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ARTICLES

SHARED EXPERIENCES, DIVERGENT OUTCOMES:

AMERICAN INDIAN AND IMMIGRANT VICTIMS OF
DOMESTIC VIOLENCE

*Jacqueline P. Hand & David C. Koelsch**

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* Jacqueline P. Hand is a professor at the University of Detroit Mercy School of Law and directs the American Indian Law Center. David C. Koelsch is an assistant professor and director of the Immigration Law Clinic at the University of Detroit Mercy.

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I. UNLIKELY ALLIES? THE INTERSECTING LIVES OF AMERICAN INDIAN AND IMMIGRANT WOMEN

Perhaps no two groups within U.S. society share as little common history as American Indian and immigrant women.¹ American Indian and immigrant women differ, to varying degrees, along historical, geographic, linguistic, cultural and economic lines. American Indian women have existed as a distinct culture since before the arrival of any immigrants. Immigrant women often preserve their native cultures many years after entering the U.S. American Indian women and immigrant women often live in very different geographical worlds and do not often come into contact with each other. Each group may speak a native language and English as a primary or secondary language. And, statistically, American Indian women are less economically stable than immigrant women.²

Yet, for all of their differences, American Indian and immigrant women share certain characteristics with respect to the impact of domestic violence on their lives. For all American women, including American Indian and immigrant women, domestic violence crosses socio-economic and cultural lines and “poses the single largest health threat to adult women” in the United States, according to the U.S. Surgeon General, but is especially damaging to vulnerable segments of the population.³ Just as American Indian and immigrant women share in the prevalence of domestic violence so, too, do they share the leading tool at the federal level to address domestic violence. The Violence Against Women Act (VAWA) contains specific provisions to benefit both

1. Although statistical studies do not distinguish between American Indians living on reservations and off reservation, this paper will focus on the problems created by jurisdictional limitation on tribal sovereignty.

2. U.S. CENSUS BUREAU ET AL., AMERICAN COMMUNITY SURVEY FIELD REPRESENTATIVE'S MANUAL (2008); U.S. CENSUS BUREAU ET AL., INCOME, EARNINGS, AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 3 (2008); AMERICAN IMMIGRATION COUNCIL, IMMIGRANT WOMEN IN THE UNITED STATES: A PORTRAIT OF DEMOGRAPHIC DIVERSITY (JUNE 2008), <http://immigrationpolicy.org/just-facts/immigrant-women-united-states-portrait-demographic-diversity>.

3. Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 97 (2002).

American Indian and immigrant women.⁴ Among other provisions targeting domestic violence against American Indian women, VAWA requires personal protection orders issued by one tribal authority to be afforded comity by all others.⁵ VAWA provides specific forms of immigration relief to immigrant women victims of domestic violence and reflects Congressional appreciation for the increased vulnerability of this population.⁶ In fact, American Indian and immigrant women are the only groups of women in the United States separately targeted by VAWA.⁷

This article argues that, despite its promise, VAWA fails to adequately protect American Indian women from domestic violence and does little to further the prosecution of perpetrators of violence against American Indian women. In addition, while immigrant women fare much better than American Indian women under VAWA, VAWA is under-utilized and misapplied among immigrant women. In order to support such a sweeping indictment of VAWA, this article compares and contrasts the experiences of American Indian and immigrant women with domestic violence in addition to evaluating obstacles in each community to effectively address this problem. The article then explores the impact of VAWA on American Indian and immigrant women, and critiques the effectiveness of VAWA in serving the interests of these communities.

Finally, rather than dwell on the unfulfilled potential of VAWA for each community, the article suggests several short-term and systemic changes to aid in the prevention, deterrence and prosecution of domestic violence against these distinct populations. Each community – although very different – has something to offer the other in terms of how domestic violence is addressed. American Indian and immigrant women can work together – not only to make VAWA more effective but also to learn from each other's experiences in order to prevent, deter and prosecute domestic violence. However, laws can only do so much. While VAWA certainly could be improved via further amendments or better implemented, domestic violence rates for American Indian and immigrant women will likely only decline when it is no longer tolerated or excused within and outside of those communities. Despite some progress in recent years, policymakers and law enforcement officials still regard domestic violence as an unfortunate and intractable fact-of-life among American Indian and immigrant women. In keeping with the principle that thoughts become words which become actions, this article hopes to spur a shift in attitudes and actions regarding domestic violence directed at American Indian and immigrant women.

4. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3796gg (2000).

5. Violent Crime Control and Law Enforcement Act of 1997, 18 U.S.C. § 2265 (2000).

6. Orloff & Kaguyutan, *supra* note 3, at 95, 109-10.

7. 42 U.S.C. § 3796gg. Title VIII of VAWA is devoted exclusively to immigrant women and Title IX targets domestic violence against American Indian women.

II. COMPARISON OF DEMOGRAPHIC TRENDS AND DOMESTIC VIOLENCE

A. American Indian Women

American Indian women experience domestic violence more frequently than other women in the U.S.⁸ American Indian and Alaska Native women are raped at nearly twice the rate of White and African-American women and are stalked at more than twice the rate of Whites and African-Americans.⁹ In fact, physical assaults, most of which are domestic in nature, are higher among American Indian women than among any other demographic group in the United States¹⁰ Nearly 40-percent of American Indian women report that they have been victims of domestic violence.¹¹

While rape is, of course, not always perpetrated within the context of domestic violence, the frequency and lack of consequences of rapes of American Indian women are staggering. According to the U. S. Department of Justice, one-third of American Indian women will be raped in their lifetimes.¹² Yet even that percentage, striking as it is, may undercount the extent of domestic violence and rape against American Indian women: many American Indian women do not trust non-Indian researchers and are unwilling to discuss private matters, such as domestic violence and, in particular, rape, openly.¹³

The unwillingness of American Indian women to discuss rape and domestic violence openly has been recognized as a problem for more than two decades and has triggered numerous studies, surveys and reports by the U.S. Department of Justice¹⁴ and by non-governmental organizations such as Amnesty International.¹⁵ These organizations use varying methodologies

8. PATRICIA TJADEN & NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 26 EXHIBIT 6 (U.S. Dep't of Justice, 2000) [hereinafter EXTENT, NATURE AND CONSEQUENCES].

9. Edward Reina, Jr., Domestic Violence in Indian Country: A Dilemma of Justice, 5 Domestic Violence Report 33, 47 (Feb./Mar. 2000).

10. PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 EXHIBIT 7 (U.S. Dep't of Justice ed., 2000) [hereinafter FULL REPORT].

11. EXTENT NATURE AND CONSEQUENCES, *supra* note 8, at 26.

12. FULL REPORT, *supra* note 10, at 22.

13. Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 189 (2008).

14. *See e.g.* LAWRENCE A. GREENFIELD & STEVEN K. SMITH, AMERICAN INDIANS AND CRIME (1999); STEVEN W. PERRY, AMERICAN INDIANS AND CRIME 1992-2002 (2004); FULL REPORT, *supra* note 10, at 22.

