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Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images

by

LINDA KELLY*

Are fathers and mothers equal parents? Not according to the Supreme Court. Announcing the recent decision of Miller v. Albright, the Court declared that while a woman becomes a parent immediately upon the birth of her child, a man is not legally considered a parent until he assumes post-birth responsibility for his child.1 Miller challenged a provision of the United States Immigration and Nationality Act (INA) which denies U.S. citizenship to a child who is born abroad and out of wedlock to a citizen father unless paternity is legally established during the child’s minority.2 By contrast, the statute does not require a mother to undertake any affirmative acts. Upholding the provision, the Court found its decision was not based on gender stereotypes.3 Instead, it reasoned that a statutory disparity was the only means of encouraging fathers to have relationships with their children.4 Mothers, on the other

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3. See Miller, 523 U.S. at 434.

4. See id. at 439.
hand, needed no such provocation. Indeed, to place similar demands on mothers would be "superfluous." Miller is a powerful reminder of the control gender images command. Despite its reassurances, the effect of Supreme Court's decision was to openly justify a statute based upon implicit assumptions regarding the inherent nurturing ability of mothers and the wayward nature of fathers.

In many areas of law, the influence of gender perceptions has been revealed. On occasion, legally confronting such biases has brought relief. Of course, in many other instances, legal remedies have been of little use against the power of gender stereotypes. In immigration law, legal images of gender remain unspoken and unchallenged. In part, the federal government's absolute, "plenary power" over matters regarding the admission and deportation of

5. Id.


8. Recognizing the limits of the legal system, Jane Murphy advocates the use of stories to foster greater empathy toward gender issues. See Jane C. Murphy, Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform, 21 HOFSTRA L. REV. 1243 (1993). This argument is largely built on the realization that despite legal successes in the struggle to end racial segregation, racial discrimination and prejudice continues. See id. at 1250-51. Elizabeth Iglesias also urges improving images of women and men in order to eliminate legal biases. See Iglesias, supra note 6.
aliens may explain the unchecked control of such biases. As one critic recently quipped, "Immigration scholars love to hate the plenary power doctrine." Sovereignty alone, however, does not explain the absence of attention to gender issues in immigration law. A great deal has been written, for example, about the influence of race on immigration. Yet there has been virtually no attention to the pervasiveness of gender biases in immigration law. Why? The

9. For the lead cases acknowledging the federal government's "plenary power" over immigration, see Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 216 (1953) (finding Congressional power to determine due process rights of returning residents); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (upholding federal government power to exclude aliens free from judicial review); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (finding absolute power to deport aliens); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 585 (1889) (declaring an absolute federal power to exclude aliens).


12. My own review uncovered only one article which undertook to look for a pattern of treating gender throughout immigration law. However, rather than addressing the law's underlying stereotypes of both men and women which affect both U.S. citizens and aliens, Joan Fitzpatrick's exceptional article dealt exclusively with the law's "complacency" or "unanticipated" impact upon female immigrants. Joan Fitzpatrick, The Gender Dimension of U.S. Immigration Policy, 9 YALE J.L. & FEMINISM 23, 26-27 (1997).
silence only corroborates how deeply engrained gender images have become. The effect of such images becomes even more disturbing upon realizing that not only aliens, but U.S. citizens, are affected by immigration law, oftentimes at the most intimate level. As in Miller, U.S. citizens must rely upon immigration law to secure citizenship for family members. Immigration law also dictates what family members of U.S. citizens and residents will be accorded the privilege of lawful permanent residency in the United States. Likewise, immigration law controls which spouses, children, parents and siblings may be deported. By controlling the flow of aliens seeking refuge within our borders, the law governing asylum also directly impacts upon the U.S. citizenry. It is this daunting power immigration law wields over the passage of persons which makes uncovering its underlying gender biases so essential.

