visa holder, the law reinforces the roles men and women play within the traditional family. As with other laws based in coverture, these immigration regulations define married women according to their role in the domestic sphere, without evaluating the independent public contributions they could make to their newly-adopted country. In this way, immigration law replicates the antiquated gender norms of coverture, attempting to recreate this traditional conception of the family—what Martha L.A. Fineman has referred to as “our most explicitly gendered institution.”<sup>38</sup> Fineman describes a vision of the “traditional family” as “a husband and wife—formally married and living together—with their biological children. The husband performs as the head of the household, providing economic support and discipline for the dependent wife and children, who correspondingly owe him duties of

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<sup>34</sup> Leslie E. Orloff and 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 at 100, citing Act of May 29, 1921, Pub. L. No. 5, § 2(a), 42 Stat. 5 (1921).

<sup>35</sup> Immigration Act of 1952 § 101(a)(35).

<sup>36</sup> INA §203(d), 8 U.S.C. §1153(b).

<sup>37</sup> Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Dimishment, But Not Its Demise*, 28 *SANDLR* 153 at 155.

<sup>38</sup> Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 *VALR* 2181 at 2187.

obedience and respect.”<sup>39</sup> She notes that these family roles are “formulated in the context of the relationship between the states and the legally contrived institution of the ‘official’ family,” and serve as the model for transmitting norms of role definition and behavior.<sup>40</sup>

As with early immigration laws, a dependent’s lawful status and accompanying rights largely hinge upon the existence of her marriage; where there is a right to petition for adjustment of status, that right belongs to the principal alone. Janet Calvo observes that, although both male and female immigrants are theoretically affected by the coverture provisions affecting dependent spouses, women are affected the most: first, because those obtaining immigration status as dependents have been mostly women, and second, because “wives have legally and socially been the historical target of subordination in marriage.”<sup>41</sup>

In the case of H-4 visa holders, the emphasis on principal visa holders in immigration law is tantamount to an assumption that this person is “the man” of the family—he is the Husband-Father, family leader and breadwinner.<sup>42</sup> This role also appears as justification as to why he is the party entrusted with the rights to decide where the family goes, what work he will do, and whether to petition for other members of his family. 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 spoke specifically about H-4 visa holders in the trailer to Meghna Damani’s documentary film “Suspended Hearts,” but she spoke to the situation of many dependent spouses when she said the law provided for their immigration to the United States according to their “most base function as women: housewives, babymakers, and sex partners.”<sup>43</sup>

The law places few limitations on this ability of principals to dominate

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<sup>39</sup> Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VALR 2181 at 2182.

<sup>40</sup> Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VALR 2181 at 2187.

<sup>41</sup> Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev. 538 at 613-614.

<sup>42</sup> Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VALR 2181 at 2187.

<sup>43</sup> “Hearts Suspended” (Video 2007).

their spouses. As Calvo points out, coverture establishes a regime that subordinates one human to another,<sup>44</sup> and immigration law “continues to sanction the domination of husbands over wives and the underlying gender inequality that it promotes.”<sup>45</sup> Essentially, the state cedes control over a dependent’s immigration status to the principal visa holder, who controls the marriage; it will only consider the dependent’s rights independently in a limited range of circumstances.<sup>46</sup> Though an H-4 may theoretically transfer her 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 requires cooperation from her spouse or 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 status.<sup>47</sup>

Without a claim to permanent legal status, or an independent means to obtain independent status, derivative visa holders are confined by the law into a household dynamic of forced dependency and subjugation. According rights to the principal without creating comparable independent rights for a dependent essentially gives the principal the authority to regulate the immigration status of a spouse. The unintended consequence is to make the principal visa holder the gatekeeper for all rights enjoyed by a spouse<sup>48</sup>—whether she can remain in the United States, whether she can enjoy access to her citizen children, and whether she should in fact become a permanent resident and have the option to obtain U.S. citizenship.

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

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<sup>44</sup> Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, But Not Its Demise*, 24 NILULR 153 at 160-61.

<sup>45</sup> Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, But Not Its Demise*, 24 NILULR 593 at 598.

<sup>46</sup> See discussion *infra* Section III.

<sup>47</sup> Shivali Shah, “Middle Class, Documented, and Helpless: The H-4 Visa Bind,” in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 203.

<sup>48</sup> See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, But Not Its Demise*, 24 N. Ill. U. L. Rev. 153,167.

rather a reflection of her marital relationship under the law. However, the laws not only create household hierarchies, but also stratify public participation of principals and derivatives. To this end, Catherine Dauvergne notes that “[a] shift in emphasis toward economic migration does not... remove women from the pool of potential new citizens in a straightforward way, but it does ensure that women enter this pool because of their relationships of legal dependence.”<sup>49</sup>

### *B. Coverture and Women's Labor*

The law of coverture had extensive historical effects on women's economic and social interests, quite notably concerning married women's right to work outside the home. H-4 visa holders are similarly prevented from working, which carries implications for their independence and public participation, which may affect their psyche and sense of self, as well as state recognition of their legal personhood.

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, and thus wives were effectively barred from selling their labor outside the home.<sup>50</sup> Accordingly, a married woman

“earned citizenship, or standing, derivatively. Rather than through her (domestic) labor, which was not ‘work,’ her citizenship derived from her contractual relationship with her husband. Under the law of ‘coverture,’ his status as a wage worker and citizen who enjoyed civil, political, and social citizenship was assumed to ‘cover’ her.”<sup>51</sup>

Like married women in the age of coverture, H-4 spouses are not permitted to work, because they cannot legally obtain work authorization. This represents an anomaly within the field of immigration law, as dependent visa holders in other visa categories are permitted to work, including spouses of intra-company transferees, treaty investors, employees

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<sup>49</sup> Catherine Dauvergne, *Globalizing Fragmentation: New Pressures on Women Caught in the Immigration Law- Citizenship Law Dichotomy*, in *MIGRATION AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER* (2009) at 345-346.

<sup>50</sup> See Cristina Gallo, *Marrying Poor: Women's Citizenship, Race, and TANF Policies*, 19 *UCLA Women's L.J.* 61 at 69.

<sup>51</sup> See Cristina Gallo, *Marrying Poor: Women's Citizenship, Race, and TANF Policies*, 19 *UCLA Women's L.J.* 61 at 70.

of international organizations, and exchange visitors.<sup>52</sup>

By contrast, H-4 visa holders do not have the right to work, and thus their opportunities are limited in terms of economic participation outside the home. Because the H1-B program essentially forces families into the single-breadwinner model—similar to the family structure shaped by the law of coverture—the H-4 spouse finds herself in that same situation of an economic as well as legal relationship of dependence. Though H-4 visa holders are eligible for work authorization when their spouses file for green cards, the principal has exclusive control over the process as the only party authorized to file the green card applications for himself and his derivatives,<sup>53</sup> illustrating—yet again—how legal and economic dependence are correlated as defining features of this program.

This reliant dynamic affects couples differently, but potentially carries psychological implications for the spousal visa holder. Some H-4 spouses, for example, married during their husband's brief visit to the wife's country of origin,<sup>54</sup> find themselves completely reliant on someone they may hardly know upon travelling 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 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,"<sup>55</sup> and introduces potentially problematic power dynamics into even the strongest relationships.

To some H-4 visa holders, the work authorization policy represents not only a loss of independence, but also a loss of opportunity. Information gleaned from a range of sources indicates that a number of these dependent

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<sup>52</sup> See note [ ]. Spouses of exchange visitors are not automatically granted work authorization, but may apply provided "the income 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." See 8 C.F.R. § 214.2(j)(1)(v)(A).

<sup>53</sup> 8 U.S.C. §§ 1154(a)(1)(A)(i), 1154(a)(1)(B)(i) (2000).

<sup>54</sup> See, e.g. Shivali Shah, "Middle Class, Documented, and Helpless: The H-4 Visa Bind," in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 203.

<sup>55</sup> Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 *SEAULR* 937 at 952.



visa holders are highly-educated,<sup>56</sup> ironically, many H-4 visa holders have university degrees and comparable professional qualifications to their husbands.<sup>57</sup> Some H-4 visa holders are not even aware that they would be prohibited from working until after they arrived in the United States, and are dismayed to find that they have arrived in the proverbial “land of opportunity” only to find their professional options limited.<sup>58</sup> Though theoretically it is possible for both spouses to obtain and work on H1-B visas if they have the requisite qualifications, the challenges of obtaining sponsorship,<sup>59</sup> finding placements in the same city,<sup>60</sup> and the limitations on the total number of H1-B visas granted each year<sup>61</sup> effectively prevent the couple from being able to live together and both 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 associated with a green card—a process that can take more than 6 years<sup>62</sup>—

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<sup>56</sup> See Shivali Shah, “Involuntary Housewife Status: The H-4 Visa,” ILW.COM Immigration Daily, August 26, 2005, available at <http://www.ilw.com/articles/2005,0826-Shah.shtm>; Hearts Suspended (Video 2007). See also Shivali Shah, *Desperate Housewives*, INDIA ABROAD, Sept. 2, 2005 at M2, available at <http://web.archive.org/web/20070103041715/http://www.hvisasurvey.prg/Art-Desperate+Housewives.htm> (cited in Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 SEALUR 937 at FN82).