15. *See* AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA, (2007) (focusing research on three areas: Alaska, Oklahoma and the Standing Rock Sioux Reservation in North and South Dakota).

ranging from mechanically randomized phone calls to the entire U.S. population¹⁶ to interviews focused specifically on American Indians.¹⁷ While this mode of data collection generates some differences in the specifics, there is unquestionably a consensus on the seriousness and severity of domestic violence. A major discrepancy with these statistics is that they generally do not distinguish between American Indians living in the broader community and those living in Indian Country.¹⁸ In Census 2000, 2,475,956 persons were designated as American Indian.¹⁹ These people were self-identified so that these numbers are not necessarily “limited to federally or state-recognized tribes or actual tribal enrollment.”²⁰ In 2000, roughly 65 percent of Indians lived outside American Indian areas while 35 percent lived in areas of tribal control.²¹ It is unclear how the broad statistics cited earlier in this section, which do not differentiate between American Indian women on and off the reservation, apply to each of these sub groups. Because it is unclear how statistics regarding domestic violence apply to each sub group of the American Indian population, these two populations present quite different challenges to policy makers who want to decrease the domestic violence to which Indian women are subjected. Women in Indian Country face the problem of a judicially limited jurisdiction which has put them in a clear, if politically difficult, solution. Not surprisingly, this has directed the majority of scholars to focus on women who reside in Indian Country. This analysis is no exception.²² Before reasonable proposals to provide added protection for non-reservation American Indian women can be developed, further research is needed to establish why the victimization rate for such women is twice that of other groups.

B. *Immigrant Women*

It is clear that immigrant women face significant obstacles in their daily lives. First-generation immigrant women comprise 12-percent of all women in the United States.²³ Generally, immigrant women are older, less-educated, and

16. See EXTENT NATURE AND CONSEQUENCES, *supra* note 8, at iii (the National Violence Against Women Survey was a national telephone survey consisting of interviews with a representative sample of 8000 U.S. women and 8000 U.S. men).

17. AMNESTY INTERNATIONAL, *supra* note 15, at ii.

18. See 18 U.S.C. § 1151 (2000) (explaining that Indian Country includes land on the reservation, trust land and “dependent Indian communities”).

19. U.S. CENSUS BUREAU, THE AMERICAN INDIAN POPULATION (September 2001), <http://www.census.gov/prod/2001pubs/mso01aian.pdf>.

20. PERRY, *supra* note 14, at 1.

21. STELLA U. OGUNWOLE, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 14 (U.S. Census Bureau ed., 2006).

22. See analysis in text accompanying footnotes 68 through 92 *infra*.

23. JEANNE BATALOVA, Migration Pol’y Inst., IMMIGRANT WOMEN (2009) *available at* <http://www.migrationinformation.org/Feature/display.cfm?id=763>.

less likely to be employed than U.S.-born women.²⁴ Furthermore, immigrant women who are employed earn 14-percent less than their U.S.-born counterparts.²⁵ Immigrant women also fare worse than immigrant men on several key demographic indicators: while they are slightly more likely to be employed (albeit in jobs in which they are paid less than men), more immigrant women live in poverty, and immigrant women are twice as likely to be widowed, divorced or separated as are immigrant men.²⁶

In addition to the economic and social challenges facing immigrant women, empirical research consistently demonstrates that immigrant women married to U.S. Citizens and Lawful Permanent Residents are especially vulnerable to domestic abuse.²⁷ Indeed, the lifetime prevalence of intimate partner violence among Latina immigrant women exceeds the 21 percent prevalence in the general population by almost twofold.²⁸ Immigrant women are not only more likely to experience abuse but they also suffer more than the general female population from domestic violence. Immigrant women tend to stay longer in abusive relationships, suffer more severe forms of abuse, and sustain more devastating physical and psychological damage compared to U.S.-born victims of domestic violence.²⁹

Several factors explain the higher rates of domestic violence experienced by immigrant women. Immigrant women are a rich tapestry of different cultures, languages and norms of behavior and, as a result, it is impossible to make sweeping generalizations applicable to the entire group. In addition, immigrant women have various forms of immigration status, including undocumented, temporary student- or employment-based visa holders, Lawful Permanent Residents and U.S. Citizens. Immigration status alone may render certain immigrant women more likely to be victimized by domestic violence than other immigrant women.³⁰ Women who immigrate to the United States as highly-sought employees of a U.S. company may be less likely to be victims of domestic violence because their immigration status in the United States is not dependent on a domestic relationship and immigrant women with employment-based visas are, in general, more highly-educated and older than women who immigrate to join a fiancé or husband sponsor.³¹ In contrast, younger, less-educated women are statistically more likely to be victims of domestic

24. *Id.*

25. *Id.*

26. *Id.*

27. GISELLE HASS, NAWAL AMMAR, & LESLYE ORLOFF, BATTERED IMMIGRANTS AND U.S. CITIZEN SPOUSES (2006), <http://legalm.convio.net/site/DocServer/dvusc.pdf?docID=314> (citing H.R. REP. NO. 103-935).

28. Giselle Hass, Mary Ann Dutton, & Leslye E. Orloff, *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, *Domestic Violence: Global Responses*, 7 INT'L REV. OF VICTIMOLOGY (Special Issue) 93, 96, 103 (2000).

29. *Id.* at 2.

30. *Id.*

31. American Immigration Council, *supra* note 2.

violence.³² For example, immigrant women from India are highly educated and are present in the United States on employment-based visas in predominantly professional positions while immigrant women from Mexico are statistically less-educated and are present in the U.S. based on family ties and employed in lesser-skilled positions.³³

Despite their differences in education, income-earning capacity, and immigration status, immigrant women share certain common attributes. First, unlike U.S.-born women, many women who grew up in a foreign country and come to the United States as adults often struggle with unique cultural, language, economic, and informational challenges, which can restrict their ability to recognize and terminate abusive relationships.³⁴ For example, limited English proficiency may prevent an immigrant woman from reporting domestic abuse to social service agencies or the police.³⁵ In addition, as noted by Deanna Kwong in a study of immigrant victims of domestic violence, cultural norms legitimizing “disciplinary” beatings of women by their husbands often make finding sympathy and support in a community – and even in one’s own family – problematic.³⁶

The interaction of these factors is illustrated by the story of Privya, a university-educated woman from India who came to the United States to join her husband, a Lawful Permanent Resident employed by a U.S.-based multinational corporation.³⁷ Privya’s husband refused to allow her to leave the house, to have visitors, or to work, even though she was highly educated. He disconnected the television and insisted that she cook and clean all day while he was at work. When the house was not cleaned or meals not prepared to his satisfaction, he beat her and raped her repeatedly. Privya tried to get help from her family in India but they were afraid of approaching her husband’s family because of social norms; they were from a slightly lower caste and they feared that her husband would divorce her, bring shame upon her family and cause a substantial dowry to be returned to her husband’s family. She contacted family members in the United States and begged for their help but they, too, refused to intervene because they were in the United States on expired visas and feared Privya’s husband would turn them in to government officials if they intervened.