This article undertakes to initiate that discovery. Such a task, however, can only be accomplished after reviewing the legal culture of gender images. Part I of this article therefore begins by tracing the images of fathers and mothers which underpin child custody laws. From this history, an insight can be gained into the Miller decision and other provisions in immigration law which discriminate against fathers and their children. Similarly, appreciating the shifting legal images of women provides a basis for understanding the law's dangerous treatment of mothers. Yet apart from immigration law's stereotypical treatment of fathers and mothers, other societal prejudices are also present. Adhering to the same notions of feminine goodness which emphasize a woman's primary parenting role, immigration law also works to treat women as victims. After defining the female "good victim" and her omnipresence in U.S. domestic law, Part II points to the presence of this image in various provisions which restrict a woman's ability to secure residency or asylum and increase the means for deporting men. By engaging in this overview, what becomes increasingly apparent is the widespread damage gender images can unleash.

13. See infra notes 40-77 and accompanying text.
14. See infra notes 78-86 and accompanying text.
15. See infra notes 126-133 and accompanying text.
16. See infra notes 145-147 and accompanying text.
I. Republican Mothers and Bastards’ Fathers

A. Gendered Nationality Rights

(1) The Tradition of Coverture in Child Custody Law

With the perceptions of each sex’s “natural” parental duties in constant flux, legal thought on the issue of child custody has never been stagnant. The influence of gender biases began early in the jurisprudential development of the new U.S. republic. Based on the “myth of marital unity,” coverture declared that by joining in marriage a man and a woman became a singular entity—embodied by the husband.\(^\text{17}\) As a result, the husband assumed extensive ownership rights over his wife’s person and property.\(^\text{18}\) Coverture’s basic principles thereby also influenced the treatment of children born to a marriage. Because legitimate children were regarded as marital property, they too fell under the father’s unquestioned authority.\(^\text{19}\) Consequently, fathers not only owned their children but bore primary responsibility for their upbringing. Following such expectations of men as absolute and women as chattel, a mother was regarded as playing a very minor role in her legitimate children’s development, “entitled to no power, but only to reverence and respect.”\(^\text{20}\)

By contrast to the treatment of a legitimate child, a child born out of wedlock was “filius nullius”—the child and heir of no one.\(^\text{21}\) Without legal relations to his parents, the so-called “bastard child” was not subject to the laws of custody, maintenance or inheritance. Such treatment carried both moral and practical implications. By refusing to legally recognize the illegitimate child, the law intended to discourage out of wedlock procreation while protecting the rights and privileges of legitimate children.\(^\text{22}\) But perhaps more importantly, by not infringing upon man’s independent control of his property and family lineage, the law of bastardy complemented liberalism’s

\(^{17}\) “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband.” LESLIE J. HARRIS ET AL., FAMILY LAW 4 (1996) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (W. Lewis ed., 1897)).

\(^{18}\) For a history of coverture’s influence over a woman’s body and property see HARRIS, supra note 17, at 3-138.


\(^{20}\) Id. at 236 (quoting WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 2:452 (George Sharwood ed., 1860)).

\(^{21}\) See id. at 197.

\(^{22}\) See id. at 196.
safeguard of the public/private dichotomy and individualism.  

Despite the contradictory, inapposite treatment of legitimate and illegitimate children, the laws governing legitimate and illegitimate children evolved in a similar manner as attitudes toward children and public welfare developed. By the early nineteenth century, there was a growing concern for the well-being of children. No longer regarded simply as small adults, children began to be recognized as “delicate persons” needing proper care in order to develop as good and moral beings. This change in perceptions was further motivated by the country’s growing industrialization which, by increasing the number of jobs outside the home, made the job of caring for children even more critical. In the spirit of coverture, women had been regarded as “devious, sexually voracious, emotionally inconstant, or physically and intellectually inferior.” Now, in order to assure that fathers could work outside the home while their children were properly raised, women had to assume a new identity. And so, the nineteenth century witnessed woman’s full transformation from a peripheral parent to a model of virtue and care. Such change was consistent with the post-revolutionary belief that the future of the nation warranted the assumption of new duties by the female citizenry. In order that their male counterparts could get on with the business of running the nation’s government, women were charged as the new republic’s moral leaders. The “republican mother” bore primary responsibility for instilling her children with a sense of civic duty and commitment.