<sup>57</sup> See S. Mitra Kalita, *Immigrant Wives Visa Status Keeps them Out of the Workplace*, WASH.POST, Oct. 3, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/02/AR2005100201377.html?sub=new/>

<sup>58</sup> See, e.g. Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 SEALUR 937 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 the time, a single-sentence regulation would completely strip me of my independence for years to come.”)

<sup>59</sup> Shivali Shah, “Middle Class, Documented, and Helpless: The H-4 Visa Bind,” in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 2003 (“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.”)

<sup>60</sup> Shivali Shah, “Involuntary Housewife Status: The H-4 Visa,” ILW.COM Immigration Daily, August 26, 2005, available at <http://www.ilw.com/articles/2005,0826-Shah.shtm>. (“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.”)

<sup>61</sup> In the 2011 fiscal year, 129,134 H1-B visas were issued. See State Dept. 2012 Annual Report, available at [http://www.travel.state.gov/visa/statistics/statistics\\_5641.html](http://www.travel.state.gov/visa/statistics/statistics_5641.html).

<sup>62</sup> An H1-B visa is valid for three years, and can be extended for up to six years while

she may have gaps in her resume, and, outside volunteer activities, may have had limited opportunities to keep her professional knowledge current. This indefinite period, spent waiting for a green card and the ability to work, is something many H-4 visa holders come to dread. Without the opportunity to build social connections through work or attending school, a dependent spouse may feel isolated and homesick, and a significant number report suffering from depression.<sup>63</sup> Though it is possible for an H-4 visa holder to attend school pursuant to her status, and even change to a student visa, tuition is often cost-prohibitive for these single-earner households, particularly when the family also requires childcare.<sup>64</sup> An H-4 visa holder is not eligible for in-state tuition or student loans.<sup>65</sup>

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. Without work authorization, an H-4 visa holder cannot obtain a social security number, making it more difficult to obtain driver's licenses, bank accounts, and credit histories.<sup>66</sup> She can obtain an individual tax identification number for the purpose of filing joint taxes, but all reported earnings will be those of her spouse. This makes it difficult for her to prove her identity, her net worth in terms of assets, 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, and the right to work in particular, are not necessarily illegitimate.<sup>67</sup> However, the current immigration system—tailored to the needs of employers and, to

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waiting for approval on an application for legal permanent residence. *See* American Competitiveness in the 21st Century Act, Pub. L.No.106-313, 114 Stat.1251, 2000 S. 2045; Pub. L. No. 106-311, 114 Stat. 1247 (Oct 17, 2000), 2000 HR 5362; 146 Cong. Rec. H9004-06 (October 5, 2000).

<sup>63</sup> *See, e.g.* Meghna Demani's film "Hearts Suspended" (Video 2007).

<sup>64</sup> Shivali Shah, "Middle Class, Documented, and Helpless: The H-4 Visa Bind," in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 203. *See also* Shivali Shah, "Involuntary Housewife Status: The H-4 Visa," *ILW.COM Immigration Daily*, August 26, 2005, *available at* <http://www.ilw.com/articles/2005.0826-Shah.shtm> (in which one of the interviewees explains, "With only \$50,000 salary, and having to support family back in India, we cannot afford [tuition].")

<sup>65</sup> *Id.*

<sup>66</sup> Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 *SEAULR* 937 at 953.

<sup>67</sup> *See* Marion T. Bennett, *American Immigration Policies, A History* 145 (1963).

some extent, principle visa holders— 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 without the freedom of choice or the benefits associated with full economic participation. The employer- and principal-centric employment visa system neither acknowledges spousal contributions, nor the potential economic contributions of these spouses. The lack of attention to their rights is particularly ironic, given the public's ostensible interest in social integration and economic participation and contribution of arriving immigrants, particularly those who are likely to permanently reside and raise families within the United States.

### *C. Coverture and Women's Rights Within the Family*

A third significant area of limitation placed on the rights of spousal visa holders concerns matters of the family—namely, the rights to live free of domestic violence, leave a marriage and obtain a legal divorce, and to obtain child access and custody through the courts. How to best actualize formal rights for all is a matter of ongoing debate for advocates and scholars alike; however, it is clear that the visa hierarchy creates a series of obstacles for H-4 visa holders. The power and control wielded by an abuser is reinforced by an immigration system that grants him exclusive control over his spouse's status and exercise of her rights pursuant to that status. This power imbalance also creates additional problems in divorce and custody proceedings, where loss of the dependent spouse's immigration status may hinder her ability to obtain relief in U.S. courts.

#### 1. Domestic Violence

Closely linked with the law of coverture is the doctrine of chastisement. "As master of the household," Reva Siegel explains, "a husband could command his wife's obedience, and subject her to corporal punishment... if she defied his authority."<sup>68</sup> Blackstone explains this need for a husband to "give his wife moderate correction," because "as he is to answer for her

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<sup>68</sup> Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2123.

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.”<sup>69</sup> This aspect of coverture continues to manifest itself in the laws pertaining to domestic violence.<sup>70</sup> The power of petition in immigration law reinforces the notion that women are the property of their husbands and therefore the lawful objects of chastisement.

The dependent dynamic between principal visa holders and their spouses becomes more problematic when the marital relationship is placed under strain. The amount of power principals have over their spouses' immigration status and the rights it entails situates H-4 visa holders to be more vulnerable to domestic violence.<sup>71</sup> This presents a challenge to women who must make a decision whether to stay in a violent marital relationship, or leave and risk the consequences—including loss of immigration status.<sup>72</sup>

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<sup>69</sup> 1 William Blackstone, Commentaries \*444 (cited in Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, FN18).

<sup>70</sup> For example, Douglas Scherer notes that coverture prevented women from bringing civil suits for domestic violence because the legal merger between husband and wife essentially meant the suit was tantamount to the husband bringing a case against himself, which is the underlying sentiment behind the doctrine of interspousal immunity. See Douglas Scherer, Tort Remedies for Victims of Domestic Abuse, 43 S.C. L. Rev. 543, 561-63 (1992).

<sup>71</sup> Leslye E. Orloff and Janice 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 at 97 (“The battered immigrant’s ability to obtain or maintain lawful immigration status may depend of her relationship to her United States citizen or lawful permanent resident spouse. The same dynamic occurs any time immigration law gives an abusive spouse total control over the immigration status of his spouse and children.”). Anita Raj and Jay Silverman, “Intimate Partner Violence Against South Asian Women in Greater Boston,” 75 JAMWA 2, 111; Shivali Shah, “Trapped on a H-4,” The Hindu, November 28, 2004, available at <http://www.hindu.com/mag/2004/11/28/stories/2004112800380300.htm> (“Trapped on a H-4.”)

<sup>72</sup> See Naryan Lakshman, “On the H-4, a Trail of Misery and Lonely Battles,” The Hindu, July 30, 2012, available at <http://www.thehindu.com/opinion/op-ed/on-the-h4-a-trail-of-misery-and-lonely-battles/article3700233.ece> (“Priya told *The Hindu* that after suffering numerous beatings by her husband, she managed to file a police complaint and had him arrested. However, because as an H-4 spouse she had no access to bank accounts and other paperwork — all of which were controlled by her husband — she was unable to afford an attorney to fight the case. She was left praying for a denial of visa renewal for her husband for she had no other means to reach out to her family back in India....A similar case was Poorvi who, despite overcoming financial hurdles and completing a U.S. academic degree, faced marital trouble, loneliness and spousal abuse that ultimately led to divorce.”)