Privya was only able to get help when she locked herself out of the house one day while taking out the garbage and had to ask a neighbor for help. The

32. *Id.*

33. *Id.*

34. Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137, 139-41 (2002).

35. Carolyn Ham, *Reducing Language Barriers to Combating Domestic Violence: The Requirements of Title VI*, http://onlineresources.wnyc.net/pb/orcdocs/LARC_Resources/LEPTopics/DV/REDUCINGLANGUAGEBARRIERSTOCOMBATINGDOMESTICVIOLENCE.pdf.

36. Kwong, *supra* note 34, at 140.

37. Privya is a client of the Immigration Law Clinic at the University of Detroit Mercy School of Law. Her name and identifying information have been altered for her protection.

neighbor, a U.S.-born citizen, struck up a friendship with Privya and, after several weeks, Privya confided in her. The neighbor called the police and Privya's husband was arrested and prosecuted for domestic violence. He managed to enter a plea to have the conviction reduced to disorderly conduct and avoid immigration consequences. Privya was placed in a domestic violence shelter, where she endured a form of culture shock because she was the only immigrant woman in the shelter. However, Privya received counseling and legal services and eventually was able to break free from her abusive husband and gain independent immigration status in the United States through a U Visa. Privya is a success story: two years after her husband's arrest, she now owns and operates a business designing clothes and has moved into her own apartment.

Abused immigrant women face a number of unique legal hurdles to counter the devastating effects of physical and psychological abuse, which makes it especially difficult for these women to leave violent relationships. U.S. immigration laws and regulations, which give U.S. Citizens and Lawful Permanent Residents broad discretion over the immigration status of their immediate relatives, play a crucial role in keeping battered immigrant women with their abusive husbands.³⁸ In an abusive marriage, the control inherent in the immigration laws and regulations becomes a powerful tool of intimidation and coercion used by U.S. Citizen and Lawful Permanent Resident husbands against immigrant women, which causes these women not to report domestic violence. In the name of promoting family unity, wives of U.S. Citizens and Lawful Permanent Residents are provided a fast track to permanent residency, citizenship, and other immigration benefits.³⁹ Yet, at the same time, when a marital relationship turns violent, these same immigration laws can facilitate abuse, because they place control over the legal status of non-citizen spouses squarely in the hands of their U.S. Citizen or Lawful Permanent Resident spouses.⁴⁰

For example, the Immigration and Nationality Act (INA) gives nearly complete control over the immigration status of immigrant women to their U.S. Citizen or Lawful Permanent Resident husbands.⁴¹ In a typical situation, a U.S. Citizen husband petitions for his wife by filing an I-130 Petition for Alien

38. H.R. REP. NO. 103-395, at 26-27 (1993) (noting that “[d]omestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen[']s legal status depends on his or her marriage to the abuser”).

39. 8 U.S.C. § 1430(a) (2006) (for example, spouses of a U.S. citizen may petition for naturalization after only three years of continuous residence in the U.S. instead of the usual five); *Id.* § 1151(b) (moreover, spouses of U.S. citizens are not subject to the annual numerical limits on immigrant visas, which means that they do not have to go through a long waiting period before a visa number becomes available).

40. Uma Narayan, “Male-Order” Brides: *Immigrant Women, Domestic Violence and Immigration Law*, 10 *Hypatia* 104, 108-09 (Winter 1995).

41. Kavitha Shreeharsha, Immigration Policy Center, Reforming America's Immigration Laws: A Woman's Struggles 8 (June 2010) available at http://www.immigrationpolicy.org/sites/default/files/docs/A_Womans_Struggle_062810.pdf.

Relative and she files an I-485 Application for Lawful Permanent Residence.⁴² At any time before, during and after adjudication of the I-130 and I-485 by U.S. Citizenship and Immigration Services (USCIS), the husband may revoke the application without any explanation or cause.⁴³ If the I-130 is revoked, the petition is automatically terminated and the woman is advised that she must depart the United States within thirty days or she will be placed in removal proceedings before the U.S. Immigration Court.⁴⁴ In addition, after the I-485 application for an immigrant woman is approved, she becomes a Conditional Lawful Permanent Resident.⁴⁵ Then, after two years, she and her husband must file an I-751 Petition to Remove Conditions on Lawful Permanent Residency.⁴⁶ Again, the woman needs her husband's cooperation to remove the conditions on her Lawful Permanent Residency.⁴⁷ To obtain legal employment, an immigrant woman must obtain an employment authorization document from USCIS.⁴⁸ The issuance of an employment authorization document is tied to the immigrant's legal status which, in turn, also depends on the cooperation of the U.S. Citizen or Lawful Permanent Resident spouse.⁴⁹

U.S. immigration laws and regulations conflict with cultural and religious norms that many immigrant women internalize before coming to the United States. These conflicting ideas often keep immigrant women in abusive relationships.⁵⁰ As noted above, it is dangerous to make broad assertions regarding the cultural legacy of women immigrants from many diverse parts of the world and so, too, it is difficult to portray immigrant cultures as less respectful of women than is U.S. culture. Yet, a few general points can be made. First, social customs and religious beliefs of many non-Western cultures may tend to minimize the impact of domestic violence and place women subordinate to their husbands.⁵¹ Second, an immigrant woman's native culture may value familial unity more than her individual dissatisfaction with the marital relationship.⁵² If that is the case, a battered woman who leaves an abusive marriage may be ostracized by her extended family as well as by the

42. 8 C.F.R. §§ 204.1(a)(1), 245.2 (2010).

43. *Id.* § 1205.1(a)(3).

44. *See* Cook, General Counsel, Legal Opinion (Jan. 9, 1990), *reprinted in* 67 Interpreter Releases 153, 168-70 (Feb. 5, 1990).

45. Immigration and Nationality Act § 216(d), 8 U.S.C. 1186a (2000) [hereinafter INA].

46. 8 C.F.R. § 216.4(a)(1) (2010).

47. As noted below, the I-751 Petition to Remove Conditions on Permanent Residency allows women who have divorced and/or been victims of abuse during the two-year period to file self-petitions but a self-petition requires a great deal of documentary evidence and USCIS reviews self-petition I-751s with a great deal of skepticism.

48. 8 C.F.R. § 274a.2(b)(1)(i)(B) (2010).

49. Orloff & Kaguyutan, *supra* note 3, at 98.

50. Hass, Ammar & Orloff, *supra* note 27, at 5-6.

51. *See Id.*

52. *Id.* at 6.

people and institutions of her culture.⁵³ Third, an immigrant woman's culture or religion often requires strict adherence to traditional gender roles.⁵⁴ Keeping a woman in the home in a traditional role of a homemaker can increase her isolation from potential sources of support.⁵⁵ Similarly, a cultural requirement that a woman must assume the traditional role of a housewife upon marriage may cut short her career aspirations, increase her economic dependence on her spouse, and lower her sense of self-worth or value independent of her husband.⁵⁶ The cultural baggage that some immigrant women may bring with them to the United States can exacerbate the already daunting challenge of escaping a marriage poisoned by domestic violence.⁵⁷

An immigrant woman's lack of proficiency in the English language also makes escaping a violent relationship more difficult. First, immigrant women lacking English proficiency may find themselves completely dependent on their U.S. Citizen or Lawful Permanent Resident spouses in their daily functions.⁵⁸ A controlling husband may intentionally sabotage an immigrant woman's attempts to learn English in order to increase her isolation and dependence.⁵⁹ Similarly, an abusive spouse may also restrict his immigrant wife's pursuit of job training or education in order to further erode her independence.⁶⁰

Limited ability to communicate in English drastically reduces a battered woman's options for getting help from the U.S. legal system or social service organizations.⁶¹ This problem is exacerbated by the fact that many community and government programs that help domestic violence victims explicitly try to limit their efforts to U.S.-born, English-speaking women.⁶² Finally, limited English proficiency reduces an immigrant woman's chances of finding stable employment and achieving economic independence, further minimizing the likelihood that she will leave an abusive relationship.⁶³

53. Edna Erez & Carolyn Copps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, 4 *Western Criminology Review*, 155, 158 (2003); *See also Id.*

54. Hass, Ammar & Orloff, *supra* note 27, at 6.

55. *See* Erez & Hartley, *supra* note 53, at 157-58.

56. *Id.* at 157.

57. *Id.* at 156-58.

58. *See* Kwong, *supra* note 34, at 141.

59. *Id.*

60. *Id.* at 142.

61. *Id.*

62. DEBBIE LEE, ACCESSIBILITY: SERVING A CHANGING COMMUNITY, DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN, (Deana L. Jang et al. eds., 2d ed. 1997) (noting a shortage of domestic violence support organizations for immigrant women disproportionate to their representation in the U.S. population).

63. Jen'nan Ghazal Read & Philip N. Cohen, *One Size Fits All? Explaining U.S.-born and Immigrant Women's Employment across 12 Ethnic Groups*, 85 *Soc. Forces* 1713, 1714 (2007).

These limited language skills also lead to an informational handicap experienced by many battered immigrant women due to limited knowledge of and misconceptions about the workings of the American society and, in particular, its legal system.⁶⁴ For example, an immigrant woman may fear contacting the police because of negative experience with police corruption or misconduct in her home country or a concern that the police may contact the U.S. Department of Homeland Security.⁶⁵ An immigrant woman may also be unfamiliar with personal protection orders, temporary restraining orders and other judicial means to offer protection if these means did not exist or were difficult to obtain in her home country. Similarly, immigrant women may be unaware of the services offered by victim advocates and domestic violence shelters to access the judicial system.

For example, Olga, an undocumented immigrant woman from Bulgaria was in an abusive relationship for over ten years and had a child with her abusive undocumented boyfriend.⁶⁶ Her daughter was a U.S. Citizen by birth and Olga feared reporting the abuse to the police because her boyfriend threatened that he would have her deported and she would never see her daughter again. She only managed to break free from her abuser when he beat her while they were driving in a public place and a driver in a nearby car called the police and followed them until the police arrived. Her boyfriend was prosecuted and eventually deported and Olga was able to obtain immigration status through a U Visa petition. Olga was one of the “fortunate” undocumented women who experienced abuse in a public place and a quick-thinking bystander acted to help her.

III. FAILINGS OF CRIMINAL JUSTICE SYSTEM FOR AMERICAN INDIAN WOMEN

Unlike many of the world’s cultures, American Indian tribes treat violence against women as an aberration to be rectified by the extended family and the community as a whole.⁶⁷ While it is necessarily an oversimplification to talk about tribes as if they are a homogenous unit, it seems clear that colonization introduced substantial changes from traditional tribal cultures in which women were treated as “life givers and life sustainers,” often with the power to choose and remove leaders.⁶⁸

64. Kwong, *supra* note 34, at 143.

65. *Id.* at 142-43.

66. Olga is a client of the Immigration Law Clinic at the University of Detroit Mercy School of Law. Her name and identifying information have been altered for her protection.

67. See generally Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN’S L. REV. 69 (1995); James W. Zion & Elsie B. Zion, *Hozho’ Sokee’ – Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L. J. 407 (1993).

68. Michelle Tirado, *Reclaiming Their Status: Native Women and Domestic Violence*, 21 AM. INDIAN REP. 10, 10 (2005); See generally, LAURA F. KLEIN & LILLIAN A. ACKERMAN,

A full discussion of the multiple changes forced on tribes since European contact is obviously far beyond the scope of this paper, but that is not necessary to see that the protection offered to American Indian women under the current criminal justice system is completely inadequate.⁶⁹ Our discussion focuses on the deficiencies of the system operating in Indian Country on lands subject to tribal governance.⁷⁰ This problem was created by events which began in the nineteenth century and has accelerated in the last three decades. An Indian tribe's authority and power to govern is inherent by virtue of its sovereignty and remains undiminished unless either of two events occurs.⁷¹ The first diminishment is created when a tribe voluntarily gives up some aspect of sovereignty.⁷² The second diminishment operates if Congress acts affirmatively to divest the tribe of a particular aspect of sovereignty.⁷³ The second diminishment is well exemplified by the Major Crimes Act, which began the erosion of tribal judicial power.⁷⁴ Under this statute, Congress removed tribes' jurisdiction over murder, kidnapping and eight other major crimes and placed them in the exclusive jurisdiction of the federal criminal system.⁷⁵ Jurisdiction was further limited by Congress in 1968 by a law which severely limited the criminal penalties which could be imposed by tribal courts to imprisonment of no more than six months and \$500 in fines, limits which were later increased to one year in jail and \$5000.⁷⁶

In 1978, the Supreme Court delivered a much more severe blow to the ability of a tribe to protect its people within its own territory. In *Oliphant v. Suquamish Indian Tribe*,⁷⁷ the U.S. Supreme Court held that despite the fact that Congress had not acted to so limit tribal jurisdiction, the judiciary could also divest the tribes of a portion of their power if such sovereignty was

WOMEN AND POWER IN NATIVE NORTH AMERICA (Laura F. Klein & Lillian A. Ackerman eds., 1995).

69. See notes and accompanying text, *supra* notes 8-22 (citing statistics of domestic violence effecting American Indian women).

70. The research on domestic violence against American Indian victims does not differentiate between women living on the reservation and those living elsewhere. Jurisdictional issues particularly affect women in Indian Country.

71. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942).

72. *See Id.*

73. *Id.*

74. 18 U.S.C. § 1153(a) (2006).