“Domestic violence” is a broad term, referring to “the abuse of power and control in an intimate relationship.”<sup>73</sup> Violence may be physical in nature, but frequently includes psychological abuse. This can include withholding money or access to resources like the family car, threats of divorce or denial of access to children. This may also include threats pertaining to the abuser’s control over the spouse’s immigration status, such as refusals 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.<sup>74</sup>

This psychological abuse is compounded by the isolation and economic dependence experienced by many H-4 visa holders. Such economic dependence is the major obstacle to immigrant women seeking to leave a violent relationship.<sup>75</sup> There is also a strong correlation between economic dependence and the severity of abuse.<sup>76</sup> In interviews with South Asian immigrant women, Anita Raj also found that deportation threats and refusal to file for change of status were also significantly related to physical abuse and sexual abuse, and that batterers prevent access to immigration documents as part of a strategy to control their spouses.<sup>77</sup>

The vulnerability of spousal visa holders cannot be discussed independently from their systematic subordination within the U.S. immigration system, which facilitates this pattern of abuse. A survey of organizations in the United States that serve the South Asian community reveals that, across these organizations, H-4 visa holders make up anywhere from twenty to seventy-five percent of their domestic violence clients.<sup>78</sup>

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<sup>73</sup> Leti Volpp, Family Violence Prevention Fund, “Working with Battered Immigrant Women: A Handbook to Make Services Available” 3 (1995).

<sup>74</sup> See Lauren Gilbert, Family Violence and U.S. Immigration Law: New Development, Immigr. Briefings, March 2001, at 33 n.4 (citing the Family Violence Prevention Fund of San Francisco’s Power and Control Wheel).

<sup>75</sup> Mary Ann Dutton et al., “Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrants,” 7 *Geo. J. on Poverty L. & Pol’y* 245, 295-96.

<sup>76</sup> 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).

<sup>77</sup> Anita Raj et al., “Immigration policies increase south Asian immigrant women’s vulnerability to intimate partner violence,” *J Am Med Womens Assoc.* 2005 Winter;60(1):26-32.

<sup>78</sup> Shivali Shah, “Middle Class, Documented, and Helpless: The H-4 Visa Bind,” in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 200-2001.

Even so, there is reason to believe that domestic violence rates may be even higher; H-4 visa holders may face obstacles accessing services, given the potential compounded factors of social isolation, lack of awareness around legal rights, limited language proficiency, and stigma associated with domestic violence.<sup>79</sup>

The lack of work authorization combined with the dependent immigration status for H-4 make these not unexpected, though no less tragic. Leslye Orloff, former director of the Immigrant Women's Project at Legal Momentum, notes that economic dependence has a strong correlation with severity of abuse.<sup>80</sup> Dependence on a spouse for both financial sustenance and immigration status is something of a perfect storm for domestic violence: 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 husband than those with other immigration status.<sup>81</sup> This comparison includes women with work visas, green cards, and U.S. citizenship.<sup>82</sup>

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.<sup>83</sup> Derivative visa holders face additional

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<sup>79</sup> See, e.g. Susan Girardo Roy, "Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women," 9 *Geo. Immigr. L.J.* 263, 271 (1995).

<sup>80</sup> Leslye Orloff, *Women Immigrants and Domestic Violence*, in *WOMEN IMMIGRANTS IN THE UNITED STATES*, ed. Philippa Strum and Danielle Tarantolo 49 at 52 (Woodrow Wilson International Center for Scholars, 2003) ("Like all battered women, 67.1 percent of battered immigrant women report lack of access to money as the one of the largest barriers to leaving an abusive relationship.")

<sup>81</sup> Anita Raj et al., "Immigration policies increase south Asian immigrant women's vulnerability to intimate partner violence," *J Am Med Womens Assoc.* 2005 Winter;60(1):26-32.

<sup>82</sup> Anita Raj et al., "Immigration policies increase south Asian immigrant women's vulnerability to intimate partner violence," *J Am Med Womens Assoc.* 2005 Winter; 60(1):26-32.

<sup>83</sup> Large corporations are regular speakers at congressional hearings on matters affecting business immigration. See *Examining Strengthening American Competitiveness for the 21<sup>st</sup> Century: Hearing of the S. Comm. On Health, Education, Labor, and Pensions, 110<sup>th</sup> Cong. 10 (2007)* (featuring testimony from Bill Gates, Chairman, Microsoft Corporation). See also *Comprehensive Immigration Reform: Business Community Perspectives: Hearing Before the Subcomm. On Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. On the Judiciary, 110<sup>th</sup> Cong. 9 (2007)* (featuring testimony of Laszlo Bock, Vice President, People Operations, Google, Inc.). There is little comparable representation and legislative influence for nonimmigrant

complications in obtaining access to their immigration information because, although the immigration attorney ostensibly represents the employer, principal visa holder, and derivatives, the principal is frequently the point of contact after arriving in the United States.<sup>84</sup> Principal visa holders may exploit the fact; Shivali Shah reports 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.’”<sup>85</sup>

Again, the nature of the visa creates a disincentive to report the violence. Many authors have written about the reluctance of immigrant women to contact the police with respect to DV cases.<sup>86</sup> The psychological abuse of H-4 visa holders often includes 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,<sup>87</sup> and if the principal is subject to removal, so is the rest of his family.

Numerous critics of enforcement of domestic violence laws 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.<sup>88</sup> An arrest might cost the H-4 her visa status, but it could also cost her safety—a visit from the police or an arrest

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spouse visa holders, even in the context of domestic violence prevention. *See* Shivali Shah, note – *infra*.

<sup>84</sup> ABA Model Rule 1.7 titled *Conflict of Interest: Current Clients* provides the ethical basis for representing multiple clients: “(a) 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 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.” Despite this guidance, immigration attorneys do represent employers without considering possible conflicts of interest between the employer and employee, and between the employee and his spouse. *See* Shivali Shah, note 80 *infra*.

<sup>85</sup> Shivali Shah, *Trapped, On a H-4*, *The Hindu*, November 28, 2004, available at <http://www.hindu.com/mag/2004/11/28/stories/2004112800380300.htm>.

<sup>86</sup> *See*, e.g. Elizabeth Schor, *Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility*, 9 *CNLJLPP* 697, 706-8; Linda Kelly, “Domestic Violence Survivors: Surviving the Beatings of 1996,” 11 *Geo. Immigr. L.J.* 303, 304 (1997).

<sup>87</sup> Specifically, domestic violence is considered a crime pursuant to 8 U.S.C. § 1227(a)(2)(E) or an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(F), as defined in 18 U.S.C. § 16(a).

<sup>88</sup> *See* Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 *Clearinghouse Rev.* 383, 387 (1994).

may provoke the abuser and jeopardize the spouse's physical and financial security.

The potential for abuse is clear in the inherent structure of the visa, and the way it facilitates economic dependence for H-4 visa holders and places exclusive control of a derivative's immigration status in the hands of the principal. Though abuse does not exist in every relationship, it is worth noting that the dysfunction of a skewed power dynamic within a marriage may introduce tension and discordance into otherwise solid relationships.<sup>89</sup>

## 2. Divorce and Child Custody

It makes sense to think about divorce in the context of domestic violence, but it is certainly worth noting that the ability to end a marital relationship and maintain child access are issues of fundamental importance to an individual's family life, regardless of whether the divorce is based on domestic violence.

Just as there is an historical preference for the traditional family, which is replicated by the state, there is a cultural and political bias against divorce throughout the legal system. This is apparent with respect to any legislation that attempts to regulate the family and marital roles.<sup>90</sup>

It is therefore unsurprising that divorce is also subject of suspicion in the context of immigration. The anxieties of courts around immigration status are notably reflected in divorce cases.<sup>91</sup> In this vein, Congress enacted the Immigration Marriage Fraud Amendments of 1986, which created a

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<sup>89</sup> Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 *SEAULR* 937 at 955.

<sup>90</sup> A powerful example of this is the debate over the Personal Responsibility and Work Opportunity Reconciliation Act, in which Congress emphasized the importance of marriage, referring to it as "the foundation of a successful society" and "an essential institution of a successful society which promotes the interests of children." Personal Responsibility and Work opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2113, §101(1), (2).