75. *Id.* (providing: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian Country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States").

76. See 25 U.S.C. § 1302(7) (2000).

77. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

“inconsistent with their status” as domestic dependent sovereigns.⁷⁸ In *Oliphant*, the Court divested the tribes of the power to prosecute non-Indians for any crime, including misdemeanors, such as most domestic violence cases, leaving federal action as the only option.⁷⁹ Later, the Supreme Court expanded the coverage of the *Oliphant* decision to provide that tribes could not prosecute members of other tribes. Eventually, that expansion was removed by Congress, but the underlying holding of the *Oliphant* decision still stands.⁸⁰

The practical impact of this defective legal structure, combined with limited resources on the part of all the players, is often to leave Indian women defenseless against domestic violence. As a result, tribes can exercise jurisdiction over domestic violence committed by American Indians against one another,⁸¹ yet this is of very limited impact because domestic violence is most often perpetrated by non-Indians. In fact, non-Indians commit 75 percent of the rapes of Indian women,⁸² none of which can be prosecuted within the community.⁸³

The one-two punch of the Major Crimes Act and the *Oliphant* decision leaves American Indian women in Indian Country substantially unprotected because they must rely upon federal prosecutors and the Federal Bureau of Investigations (FBI) to investigate and prosecute crimes of domestic violence in Indian Country.⁸⁴ Unfortunately, such crimes must compete with many other serious crimes and, as such, are often not a high priority for federal law enforcement officials.⁸⁵ This does not reflect a lack of concern for victims of domestic violence,⁸⁶ rather the fact that resources are limited and often stretched too thin.⁸⁷ In addition, complex jurisdictional issues, such as the status of victim and perpetrator and the distance of the location of the crime from the

78. *Id.* at 208.

79. *Id.* at 195, 212; Michael Riley, *Promises, Justice Broken*, The Denv. Post (Nov. 21, 2007), http://www.denverpost.com/ci_7429560.

80. 25 U.S.C. § 1301(2) (2000).

81. *Id.*

82. GREENFIELD & SMITH, *supra* note 14, at 8.

83. 25 U.S.C. § 1302(7) (2000).

84. Riley, *supra* note 79, at 4.

85. *Id.* (reporting that, between 1997 and 2006, federal prosecutors declined to prosecute nearly two-thirds of cases stemming from alleged criminal acts in Indian Country, which is more than twice the rejection rate for all crimes prosecuted by the U.S. government).

86. See Christopher B. Chaney, *Victim Rights in Indian Country – an Assistant United States Attorney Prospective*, 51 U.S. ATTYS’ BULL. 36 (2003).

87. See Letter from James S. Richardson Sr., Federal Bar Association to Senate Indian Affairs Committee (July 2, 2008) available at <http://www.fedbar.org/Advocacy/Testimony-and-Letters-to-Congress/Indian-Law/Draft-Bill-Concerning-Law-Enforcement-Issues.aspx?FT=.pdf>.

nearest U.S. Attorneys office, make federal prosecution cumbersome and unappealing.⁸⁸

The complex jurisdictional puzzle is further muddled by Public Law 280. This statute allows states to assume the federal jurisdictional role over crimes committed by non-Indians against American Indians in Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin in favor of state prosecution.⁸⁹ The enactment of Public Law 280 has had the naive consequence of discouraging the development of tribal legal institutions, including courts and police forces despite the fact that it did not inhibit tribal jurisdiction over Indians.⁹⁰ Like their federal brethren, state and local prosecutors often do not have the resources or political will to obtain convictions for non-Indians who commit domestic violence against or rape American Indian women.⁹¹ For example, in 2006, federal and state prosecutors only filed 606 criminal cases involving alleged crimes committed by non-Indians in Indian Country, despite the existence of 560 tribes within the United States.⁹² The end result of Public 280 is an uneven playing field with respect to prosecutions of domestic violence, which leaves American Indian women with limited protection in their own communities.

IV. FAILINGS OF IMMIGRATION SYSTEM FOR IMMIGRANT WOMEN

Immigrant women are vulnerable to the misuse of immigration laws by their spouses.⁹³ Marriage-based immigration laws continue to have a disproportionately adverse effect on women in an era of relative gender neutrality. For example, a U.S. Citizen or Lawful Permanent Resident husband retains the power to determine if and when his spouse will receive or retain a particular benefit under the INA at multiple stages in the immigration process.⁹⁴ Immigration laws provide an opportunity for an abusive spouse, fiancée or partner to exercise this discretionary power to keep an immigrant woman in an abusive relationship or to discourage her from reporting abuse.⁹⁵

88. See Matthew L.M. Fletcher, American Constitution Society Issue Brief, Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty (2009) available at <http://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf>.

89. 18 U.S.C. § 1162(a) (2001).

90. Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 705 (2006).

91. *Id.* at 701; see also N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. Times, Aug. 11, 2008, at A17 available at <http://www.nytimes.com/2008/08/11/opinion/11duthu.html>.

92. Duthu, *supra* note 91.

93. Orloff & Kaguytan, *supra* note 3, at 98 n. 5 (quoting Callie Marie Rennison & Sarah Welchans, Intimate Partner Violence, Bureau of Justice Statistics: Special Report, "reporting that 85% of victimizations by intimate partners in 1998 were committed against women").

94. 8 C.F.R. § 216.4(a)(6) (2010).

95. See analysis in text accompanying footnotes 23 to 57 *supra*.

First, in the initial phase, immediately after arrival in the United States, an abusive spouse can threaten to not file or complete the I-130 Petition for Alien Relative, withdraw the petition at any time before it is approved or simply fail to appear for the mandatory interview at a USCIS office (a prerequisite for the petition's approval).⁹⁶ This is not an unusual situation. In marriages where an abusive husband controls the immigration status of the victim, applications for Lawful Permanent Resident status are either never filed or are abandoned in 72 percent of cases.⁹⁷

The control exerted by a sponsoring husband over an immigrant woman is exacerbated by a law intended to combat marriage fraud, the Immigration and Marriage Fraud Amendments (IMFA).⁹⁸ The IMFA provides that, when based on marriage, lawful permanent residency is granted to immigrant spouses conditionally for two years.⁹⁹ Before the second anniversary of the immigrant's admission to Lawful Permanent Resident status, the couple must file a joint petition and appear for a final interview to remove conditions.¹⁰⁰ Although the legislation is aimed at marriage fraud, the law has unintended negative consequences for abused immigrant women. The U.S. Citizen or Lawful Permanent Resident husband retains control over his wife's status as a Conditional Lawful Permanent Resident even after the initial grant of permanent residency.¹⁰¹ In addition, even after full Lawful Permanent Resident status is granted, an abusive husband may withhold the documents his wife needs to adjust or prove status.¹⁰² As a result of the structure of the adjustment of status process, the INA and IMFA inadvertently enable an abusive husband to constrain his wife from taking steps to escape or report abuse, on the peril of losing her Conditional Lawful Permanent Resident status and any prospect of acquiring full Lawful Permanent Resident status.

Because the INA makes U.S. Citizens or Lawful Permanent Residents responsible for formalizing the immigration status of their spouses, their refusal or failure to take these steps within the period required by law renders their foreign-born wives removable.¹⁰³ Once his wife is out of status and subject to removal, the ability of the U.S. Citizen or Lawful Permanent Resident husband to exploit federal laws to further isolate the victim and control her actions expands dramatically. First, the abuser may capitalize on his wife's lack of immigration status by threatening to report her to Immigration and Customs Enforcement (ICE) or to initiate deportation proceedings on a false claim of

96. 8 U.S.C. § 1186(a)(1) (2000); *Id.* § 1255(e)(3).

97. Hass, Ammar, & Orloff, *supra* note 27, at 4.

98. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, §2, 100 Stat. 3537, (1986); 8 U.S.C. § 1186a(g) (2000).

99. INA § 216(d), 8 U.S.C. 1186a (2000).

100. 8 U.S.C. § 1186a(c) (2000).

101. *Id.*

102. Hass, Ammar, & Orloff, *supra* note 27, at 4.

103. 8 U.S.C. § 1186a(c)(2)(A); *Id.* § 1227(a)(1)(D).

marriage fraud.¹⁰⁴ Second, the fear of detention and removal deters the victim from seeking protection from the criminal justice system.¹⁰⁵ The lack of lawful immigration status also substantially diminishes the ability of battered women to utilize social support and counseling services, such as women's shelters,¹⁰⁶ which is further complicated by the fact that governmental and community organizations are often reluctant to expend scarce resources on "illegal" women, who are seen as outsiders.¹⁰⁷

The story of Natalya, a woman from Ukraine who immigrated to the United States with her teenage son as a result of an engagement to a U.S. citizen illustrates this stark reality.¹⁰⁸ Natalya holds a university degree and was employed as an accountant in Ukraine and did not come to the United States due to economic need. Her husband visited her and her son in Ukraine six times before he proposed to her. Soon after she arrived in North Carolina on a K-1 Fiancée Visa, she and her husband were married and he promised to file the I-485 Application for Adjustment of Status in order for her and her son to gain Conditional Lawful Permanent Resident status. Natalya soon realized that her husband was not the man he appeared to be when he visited Ukraine. He had several unlicensed weapons in the house, including an assault rifle and machetes, and he installed cameras inside the house to remotely watch her and her son. Natalya's husband told her that he could have her son deported within a few hours if she did not obey his every command, including to clean the house and to have sex with him when and where he wanted it. He threatened her that he would not file the I-485 unless she "behaved". Natalya's confidence eroded and her sense of self-worth was degraded. She also learned that he took pain pills every day and that, while he was not disabled, he pretended to be disabled in order to collect Social Security disability payments.

The situation further deteriorated after Natalya's husband and her son got into a fight during which her husband punched her son in the face and threatened to kill him. The neighbors heard the commotion and called the police. When the police arrived, they took statements from everyone and noticed the unlicensed weapons. The police also ran a criminal record check on Natalya's husband and learned that he had been arrested and convicted for three prior domestic assaults against former girlfriends. When her husband was arrested Natalya and her son were taken by the police to a domestic violence shelter. The prosecutor declined to press charges and soon thereafter the shelter

104. Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 271 (2000) (finding that 21.7% of battered Latina immigrants in the Washington, D.C. area listed fear of being reported to immigration as the primary reason for remaining in an abusive relationship).

105. Shreeharsha, *supra* note 42, at 10.

106. *See also* Hass, Ammar, & Orloff, *supra* note 27, at 2.

107. Lee, *supra* note 62, at 20.

108. Natalya is a client of the Immigration Law Clinic at the University of Detroit Mercy School of Law. Her name and identifying information have been altered for her protection.

advised Natalya and her son that they could not provide shelter to persons who were not Lawful Permanent Residents or U.S. Citizens. Natalya and her son then moved to Michigan where they obtained Lawful Permanent Resident status only by filing an I-360 VAWA Petition and documenting the mental and physical abuse she and her son received.

In this way, immigration laws allow an abusive husband to harness the threat of removal proceedings to isolate his immigrant wife and further erode her ability to resist abuse or leave the relationship. Abuse of the control given by immigration laws to U.S. Citizens and Lawful Permanent Residents over the immigration status of their wives is an extremely important contributor to victimization of foreign-born women by their husbands and partners.

V. VAWA TO THE RESCUE? IMPACT ON AMERICAN INDIAN AND IMMIGRANT WOMEN

Until relatively recently, the U.S. legal system often viewed domestic violence as a matter of the private realm not suitable for active governmental regulation.¹⁰⁹ By the 1990s, Congress began to respond to the growing societal concern about violence against immigrant women.¹¹⁰ In 1994, Congress enacted the original Violence Against Women Act (VAWA I).¹¹¹ VAWA I contained specific provisions aimed at combating and deterring domestic violence against all women in the United States but, in particular, domestic violence against American Indian and immigrant women.¹¹² Those targeted provisions, while well-intended, have had a mixed legacy on each group and, in general, VAWA I and its progeny have proven less than fully successful in addressing domestic violence against immigrant women while less so for American Indian women victims of domestic violence.

A. *VAWA Makes No Fundamental Change for American Indian Women*

VAWA I contains provisions aimed directly at the pernicious nature of domestic violence against American Indian women: “[a]ny protection order issued . . . by the court of one . . . Indian tribe . . . shall be accorded full faith and credit by the court of another . . . Indian tribe . . . and enforced . . . as if it were the order of the enforcing . . . tribe.”¹¹³ Nevertheless, it has a relatively small impact on the broader problems with controlling domestic violence in Indian Country. Under VAWA I, this new “one order” system was intended to

109. HARRY KRAUSE & DAVID MEYER, *FAMILY LAW IN A NUTSHELL* 97-98 (Thomson West eds., 4th ed. 2003).

110. Orloff & Kaguytan, *supra* note 3, at 105.

111. Violence Against Women Act, Pub.L.No. 103-322, §§ 40001- 40703, 108 Stat. 1902-1955 (1994) (codified as amended in scattered sections of 8, 18 & 42 U.S.C.).

112. *Id.* § 2001 (b).