<sup>91</sup> *See, e.g. Lee v. Kim*, No. F0105876 (Ca. Sup. Ct. Oct. 23, 2009), cited in David P. Weber, "(Un)fair Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society," 94 *Marq. L. Rev.* 613, 627 ("the immigrant wife alleged she was a victim of domestic abuse, but rather than focusing on the abuse, the judge focused on potential immigration benefits the wife may have been eligible for as a victim of domestic violence. 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.")



conditional status for spouses who have been married to citizens or permanent residence for less than one year at the time the green card petition is filed.<sup>92</sup> This provision, notes Orloff and Kaguyutan, “re-confirmed the original power of the lawful permanent resident or citizen spouse to control the immigration status of his alien spouse by allowing her to become a lawful permanent resident only if he petitioner for her.”<sup>93</sup> Narrow exceptions were included for good faith and cause, and for extreme hardship;<sup>94</sup> however, these waivers were both limited and narrow.<sup>95</sup> The “battered spouse waiver,” enacted in 1990,<sup>96</sup> as well as the Violence Against Women Act expanded these exceptions for individuals who can show a good-faith marriage and either a finalized divorce or proof that they were victims of domestic violence.<sup>97</sup>

By contrast, present law does not provide for a clear path to lawful status to a nonimmigrant spousal visa holder, such as an H-4, who is divorced. Once the marriage is terminated, the spouse loses her visa and is subject to removal. If an application for a green card has been filed, it is automatically revoked. Even if she wishes to pursue other visa options, she runs the risk of being placed in proceedings or accruing unlawful presence.<sup>98</sup> She may also fear returning to her home country a divorced

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<sup>92</sup> Pub. Law No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186a).

<sup>93</sup> Leslye E. Orloff and 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, 102.

<sup>94</sup> Furthermore, these provisions do not fully address the norms of coverture that underlie the present structure of the petition process. According to Janet Calvo, the House Judiciary Committee Report states that the purpose of the waiver to the joint filing requirement “was to ‘ensure’ that neither a spouse nor a child would be ‘entrapped in the abusive relationship by the threat of losing their legal resident status.’ Thus, the focus was not on rejecting spousal control. It was not sufficient that a spouse had entered the marriage in good faith; she had to be divorced or abused or subject to extreme hardship before she would be allowed to self-petition.” Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Dimishment, But Not Its Demise*, 24 *NILULR* 153 at 167, quoting in part H.R. Rep. No. 101-723, pt. 1, at 51, 78 (1990).

<sup>95</sup> 8 U.S.C. §1186(a)(1),(b),(c)(4).

<sup>96</sup> Immigration Act of 1990, § 701, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended at 1186a(c)(4)).

<sup>97</sup> Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1186a(c)(4).

<sup>98</sup> 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. 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

woman, knowing that she will be treated differently and may have difficulty remarrying.<sup>99</sup> She may blame herself for failure of the marriage, and feel obligated to keep the marriage together for her extended family and her children.<sup>100</sup>

Child custody is another central concern to many dependent visa holders in divorce proceedings. Once a custody proceeding is initiated, she will be unable to take her children out of the country. There is also a significant chance that a dependent spouse's custody rights will be limited or terminated if she loses her status. "Abusers use child custody litigation as a vehicle to maintain control over the victims."<sup>101</sup> David Thronson notes that "[w]hen parents in a child custody dispute do not share the same immigration status or citizenship status, it is not unusual for the parent holding a status perceived as superior to attempt to highlight the status of the other."<sup>102</sup> Though not all courts consider parents' immigration status when assessing the best interest of the child, there are cases where parents have lost custody because they are undocumented,<sup>103</sup> whether as a direct or

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prohibited from reentering for 10 years, unless they qualify for a waiver. *See* INA § 212(a)(9)(B).

<sup>99</sup> *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).

<sup>100</sup> Shivali Shah, "Middle Class, Documented, and Helpless: The H-4 Visa Bind," in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 199.

<sup>101</sup> Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51, 53 (1994); Barbara Hart, *Family Violence and Custody Orders*, 43 JUV. & FAM. CT. J. 29, 33-34 (1992). *See also* HOWARD DAVIDSON, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION* (Aug. 1994) at 20 (noting that abusers whose victims are immigrant parents often use threats of deportation to shift the focus of family court proceedings away from their violent acts)

<sup>102</sup> 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 (citing to 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)).

<sup>103</sup> *See, e.g.* *Ramirez v. Ramirez*, 2007 WL 1192587 (Ky. Ct. App. 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*, 121 Nev. 695, 120 P.3d 812 (2005) (finding that a court has discretion to consider a parent's immigration status and its derivative effects as a factor in determining custody); *Rico v. Rodriguez*, 120 P.3d 812, 818-19 (Nev. 2005) ("[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 and 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

indirect result of their immigration status.<sup>104</sup> Even where another party is not seeking custody, courts have pushed back against parents without immigration status removing a U.S. citizen child from the country.<sup>105</sup> To this end, David Thronson observes, “[w]hen courts implicitly determine that a child could not accompany a parent abroad they fail to recognize, or willingly subvert, a parent’s fundamental rights... Leaving the United States is not a sign that a parent is unfit, and not a ground to undermine parents’ role in their children’s lives.”<sup>106</sup> And yet, courts have continued to override the rights of parents with tenuous immigration status, both ignoring the impact on the child and the spouse deprived of access to her children.

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

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*Olupo v. Olupo*, 2002 WL 1902892 (Minn. Ct. App. 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 and problematic eligibility for political asylum, and lack of ties to the state other than her children).

<sup>104</sup> See David P. Weber, “(Unfair) Advantage: Damocles’ Sword and the Coercive Use of Immigration Status in a Civil Society,” 94 Marq. L. Rev. 613, 62-26 (citations omitted) (“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 (“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.”)

<sup>105</sup> See, e.g. *In Re M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (in which the court opined 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 the Matter of Sanjivini K.*, 63 A.D.2d 1021 (later reversed) (where the “the uncertainty of [the mother’s] immigration status” was a primary factor in finding neglect).

<sup>106</sup> 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, 68.

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.<sup>107</sup>

Under the doctrine of coverture, children were considered marital property and control over them belonged to their fathers, not their mothers.<sup>108</sup> Though this is no longer the rule in family court, custody proceedings remain yet another venue where immigration status can be exploited and the documented principal can exert control over a spouse in danger of losing her immigration status. In a series of interviews with 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,”<sup>109</sup> and the women “unanimously accepted their [documented] husbands’ threats to separate them from their children.”<sup>110</sup>

An important tenet underlying the U.S. immigration system is family unity. Family immigration accounts for about half of the total visas available each year,<sup>111</sup> and the principle of keeping families together remains an unchanging, and indeed desirable, facet of U.S. immigration policy. Accordingly “[d]enying immigrant victims’ access to family law courts due to a party or a child’s immigration status undermines the courts’ obligation under state family laws to resolve custody disputes in the best interests of children.”<sup>112</sup> The extent to which an imminent loss of

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<sup>107</sup> See INA § 212(a)(9). There is a possibility that an individual in this waiver may qualify for discretionary relief in the form of a waiver based on a showing of extreme hardship pursuant to INA § 212(a)(9)(B)(v).

<sup>108</sup> See Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev 593 (1991), reprinted in *Critical Race Feminism* (Adrien Katherine Wing ed., New York University Press 1997); 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).

<sup>109</sup> 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).

<sup>110</sup> 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).

<sup>111</sup> INA § 203(a)(1)-(4), 8 U.S.C. § 1153(a)(1)-(4) (1994 & Supp. IV 1998).

<sup>112</sup> Leslye Orloff, Jennifer Rose, Laura Martinez, and Joyce Noche, “Immigration Status and Family Court Jurisdiction,” in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* (Legal Momentum 2004) at 7, (citing to Nancy K. D. Lemon, *The Legal System's Response*

immigration status affects a spousal visa holder's access to her children represents a violation not only of her rights, but of the children's rights, as well as defeating the purpose of immigration regulations that preserve family integrity.

To the extent she is able to obtain representation and actually access the court system, a dependent visa holder may be granted more protection in a U.S. court than in divorce proceedings in her home country, and she may be granted legal access to her children through the process. However, challenges in accessing legal services make it difficult for women to obtain representation in these situations.<sup>113</sup> The increased costs of providing interpreters and other specialized services to those who are struggling with immigration issues means that H-4 spouses are unlikely to have their legal needs met from a provider.<sup>114</sup>

### III. "UNCOVERED" WOMEN AS VICTIMS

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

The perseverance of coverture and 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, and yet reform movements have failed to address the fundamental, coverture-based inequalities still inherent in the U.S. visa system.

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*to Children Exposed to Domestic Violence, in THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 69* (Richard E. Behram ed., 1999).

<sup>113</sup> Because H-4 visa holders do not have the ability to work, they are likely to require free legal services. However, as Mariela Olivares notes, legal aid organizations face constraints on funding that limit their ability to provide representation in divorce proceedings. See Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 *Hamline L. Rev.* 149 at 183 ("[F]unding for family law services to domestic violence victims is often influenced by philosophical preferences for representation in child custody and protective order proceedings, which are either explicitly or implicitly favored over divorce representation. In light of these funding preferences—and despite the fact that those forms of relief are often incomplete from the point of view of domestic violence victims—few qualified legal service providers are able to offer divorce representation.")

<sup>114</sup> See Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 *Hamline L. Rev.* 149, FN 163. See also Olivares at FN 23 (discussing language access barriers in accessing legal and supportive services).

The highly political discussion around the H1-B program has obfuscated the reform of H-4 policies. Dependent visa holders do not have a representative voice at the congressional level.<sup>115</sup> Senate hearings and congressional debates highlighted the tension between proponents of H1-B visa holders and employers, who believe the United States should be drawing more talent from overseas to be competitive and strengthen the national economy,<sup>116</sup> and individuals who believe immigration regulations should be tightened to protect employment opportunities for U.S. workers.<sup>117</sup> Comprehensive immigration reform has also focused on drawing and retaining immigrants who have education and specialized knowledge, who are perceived as valuable and desirable.<sup>118</sup> 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 of this is a recent USCIS fact sheet about a proposed change to the law that would allow H-4 visa holders to apply for work authorization, which appeared under the title “DHS Reforms To Attract And Retain Highly Skilled Immigrants,” and is clearly presented as an incentive for H1-B visa holders

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<sup>115</sup> Shivali Shah, “Middle Class, Documented, and Helpless: The H-4 Visa Bind,” in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) 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, who 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* Change.org petition, “Give More Rights to H4 Visa Holders,” *available at* <http://www.change.org/petitions/give-more-rights-to-h4-visa-holders>.

<sup>116</sup> *See, e.g.* H1-B Visas and Job Creation NFAP Policy Brief (Nat’ Found. for Am. Pol’y, Arlington, VA.) Mar. 2008, *available at* <http://www.nfap.com/pdf/080311h1b.pdf>.

<sup>117</sup> *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, 865 (2003).

<sup>118</sup> *See* White House Report “Building a 21<sup>st</sup> Century Immigration System” *available at* [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/immigration\\_blueprint.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf) (Among the priorities listed include “strengthening the H-1B visa program to fill the need for high-skilled workers when American employees are not available” and “Encouraging 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.”).

rather than a direct benefit to their spouses.<sup>119</sup>

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 the distinction stems from the right of nations to regulate immigration. Many opposed to 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.<sup>120</sup> 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 an intentional perpetuation of the norms of coverture, the constant focus on principals is an example of a phenomenon Reva Siegel has called “preservation through transformation”: though the rhetoric surrounding status regime may shift, the underlying power relationships within it remain unchanged, and are justified through new means. Siegel observes that “[W]hen 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.”<sup>121</sup> Similarly, the law’s traditional focus on the principal is frequently presented as a matter of an employer’s need for skilled workers and the state’s need to regulate immigration, rather than as a relic of coverture. Such differentiation, which *de facto* occurs on the basis of gender, “is sometimes implicit, veiled, and based on characteristics and attributes associated with gender

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<sup>119</sup> U.S. Citizenship and Immigration Services Fact Sheet, January 31, 2012, available online at <http://www.dhs.gov/news/2012/01/31/dhs-reforms-attract-and-retain-highly-skilled-immigrants>.

<sup>120</sup> *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).

<sup>121</sup> Reva B. Siegel, “The Rule of Love: Wife Beating as Prerogative and Privacy,” 105 *Yale L.J.* 2117 at 2119.

constructions.”<sup>122</sup>

In this instance, the stereotypes about dependent visa holders and the emphasis on the principal in the immigration process reinforce traditional notions of the family, and antiquated gender norms are preserved. Though this is presented under the gender-blind veneer language of “principal visa holders” and “derivative visa holders,” this does not disguise the fact that these roles are cast according to the doctrine of coverture and traditional roles as women and that, in fact, these laws have a disproportionately negative effect on female spouses. “In legal reform,” observes Martha Fineman, “the fundamental and initial debate is always about the underlying cultural and social constructs,”<sup>123</sup> and in many ways, debates over immigration reform have been about conceptualizing female immigrants beyond their role as wives, (or, later on, as victims).

These wives share the same liberty interests as their husbands—the same desire for choice in terms of work, travel, and access to family—and yet immigration law only considers these interests for principal spouses. It is worth noting that very few visa categories do not permit the accordance of status to dependents at all,<sup>124</sup> indicating that clearly the principal visa holder is entitled to some right of family unity, though no such guarantee or other rights are accorded to the derivatives.

### *B. State “Covering” of Women as Battered Spouses*

Preservation through transformation may account for the failure of employment visa reforms to extend their scope to include H-4 spouses; however, the stories of H-4 survivors of domestic violence have been largely absent from that angle for immigration reform as well. 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 advocacy. “Equality of gender roles in a family has been seen as threatening or unrealistic,” she writes,

“For some, this reflects a reaction to challenging ‘traditional’

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<sup>122</sup> Olivia Salcido and Cecilia Menjivar, “Gendered Paths to Legal Citizenship: The Case of Latin-American Immigrants in Phoenix, Arizona,” 46 *Law & Soc’y Rev.* 335 at 340.

<sup>123</sup> Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 *VALR* 2181 at 2186-87.

<sup>124</sup> See supra note--.



values of a wife as focused on the home and motherhood. For others, it reflects a concern that surface equality masks the need of women for special protection because of their societal roles.”<sup>125</sup>

This is an inherent part of the challenge in addressing spousal visa provisions—legal remedies should attempt not only to intervene in cases of domestic violence, but also address the larger issues of subordination inherent in the narrow conception of spousal roles within the traditional family model. Since the premise of family unity cannot be decoupled from the power to petition—at least as a matter of viable policy—immigration legislation has instead focused on narrow cases of domestic violence. In this way, the only available relief available in the form of self-petitions requires women to actually suffer domestic violence, cast themselves as victims of the purpose of obtaining relief, and invite the state to “cover” them in granting a self-petition—just as a spouse would have covered her had the abuse not occurred. This form of state paternalism is the sole alternative form of relief presented in current law, specifically in the form of the Violence Against Women Act self-petitions and the U visa.

#### 1. The Violence Against Women Act

The Violence Against Women Act, passed in 1994, created a special process whereby spouses of abusive U.S. citizens and permanent residents could petition for a green card themselves. 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.<sup>126</sup> Congress clearly stated that one of the purposes of enacting VAWA was to allow “battered immigrant women to leave their batterers without fearing deportation.”<sup>127</sup>

The provisions of VAWA allow a spouse of a citizen or permanent resident to self-petition if he or she is otherwise eligible to adjust status

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<sup>125</sup> Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Dimishment, But Not Its Demise*, 24 *NILULR* 153 at 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).

<sup>126</sup> H.R. Rep. No. 103-395, at 26-37 (1993).

<sup>127</sup> H.R. Rep. No. 103-395, at 26-7 (1993).

based on marriage, whether current or recently dissolved. VAWA self-petitions may 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. Prior to the passage of VAWA, spouses could be stood up at immigration reviews or have their green card applications revoked by the abuser. Other laudable aspects of VAWA is a more comprehensive definition of abuse—the scope of which is extended to psychological and economic abuse as well as physical violence,<sup>128</sup> and subsequent amendments that make it possible for a spouse ability to apply within two years if the would-be petitioner loses permanent resident status<sup>129</sup> or divorces<sup>130</sup> based on the abuse. The right of self-petition is therefore a highly significant development for survivors of domestic violence seeking to escape a dependent relationship on their spouses for immigration status.

However, VAWA does not address the situation of “Americans-in-waiting,”<sup>131</sup> like H-4 visa holders who may ultimately be eligible for their green cards, but face an enforced waiting period or may lose the opportunity due to the intervention of the H-B spouse.<sup>132</sup> The 2005 Violence Against Women Reauthorization Act created an option for H-4 visa holders who have experienced domestic violence to obtain work authorization.<sup>133</sup> However, the regulations were never promulgated, and women who could have benefitted from these provisions have had their lives put on hold for

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<sup>128</sup> See 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 serve alone as a basis for a self-petition. See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Dimishment, But Not Its Demise*, 24 NILULR 153 at 189.

<sup>129</sup> INA §§204(a)(1)(A)(iii)(II)(aa)(CC)(bbb) and (B)(ii)(II)(aa)(CC)(aaa).

<sup>130</sup> INA §§204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and (B)(ii)(II)(aa)(CC)(bbb).

<sup>131</sup> See discussion *infra* Section IV.A.

<sup>132</sup> For example, if the H1-B files a petition for legal permanent residence for his spouse and then later withdraws it, the H-4 visa holder would lose her option for adjustment of status. See Shivali Shah *supra* note \_\_\_\_.