113. Violence Against Women Act, 18 U.S.C. § 2265 (1994).

protect American Indian women throughout Indian Country.¹¹⁴ VAWA was amended in 2000 to strengthen the authority of tribes to prevent domestic violence.¹¹⁵ Congress specified that “tribal court[s] shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms”¹¹⁶

Despite these provisions requiring cross recognition of personal protective orders, VAWA leaves many gaps. Tribes generally adhere to the VAWA mandate to extend full faith and credit to protection orders issued by other tribes yet the lack of jurisdiction over non-Indians prohibits them from enforcing orders against non-Indians even when issued by a state court.¹¹⁷ Similarly, while states are obligated under VAWA to enforce personal protection orders issued by tribes, many state courts fail to do so, leaving a woman who moves off the reservation unprotected.¹¹⁸ Perhaps the most important contribution of VAWA comes not from its jurisdictional provisions but from financial grants and other infrastructure development mechanisms for which VAWA provides. This is particularly true for the 2005 Act reauthorizing VAWA, which for the first time provided Title IX, solely devoted to the protection of American Indian women.¹¹⁹ Under the 2005 reauthorization of VAWA, the Office on Violence Against Women has begun regular consultations with tribes, as well as seeking recommendations on the administration of grant funds and the development of programs from tribal leaders.¹²⁰ In addition, VAWA contains a mandate for research to establish baseline data on domestic violence, dating violence, assault, stalking and murder of native women and projecting the incidence of injury and homicide and the health expenses which these require. While these are of some benefit, they do not deal with the fundamental problem for women in Indian Country—the inability of tribes to assert jurisdiction over non-Indian perpetrators.

The obvious solution has been introduced in the Congress in the context of a broader bill entitled the Tribal Law and Order Act.¹²¹ This legislation,

114. Melissa L. Tantum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L. J. 123, 165-66 (2001).

115. 18 U.S.C. § 2265(e).

116. *Id.*

117. See Sarah Deer and Melissa L. Tatum, *Tribal Efforts to Comply with VAWA's Full Faith and Credit Requirements*, 39 TULSA L. REV. 403, 416 (2003).

118. *Id.* at 412.

119. Pub. L. No. 103-322, § 40302, 108 Stat. 1941-1942 (1994); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 901-909, 119 Stat. 2960 (2006).

120. Jerry Reynolds, *Federal Monies for Anti-Violence Studies Possible*, Indian Country Today, Oct. 5, 2007 <http://www.indiancountrytoday.com/archive/28144169.html>; See also David Melmer, *Violence Against Women Act Up for Renewal*, Indian Country Today, Sept. 9, 2005 <http://www.indiancountrytoday.com/archive/28163154.html>.

121. Tribal Law and Order Act, S. 797, 111th Cong. (2009).

introduced by Sen. Byron Dorgan (D-N.D.), focuses broadly on crime rather than domestic abuse and does not expand prosecutorial jurisdiction.¹²² It does, however, require that federal law enforcement agencies and U.S. attorneys who decline to pursue an Indian Country case must provide evidence and related reports to the appropriate tribal authorities¹²³ encouraging cooperation between tribal and federal officials in the prosecution of crimes on the reservation. While tribal court jurisdiction is not expanded, it does increase the penalties these courts can impose from one year to three years.¹²⁴ The best solution, although the most politically unlikely, is reflected in the analysis by the National Congress of American Indians, which suggests that violence against women be addressed directly by an expansion of tribal jurisdiction on all matters related to domestic violence to cover all violence within the tribe's territory including non-Indians.¹²⁵ The National Congress suggests that this "is justified by the close voluntary link established by a non-Indian who marries an Indian woman. By marrying a tribal member and living in a tribal community, they give their consent to be part of the tribal community."¹²⁶ Without a change this drastic, given the large proportion of perpetrators who are non-Indian, efforts short of this approach are likely to merely nibble around the edges of the problem.

B. VAWA Benefits Many Immigrant Women – But Expanded Coverage is Needed

Congress sought to address the problem of intimate partner violence in VAWA I by removing control over the immigration process from the hands of abusive U.S. Citizens and Lawful Permanent Residents by offering battered immigrant women alternatives to acquire lawful immigration status.¹²⁷ Among its other goals, VAWA I's sweeping provisions offered a comprehensive solution to the problem of battered immigrant women.¹²⁸ The most drastic change made by VAWA I in this arena was to allow immigrant victims of "extreme cruelty" by their U.S. Citizen or Lawful Permanent Resident spouses to acquire permanent residency through a self-petitioning process, using the I-360 VAWA Petition, which does not require the abuser's participation.¹²⁹

122. *Id.*

123. *See id.* § 102.

124. *See id.* § 304.

125. *Fact Sheet: Violence Against Women in Indian Country*, THE NATIONAL CONGRESS OF AMERICAN INDIANS, 1, 5, http://www.ncai.org/ncai/advocacy/hr/docs/dv-fact_sheet.pdf (last visited Oct. 3, 2010).

126. *Id.* at 6.

127. Pub. L. No. 103-322, § 40703, 108 Stat. 1955(1994).

128. *Id.* §§ 40701-03.

129. Pub. L. No. 103-322, § 40701, 108 Stat. 1902, 1953-55 (1994) (codified at 8 U.S.C. § 1154(a)(1)(A)(iii) (1994)).

In the years after the passage of VAWA I, the remedial impact of VAWA I was diluted by several subsequent changes in immigration law.¹³⁰ As a result, in 2000 Congress passed what has become known as “VAWA II”.¹³¹ VAWA II addressed the shortcomings of VAWA I documented by the women’s rights advocates from 1994 to 2000.¹³² VAWA II strengthened the protections for battered immigrant women by relaxing the eligibility requirements of VAWA I and explicitly expanding categories of immigrant women and children who could self-petition.¹³³ VAWA II also allowed filing of petitions by battered immigrant women who unknowingly married bigamists¹³⁴ and allowed immigrant women to self-petition within two years after a divorce from or death of their U.S. citizen or Lawful Permanent Resident husband.¹³⁵ VAWA II eliminated the “extreme hardship” requirement of VAWA I which required immigrant women to document the hardship they would suffer if removed from the U.S.¹³⁶ Additionally, VAWA II allowed immigrant women with approved self-petitions to remain in the U.S. to adjust status because their abusive husbands could often act with greater impunity to punish and threaten them in their home countries, which may lack the protections found in the U.S. against domestic violence.¹³⁷ In 2005, Congress passed the VAWA Re-Authorization Act, which expedited the implementation of the substantive provisions of VAWA II.¹³⁸

Yet, despite these protections, one group of immigrant women is almost entirely unprotected by VAWA and its progeny. Undocumented immigrant women and, in particular, undocumented immigrant women married to undocumented immigrant men do not have any protection from deportation other than to seek relief from deportation by filing a U visa petition.¹³⁹ As a result, undocumented immigrant women are not only more frequent victims of domestic violence than their documented counterparts but they are also more likely not to report the abuse for fear of arrest and deportation and knowing that, solely based on the immigration status of the perpetrator, they have no redress. The abuse suffered by an immigrant woman is the same whether her

130. See generally H.R. REP. NO. 106-939 (2000) (Conf. Rep.); Orloff & Kaguytan, *supra* note 3, at 129-41.

131. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1491 (2000) (codified as amended in scattered section of 8, 18, 20, 28, and 42 U.S.C.) [hereinafter VAWA II].

132. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 116th Cong. 30-33 (2000) (statement of Rep. Janice Schakowsky).

133. VAWA II §§ 1503-1504.

134. *Id.* § 1503(c)(1).

135. *Id.* § 1503(b)(1)(A).

136. *Id.*

137. *Id.*

138. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

139. 8 U.S.C. § 1101(a)(15); 8 C.F.R. § 212.17 (2010).

abuser is her husband or boyfriend and whether he is a U.S. Citizen, Lawful Permanent Resident or undocumented immigrant. For immigrant women to lack protection from deportation based on the immigration status of her abuser adds insult to actual injury.

The U visa petition, which is the last hope for immigrants abused by their undocumented husbands or boyfriends, in contrast to other forms of immigration relief based on domestic violence, requires that the perpetrator of domestic violence be investigated and prosecuted by state or local law enforcement, that the victim cooperate with the prosecution, and that law enforcement authorities are willing to certify that the victim was cooperative.¹⁴⁰ In this manner, the victim faces two hurdles to any immigration relief: her abuser must, in fact, be prosecuted and the police and prosecutor are able to pressure the victim to cooperate with the prosecution despite significant risk to the victim.¹⁴¹ While well-intended, the U visa creates more problems than it solves. It places an unfair burden on abused immigrant women to cooperate with the prosecution of their abuser and allows law enforcement officials unfettered discretion over whether they wish to assist an abused immigrant women gain legal status in the United States.

VI. CONCLUSION AND RECOMMENDATIONS

A. *VAWA is Yet Another Broken Promise to American Indian Women*

VAWA is a qualified success story for immigrant women but has relatively little impact on American Indian women. The issue of domestic violence against American Indian women and the inability to prevent and prosecute incidents of domestic violence needs more attention and resources. With respect to the need for increased attention, additional data collection and analysis are needed to more accurately assess the most effective means of addressing domestic violence against American Indian women. For example, while it is known that most rapes against American Indian women are perpetrated by non-Indians, it would be more helpful to know which rapes occurred in the domestic relations context. In addition, it would be useful to correlate whether prior contact existed between perpetrators and victims and the presence of alcohol or illegal drugs before or during the commission of domestic violence offenses. More sophisticated data collection would include the ages of perpetrators and victims, the location of the crimes, and any evidence of underreporting of domestic violence.

With respect to the need for additional resources, law enforcement in Indian Country should no longer be a low priority for the federal government. For example, while Congress authorized in the passage of the Indian Tribal Justice Act, to bring parity between tribal and non-Indian law enforcement,

140. 8 C.F.R. § 214.14(c)(2) (2010).

141. SALLY KINOSHITA, SUSAN BOWYER & CATHERINE WARD-SEITZ, *Immigrant Legal Resource Center, U VISA MANUAL FOR IMMIGRANT VICTIMS OF CRIME*, (2nd ed. 2010).

Congress has failed to appropriate the funds needed to achieve parity.¹⁴² In addition to more funds, better cooperation is needed between tribal, state and federal law enforcement officers and prosecutors to ensure that protection orders are respected, warrants are issued and perpetrators are not allowed to fall between the jurisdictional cracks.¹⁴³ Finally, a thoughtful analysis should be conducted as to the efficacy of Public Law 280, the Major Crimes Act, and Congressional efforts to override the *Oliphant* decision.

B. VAWA's Protections for Immigrant Women are Little-Known and Incomplete

Immigrant women fare better than American Indian women under VAWA in the sense that specific forms of relief have been incorporated by VAWA into the INA to allow immigrant women to move out from under the control of their abusive U.S. Citizen and Lawful Permanent Resident husbands. Yet, despite these advantages, many immigrant women are unaware of VAWA or unwilling to pursue relief under VAWA.¹⁴⁴ To that end, greater efforts are needed to reach out to immigrant woman in culturally-appropriate ways to increase their awareness of the protections offered by VAWA and to ensure that they are able to counter the pressure from their abusers to conform or face deportation.

USCIS is the logical choice to carry out primary responsibility for raising awareness and could do so very easily by providing immigrant women with verbal and written communications at the time they are sponsored for an immigrant visa by their U.S. Citizen or Lawful Permanent Resident husbands. USCIS personnel and consular staff could be provided with training in ways to detect the subtle clues that abuse may be present in a relationship. Personnel and staff could also be empowered as mandatory reporters of any suspected abuse, as social workers, medical professionals and teachers are with respect to children. In addition, nonprofit organizations working in immigrant communities are a trusted and reliable source of information and resources for abused immigrant women and could also be designated as mandatory reporters of domestic violence. Finally, local domestic violence shelter and law enforcement personnel should be provided additional training in the immigration-related provisions of VAWA and, in particular, the requirements for a U visa.

Apart from empowering USCIS personnel and Department of State staff to identify and report abuse and to better educate immigrant women regarding their rights and available protections, Congress should act to close the gaping loophole in VAWA that fails to provide any means of gaining lawful

142. U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 67-82 (July 2003), <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

143. See, e.g., Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 Calif. L. Rev. 185, 187 (2008).

144. Erez & Copps Hartley, *supra* note 53.

immigration status for immigrant women if their abuser is undocumented. In addition, DHS should amend its regulations to comport with Congressional intent in VAWA and clarify that the prosecution of a perpetrator of domestic violence against an immigrant woman is not needed but that victimization alone can form the basis for a U visa.

C. Laws Can Only Do So Much – Change Will Happen When American Indian and Indian Women Are Not the “Other”

VAWA offers American Indian and immigrant women substantial protections and benefits but it is not a panacea for societal ills afflicting each group of women. Despite their surface differences and perhaps because they share a bond as the only two distinct groups of women targeted by VAWA, American Indian and immigrant women could leverage their combined influence to push for changes to VAWA and its implementation. In addition to changes in VAWA and other relevant laws and regulations, a shift in consciousness is needed to address the underlying causes of the epidemic of domestic violence against American Indian and immigrant women. If the same rates of domestic violence were experienced among the majority U.S. female population as are against American Indian and immigrant women, there would be loud calls for action, education and popular resistance to the victimization of American women. Why the relative silence when American Indian and immigrant women are victims?

The shift in consciousness may come when American Indians and immigrants – men and women – are recognized as full participants in U.S. society and not marginalized as the “other” and mentally or geographically segregated from the American mainstream. Laws and regulations cannot bring that shift. Structures that facilitate abuse can be changed but the foibles of human nature are not so easily fixed and expansions of jurisdiction for tribes operating in Indian Country could improve the situation for reservation-domiciled American Indian women but do not appear to be politically viable at present. Only renewed efforts to educate the American people and, more importantly, the people within society who can incrementally create the conditions needed to shift policies: the lawyers, social workers, teachers, and police officers who daily come into contact with victims of domestic violence, can open the eyes of others to the inequalities that still exist and which demand attention.