<sup>133</sup> INA §106; Section 814(c) of VAWA.

the last seven years.<sup>134</sup> Even so, this provision only addresses the situation of domestic violence survivors. Furthermore, an H-4 visa holder will still lose her status in the event that she is divorced or her husband changed status without petitioning for her. If that divorce occurs more than two years before the principal obtains a green card, she cannot self-petition under VAWA. Furthermore, the act does nothing for other categories of nonimmigrant dependent visa holders, who may also be subject to abuse.

More fundamentally, the self-petition process does fully not address the underlying power and control dynamic of coverture. While initial bills addressed fundamentally disparate power dynamic between petitioners and beneficiaries, the law ultimately provided relief only to the extent that spouses were cast as victims. The first bill, introduced in July 1992, actually would have permitted spouses of permanent residents and citizens to file their petitions independently.<sup>135</sup> 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 harm or other abuse.”<sup>136</sup> However, later version 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.<sup>137</sup>

## 2. U Visa

The U visa was created by the Trafficking Victims Protection Act of 2000 and provides a path to citizenship for victims of certain crimes where

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<sup>134</sup> See Letter to Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services RE: Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self- Petition; and, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants, January 10, 2013, *available at*

[http://www.asistahelp.org/documents/news/Comments\\_on\\_USCIS\\_VAWA\\_EAD\\_Guidance\\_3C87287ADCDEB.pdf](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 Guidance to clarify these provisions [set forth in Section 814(c) of VAWA]. 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.”)

<sup>135</sup> H.R. 5693, 102d Cong. §1(a) (1992).

<sup>136</sup> Janet Calvo, A Decade of Spouse-Based Immigration Laws: Coverture's Dimishment, But Not Its Demise, 24 NILULR 153 at 169.

<sup>137</sup> Janet Calvo, A Decade of Spouse-Based Immigration Laws: Coverture's Dimishment, But Not Its Demise, 24 NILULR 153 at 169.

the individual assists law enforcement in the investigation or prosecution of the crime.<sup>138</sup> The U visa provides for interim immigration status and work authorization for four years,<sup>139</sup> and allows the visa holder to adjust status after three years, creating a path to citizenship.<sup>140</sup> Domestic violence advocates heralded the U visa regulations because they provided an option for survivors who were not eligible to self-petition based on their marital relationships.<sup>141</sup>

Immigrant survivors of domestic violence may be eligible for U visas, including H-4 visa holders. However, there are a number of hurdles to obtaining the U visa that would prevent all H-4 visa holders in abusive or otherwise failing marriages to access relief. Community and legal advocates have noted that many survivors are hesitant to report abuse for fear they will be deported.<sup>142</sup> 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 therefore the immigration status of his dependent family members as well. Prescribing the U visa as a form of relief for survivors also lends state sanction to a particular response to domestic violence, which may not holistically respond to a survivor's situation,<sup>143</sup> and may even place her at increased risk.<sup>144</sup> This combination of factors poses serious disincentives for reporting, and may dissuade H-4 visa holders from reporting domestic violence and involving law

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<sup>138</sup> 8 C.F.R. § 214.14(b).

<sup>139</sup> 8 C.F.R. § 214.14(g).

<sup>140</sup> 8 C.F.R. § 245.24.

<sup>141</sup> For example, U visas would be available to survivors regardless of immigration status, regardless of the 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 the U.S. Citizenship and Immigration Services would consider them married for immigration purposes.

<sup>142</sup> Elizabeth Shor, *Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility*, 9 *Cornell J.L. & Pub. Pol'y* 697 at 706. (“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.”)

<sup>143</sup> 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.”)

<sup>144</sup> See S. Goldsmith, “Taking Abuse Beyond a Family Affair,” 17 *Law Enforcement News* 7 (1991) (noting that 30% of batterers assault their victims at some point during the prosecution stage of a case).

enforcement—prerequisites for the law enforcement certification, which is the basis for a U visa. Indeed, a study of 161 South Asian women immigrants in Greater Boston revealed a hesitance to engage with law enforcement and the courts—forty percent of respondents had been abused, but only two women obtained restraining orders.<sup>145</sup>

Additionally, the definition of domestic violence in the U visa statute and the nature of prosecutions in cases of domestic violence increase the potential that the regulations will be interpreted to primarily include cases where there is substantive evidence of abuse. Survivors who experience economic psychological harm—such as an abuser's refusal to provide financial support or file a green card application for the spouse or her 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 very little comfort to an individual who stands to lose her path to citizenship, her economic security, and access to her children in the event that she reports her abuser. Elizabeth Schor observes that survivors of domestic violence often want to make the marriage work and to have normal family life, 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.”<sup>146</sup>

Another problem inherent in the U visa regulations is that this relief is available to individuals who suffer domestic violence or other qualifying crimes—the dynamics of dependency and the potential for abuse are not the subject of this relief, nor is non-criminal domestic violence such as emotional and economic abuse. Like the VAWA self-petition, the U visa is another remedy focused on the status of the victim.<sup>147</sup>

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<sup>145</sup> Anita Raj and Jay G. Silverman, “Intimate Partner Violence Against South Asian Women in Greater Boston,” JAMWA Spring 2002 at 113. *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, 13111-26.

<sup>146</sup> Elizabeth Shor, Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility, 9 Cornell J.L. & Pub. Pol’y 697 at 706.

<sup>147</sup> Notably, for purposes of showing domestic violence, the statute defines “substantial physical and physical 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(a)(8). With regards to documentation to prove abuse, the USCIS Ombudsman has specified that protective orders and “documents such as the photograph of the visibly injured applicants” may be deemed relevant. USCIS Teleconference, “U Visa: One Year

### 3. Limitations on Present Forms of Relief

It is clear that VAWA and the U visa regulations 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 to be expanded to include those who may potentially be eligible for permanent residence at a later date, these provisions can only be extended to cases where domestic violence occurs. As Janet Calvo observes with respect to VAWA,

“The legislation focused only on providing relief to the abused. To obtain immigration status, spouses could not operate from a position of self-initiative and control; they had to show they were abused to the extent of being ‘victims.’ Furthermore... they further had to demonstrate that they were ‘good victims,’ with criteria and evidentiary requirements that other spouses did not have to meet.”<sup>148</sup>

The rule of sovereignty has bent for immigrant women primarily as victims of domestic violence, as in the case of the VAWA and U visa regulations, but has not contemplated the ways in which trends of gender subordination may be reversed. For example, the law does not address the unequal relationship between husband and wife with respect to the nonimmigrant visa system—the forced dependency, eclipsing of a spouse’s independent interests, and the extent of control over the derivative that is placed in the hands of the principal—all of which can exist in a perfectly happy and functional marital relationship. Truly comprehensive immigration reform would eliminate the residue of coverture that defines the role of wives, and reconceptualize spousal visas to allow immigrant women independent control over their status and rights in the United States.

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After the Interim Final Rule,” #9 August 26, 2006), *published on* AILA InfoNet at Doc. No. 08090567.

<sup>148</sup> Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Dimishment, But Not Its Demise*, 24 *NILULR* 153 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).

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

##### *A. H-4 Visa Holders as "Americans in Waiting"*

Structural inequalities within the visa system have troubling implications for the exercise of citizenship by H-4 visa holders. Feminist scholars, among others, have adopted a more expansive notion of citizenship, arguing that the citizenship implicates both public and private life.<sup>149</sup> As Yishai Blank observes, citizenship is "generated, managed and controlled today not only in the national sphere and by the organs representing it, but, in parallel, in many other spheres and by the multitude of organs representing these spheres."<sup>150</sup> 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 rights that many take for granted, including rights to live life free of domestic violence, to preserve family ties and parents' rights to access their children, and to both freely enter into and dissolve marital union.

Hiroshi Motomura, who presents the idea of citizenship of transition, has coined the term "American in waiting" to describe those who "will eventually become citizens of the United States," which "confers on immigrants a presumed equality."<sup>151</sup> Motomura notes that "transition should reach beyond mere formal citizenship as a legal status through a fuller sense of belonging through family, education, and economic opportunity." Motomura identifies these areas as "objects of admission," as well as means to admission, because they are "crucial aspects of belonging."<sup>152</sup>

Because of their potential path to formal citizenship, H-4 visa holders are among these Americans in waiting. 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

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<sup>149</sup> See, e.g. Susan Moller Okin "Women, Equality, and Citizenship," 99 *Queens Q.* 33 (Spring 1992).

<sup>150</sup> Yishai Blank, "Spheres of Citizenship," 8 *Theoretical Inquiries L.* 411 at 415.

<sup>151</sup> Hiroshi Motomura, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) at 9.

<sup>152</sup> Hiroshi Motomura, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) at 162.

limited-term visa.<sup>153</sup> 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 H-1B visa holder and derivative family members for green cards,<sup>154</sup> 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 H-1B program that there is an interest—albeit an contested one—in drawing and retaining skilled immigrants on this program. Many employers, as well as proponents of immigration law reform, believe that drawing and retaining these educated workers makes the U.S. technology sector more competitive and strengthens the national economy, and thus creating a rationale for investing in their employees as future citizens.

An historical phenomenon that approximates the favored status accorded to H-1Bs is the concept of “intended citizens,” in which individuals who immigrated to the United States and stated intent to naturalize were accorded favored status.<sup>155</sup> These declarations, which were once a prerequisite to naturalization, were a basis for the notion of “Americans in waiting”—that is, the assumption “that lawful immigrants were headed toward citizenship.”<sup>156</sup>

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<sup>153</sup> As such, while H-1Bs and their dependents are technically nonimmigrant visa holders, the law allows for “dual intent”—that is, that they may intend to reside permanently in the United States at the time they interview for their visas in the home country. *See* 8 C.F.R. § 214.2(h). Only four classes of nonimmigrants—H-1-B, H-1-C, L, and V visa holders—are permitted to have dual intent.

<sup>154</sup> H-1-B visa holders may work in the United States for up to three years, with the option of an additional three-year extension. *See* INA § 214(g)(4). During that time, they may opt to apply for legal permanent residence. In addition, Motomura specifically references permanent resident status as a way of designating Americans in waiting (“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.”) *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) at 140.

<sup>155</sup> *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) at 116,118. (“When a declaration of intent was a prerequisite for naturalization, it was clear that intending citizens were not actually citizens, but they were treated like citizens for many purposes. Many drew lines that put citizens and intending citizens on one side, and all other noncitizens on the other side. The laws that treated intending citizens like citizens addressed a wide array of topics, but underlying all of them was a view of immigrants as Americans in waiting and immigration as transition to citizenship.” Motomura at 118.)

<sup>156</sup> *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND*



While the law—and certainly the current conversation about comprehensive immigration reform—reflects a preference for a path to citizenship for highly-skilled immigrants like H1-Bs, there is not a comparable reflection of the rights of derivative spouses. The lack of work authorization and other independent rights for H-4 visa holders seems all the more peculiar, because although the law provides a path for H-4 visa holders to potentially enter the labor market years down the road, the time spent before she is eligible for permanent residence amount to years spent in limbo. The United States has an interest in promoting the integration of H-4s as Americans in waiting, and work authorization and an independent path to citizenship may be viewed as reflections of that preferred status.

Motomura notes that required declarations of intent for naturalization and other policies distinguishing Americans in waiting from other noncitizens are not a current trend within the law, but “[a]t the same time... laws that incorporate the idea of Americans in waiting remain familiar enough that legislators could revive the idea, if they so choose.”<sup>157</sup> In many ways, this is already transpiring. A national movement of immigrant youth—known as DREAMers, taking their name from the federal Development, Relief, and Education for Alien Minors program<sup>158</sup>—has made a case for a path to citizenship based on the fact that they identify as Americans.<sup>159</sup> In addition, comprehensive immigration reform has demonstrated bipartisan support for paths to citizenship for individuals who have other bases to demonstrate intent to stay in the United States.<sup>160</sup>

Increasingly, a citizenship is conceived of in broader terms, encompassing concepts of social and economic participation.<sup>161</sup> Access to

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CITIZENSHIP IN THE UNITED STATES (2006) at 120.

<sup>157</sup> AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006) at 139.

<sup>158</sup> S.952, introduced May 11, 2011; H.R.1842, introduced May 11, 2011.

<sup>159</sup> See Elizabeth Keyes, *Defining American: The DREAM Movement, Worthiness and Citizenship*, (publication forthcoming).

<sup>160</sup> See Senators Charles Schumer, John McCain, Richard Durbin, Lindsey Graham, Robert Menendez, Marco Rubio, Michael Bennet, and Jeff Flake, *Bipartisan Framework for Immigration Reform*, January 8, 2013, available at <http://apps.washingtonpost.com/g/page/politics/bipartisan-framework-for-immigration-reform-report/27/>.

<sup>161</sup> See e.g. Judith Sklar, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (Yale Univ. Press, 1991) (discussing the “right to earn” as an aspect of American citizenship); Vicki Schultz, “Life’s Work,” 100 *Colum. L. Rev.* 1881 (2000) (arguing that ensuring “everyone full and equal participation in decently-paid, life-

economic citizenship, argues feminist scholar Alice Kessler-Harris, “begins with self-support” and includes “customary and legal acknowledgement of personhood.”<sup>162</sup> 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. However, their spouses are prohibited from equal participation.

### *B. Short-Term Solutions*

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

The most obvious and lowest-stakes means of granting more autonomy to dependent visa holders is to grant all categories authorization to work. This right already exists in theory for many dependent visa holders,<sup>163</sup> but may be conditional or otherwise difficult to obtain in practice. This idea was proposed for H-4 visa holders specifically in a 2011 amendment, though it did not become law [check on status]. While a provision of the Violence Against Women Act of 2005 allows for H-4 spouses who have suffered domestic violence from the H1-B principal to apply for work authorization,<sup>164</sup> this provision is too narrow and does not address or attempt to prevent the dynamic of dependency 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, and to the extent these prospective H1-B visa holders have opportunities elsewhere, they will go where their spouses can also work. Professional

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sustaining, participatory” must serve as the “platform on which equal citizenship [is] built.”)

<sup>162</sup> Alice Kessler-Harris, *IN PURSUIT OF EQUALITY* at 283.

<sup>163</sup> This includes J-2 spouses (of exchange visitors, who are in the US for 2 years), A&G spouses (of employees of diplomatic missions, international organizations, and NATO), E1/2 spouse (treaty investor), and L1 spouse (of intracompany transferee).

<sup>164</sup> 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].”)

migration trends reveal that individuals are choosing to immigrate to other countries instead of the U.S. for this reason, as well as in general response to the comparably high number of restrictions placed on employment-based visa holders.<sup>165</sup>

Critics of the current U.S. visa policy who are proponents of professional migration note that “other nations’ policies are often more welcoming of HSIs [highly skilled immigrants] and less restrictive than those of the United States.”<sup>166</sup> Highly qualified individuals are now more frequently choosing to immigrate to places like Canada and the United Kingdom, where immigration policies grant work authorization to dependent spouses. In much the same way that E and L visas in the U.S. were explicitly conceived and marketed as “dual career” visas that would offer work authorization to both parties,<sup>167</sup> this lack of restriction on skilled immigrant workers in other countries is intended to draw more qualified individuals. In addition to losing competition for the most qualified individuals to the countries like Canada and Australia, the United States has lost access to many individuals who opt to return to their home countries where they face no restrictions on their status.<sup>168</sup>

As previously mentioned, visa quotas, work authorization restrictions, and geographic limitations present obstacles to dual-career couples where husband and wife both wish to seek employment in the United States. At the same time, employers are faced with the prospect of choosing between two candidates—husband and wife—who may be equally qualified, but cannot both be hired due to the visa cap. Ostensibly, if the idea behind

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<sup>165</sup> See, e.g. Fragoman, Ireland Business Immigration Summary, <http://pub-web.fdbl.com/1ihp8/global/media85.nsf/public-county-briefs/ireland?opendocument#dependents>; UK Border Agency, Highly Skilled Migrant Programme, <http://www.biahomeoffice.gov.uk/workingintheuk/hsmp/dependents>.

<sup>166</sup> Peter H. Schuck and John E. Tyler, Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants, 38 FDMULJ 327 at 337.

<sup>167</sup> 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. 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 202 U.S.C.C.A.N. 1789, 1790.

<sup>168</sup> Peter H. Schuck and John E. Tyler, Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants, 38 FDMULJ 327 at 337-338.

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—L and EB—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. A spousal work authorization for other dependent visa categories could provide a similar incentive. As previously mentioned, the option to work is particularly compelling for dual-intent visa holders, such as H-4 visa holders, and any category where there is a hope that individuals will remain in the U.S. long term, as it facilitates social integration and economic contribution from these families.

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

Given the notably high risk of abuse to dependent visa holders, lawmakers should consider preventative measures, starting before H-4 visa holders make their way to the United States. Under the International Marriage Brokers Regulation Act (IMBRA),<sup>169</sup> U.S. consular officers are required to advise the prospective fiancées who use an international matchmaking service regarding risks of domestic violence and services they can access in the event they are subjected to such violence. This policy was based on recognition that these individuals were in danger of abuse and in a vulnerable position on account of their immigration status.<sup>170</sup> The interview with a consular officer was the only opportunity to let these individuals know what to do in the event they were subjected to domestic violence, and made them aware of resources they could access in case of an emergency. These advisories were intended as a fail-safe in situations where the visa applicant could not be reliably advised by her prospective spouse, his lawyer, the matchmaking service, or the family members who encouraged her to use the service.

This situation is not so different from that of some H-4 visa holders. Though they may not have used a matchmaking service, a growing number of H-4 visa applicants have married during their husbands' short visits to the United States. They may have met online or through family, and many

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<sup>169</sup> PUBLIC LAW 109-162—JAN. 5, 2006.

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have known each other only briefly before the wedding. Dependent visa holders are also regularly overlooked for legal advice throughout the immigration process. Though ostensibly they are represented by their husband's attorney, most will not be advised of their rights when an application is filed. Like the fiancée visa applicants described above, many H-4 visa holders will be leaving their social support workers behind, and will face critical barriers in accessing services as survivors of domestic violence. The consular interview may be one of the few opportunities for a derivative visa holder to obtain independent advice about her status, and thus a possible avenue for providing preventative advice.<sup>171</sup>

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

Another option for dependent visa holders would be to create a self-petition process similar to the VAWA self-petitions available for spouses of permanent residents and citizens. Although the spouses of H-4 visa holders have not crossed over the critical threshold of obtaining permanent legal status, the self-petition could place H-4 visa holders in deferred action and allow them to obtain work permits.

Calvo noted that early legislative proposals to address the monopoly of principals over the petitioning process “focused simply on removing the power to petition from the citizen or resident spouse and allowing the immigrant spouse to file a petition herself.”<sup>172</sup> This would be particularly helpful if the self-petition were conceived more expansively—that is, not merely for survivors of domestic violence. VAWA also created a waiver that allows spouses to petition to remove conditions on their green cards independently 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 USCIS officers to consider a range of circumstances for both 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

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<sup>171</sup> 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* *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 (2010).

<sup>172</sup> Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Dimishment, But Not Its Demise*, 24 *NILULR* 153 at 167.

beyond instances of domestic violence.

#### 4. Reforming Rules Governing Access to Documents and Clarification of Attorney-Client Relationship

Among the factors complicating the status (or change of status) desired by H-4 visa holders, one is the lack of clarity as to which party the lawyer represents. Shivali Shah suggests a requirement for immigration attorneys 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."<sup>173</sup>

Alternatively, she suggests that, where a dependent visa holder requires access to her immigration information, USCIS find alternative means for verifying status, such as using the agency database to obtain the principal's information.<sup>174</sup> 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 them to provide a name so that the agency can verify the information.

Even if alternative means for verifying immigration status were to be made available, the immigration bar must consider the obligations owed to dependents and consider verification from USCIS to be a rare, emergency alternative. 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.<sup>175</sup> The spouse's rights become last priority in this process, and currently laws and ethical rules do not sufficiently protect her interests. Shivali Shah notes that "battered H-4 wives routinely cite failure to

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<sup>173</sup> Shivali Shah, "Middle Class, Documented, and Helpless: The H-4 Visa Bind," in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 207.

<sup>174</sup> Shivali Shah, "Middle Class, Documented, and Helpless: The H-4 Visa Bind," in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 207.

<sup>175</sup> Shivali Shah, "Middle Class, Documented, and Helpless: The H-4 Visa Bind," in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 207 ("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.").

communicate and being stonewalled by their immigration attorneys”<sup>176</sup>—an observation which brings into focus the immigration bar’s complicity in the plight of dependent spouse visa holders.

*C. Long-Term Response: Independent Status for Spouses Without  
Victimhood*

A truly comprehensive state response is one that addresses the power disparity between principals and derivatives—and more fundamentally, husbands and wives—without resorting to state paternalism and without branding the spouse 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.”<sup>177</sup> Though dependent spouse visas do not inherently cause domestic violence or 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.”<sup>178</sup>

This approach would address the fundamental issues of subordination, in the state’s casting of family roles that is inherent in the petition process. Janet Calvo observes that “[a]llowing a spouse to take the initiative to petition to regularize her immigration status does not undermine the personal choice about family structure. It enhances the protection of women, rather than removing it. It 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. Further... since domestic violence is an extension of the notion of the coercive nature of marriage, violence is promoted by a lack of clear policy that the law will not enforce coercion of one spouse by another.”<sup>179</sup>

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<sup>176</sup> Shivali Shah, “Middle Class, Documented, and Helpless: The H-4 Visa Bind,” in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* (2007) at 207.

<sup>177</sup> Karyl Alice Davis, “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.

<sup>178</sup> Janet Calvo, “A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, But Not Its Demise,” 24 *N. Ill. U. L. Rev.* 153, 200 (2004).

<sup>179</sup> Janet Calvo, “A Decade of Spouse-Based Immigration Laws: Coverture’s

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.<sup>180</sup>

As Janet Calvo points out,

“this view, that the only appropriate policy objective is the family reunification benefit to a citizen or resident, is analogous to the coverture notion that the objective of a marriage was to promote a husband’s well being. Behind the family unity language lies the concept that the marital relationship needs to serve the life choices of one spouse at another’s expense and that the law will enforce the spousal control underlying those choices. It is reminiscent of other attempts to justify wife subordination in the guise of other rationales.”<sup>181</sup>

Furthermore, the spouse’s status as an “American-in-waiting” is not irrelevant, and her need to exercise independent rights at every stage of her life in the United States 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 towards citizenship.

There is already a precedent for this in existing immigration law: the E visa, 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 therefore would no longer be eligible for dependent status. As previously mentioned, the U.S. visa system has allowed E and L spousal visa holders to work,<sup>182</sup> and thus allow for

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Diminishment, But Not Its Demise,” 24 N. Ill. U. L. Rev. 153, 190.

<sup>180</sup> See, e.g. 65 Interpreter Release 1339 (1988) (citing one senator’s views as follows: “The only real purpose in giving the substantial immigration our laws provide to an alien spouse is to keep the family together... if the marriage just simply doesn’t work—for whatever reason—even when the alien spouse is not at fault, there is no longer a family to ‘keep together.’ Further, the immigration benefit which is lost to the alien spouse if the marriage fails, for whatever reason, was made available only to that person because of the marriage to an American citizen or resident. When that marriage no longer exists, there is no reasonable justification for the special immigration benefit to continue.”)

<sup>181</sup> Janet Calvo, “A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, But Not Its Demise,” 24 N. Ill. U. L. Rev. 153, 191.

<sup>182</sup> 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. Principal visa holders also perform comparable work, and work authorization for spouses. See Magdalena Bragun, Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign*



“dual career” spouses.<sup>183</sup> These visas, which do not force distinction between primary visa holders and dependent spouses, are seen as a preferable option for immigrants. While this visa is limited by a number of factors—entrants from specific countries, with certain amounts of wealth or employed by a U.S.-based companies—this visa structure could be replicated for benefit of not just derivatives, but 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 as observed, VAWA self-petitions and U visas are only available in limited circumstances. Even with these remedies carved out, many dependent visa holders do not have the freedom to live free of violence. Legal reforms have contemplated only the right of H-4 visa holders to work, and have no opportunity for them to seek independent status before or after 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 for those in failing or unhappy marriages of whatever kind. There is perhaps a greater 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 be able to do so without sacrificing their immigration status, access to their children, or their right to pursue a career. Immigration legal reform should include consideration for women’s rights outside their status of victims, and consider violence and dependence prevention as part of its visa system.

#### CONCLUSION

H-4 visa holders suffer—to different extents—under social patriarchy, forced into relationships of economic and legal dependence on their H1-B spouses under the current immigration system. At the same time, they also suffer state paternalism not just in the legal entrenchment of these dependent relationships, but also an alternative system where the state

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Women into Involuntary Housewives, 31 *Seattle U. L. Rev.* 937, 963-64.

<sup>183</sup> 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).

recognizes their independent rights only insofar as victims. The spousal visa construct allows the principal visa holder to serve as “cover” for his wife’s public participation and exercise of her right, and under certain circumstances, the state will substitute itself as “cover” for a dependent spouse where she proves she falls within a particular 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 they 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 visa holders who have independent control over their visa status. An independent visa status for all nonimmigrant spouses would remove the aspects of subordination from existing law, allowing principals and spouses to exercise their independent rights directly and unencumbered.