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24. BERRY, supra note 6, at 54; see also GROSSBERG, supra note 19, at 235-37; Sanger, supra note 6, at 399-403.

25. BERRY, supra note 6, at 51-54; Sanger, supra note 6, at 399-403.

26. BERRY, supra note 6, at 51.

27. See id. at 49-52; Sanger, supra note 6, at 399-409.

28. See LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA, 199-200, 228-31 (1980); see also Sherry, supra note 23 (chronicling the nation’s post-revolutionary rejection of classic republicanism and acceptance of liberalism, and discussing feminism’s reliance on the republican principles of civic virtue and communitarianism).

29. See BERRY, supra note 6, at 49-52; Williams, supra note 6, at 1564-68. The belief that feminism embodies the female “ethic of care” as opposed to the male “ethic of justice” reflects the ongoing influence of socially defined gender roles. For promotion of feminism’s “ethic of care” see, for example, GLENDON, supra note 23, at 134-41; Sherry, supra note 23, at 581-82. For further discussion of the dangers of the “ethic of care,” see Linda Kelly, Reproductive Liberty Under the Threat of Care: Deputizing Private Agents
The confluence of factors which contributed to woman's metamorphosis also brought about the transformation in the legal treatment of children. The prevailing societal image of mother as nurturer became legally determinative. Gradually, the father's entitlement to custody as a property right eroded, as courts began to invoke judicial discretion to resolve custody disputes in the child's best interests. Thus, the "tender years" doctrine and its presumption that mothers should be awarded custody, particularly of young children, was a natural legal corollary to contemporary gender roles.

In a parallel fashion, these attitudes toward public welfare, children's "best-interests," and gender roles also transformed the treatment of children born out of wedlock. Common law disregard for illegitimate children ended when the "aristocratic, property-conscious English view by which a heartless monetary interest in maintaining established lines of descent [was] overruled [by] compassion and common sense." No longer willing to punish children for the sins of their parents, the law lost concern with its moral message and gained interest in ensuring that illegitimate children did not fall upon the public dole. In keeping with the century's changing parental roles, mothers also now became the "natural guardians" of illegitimate children while fathers were viewed as having no power but nevertheless charged with a duty of support. Justifying such determinations, bastardy law now portrayed mothers as "victims of male lust and irresponsibility" while fathers were cast as the "debtors and criminals." So consumed with these stereotypes and objectives, paternity and support determinations risked denying due process to a wrongly charged father in order to preserve female chastity and ensure a child's support.

30. See Grossberg, supra note 19, at 237-54.
31. Id. at 204.
32. As found in the groundbreaking Wright v. Wright case which awarded the mother custody of a child born prior to marriage, "a bastard is generally considered as the relative of no one. But, to provide for his support and education, the mother has a right to the custody and control of him, and is bound to maintain him, as his natural guardian." Wright v. Wright, 2 Mass. 109, 110 (1806) (Parsons, C.J., concurring). See also Grossberg, supra note 19, at 208.
33. See Grossberg, supra note 19, at 207-18.
34. Id. at 215.
35. For example, the doctrine barring spousal testimony on sexual access prevented a husband from proving his wife's child belonged to another. "[T]he wickedness of mankind makes it necessary for the laws to suppose them better than they really are. Thus we judge that every child conceived in wedlock is legitimate, the law having a confidence in the mother as if she were chastity itself." Egbert v. Greenwalt, 44 Mich. 245, 249 (1880) (quoting Montesquieu, The Spirit of the Laws); see also Grossberg, supra note 19,
Almost two hundred years later, we remain transfixed by these familial images. "Good mothers" remain held to the presumption of virtue and care, while fathers are simply expected to provide financial support. Such image reform may have originally empowered women, entitling them to duties and a legitimacy never before realized. Today, however, the good mother stereotype impedes the progress of women. Despite the growing necessity and desire of women to work outside the home, women continue to be regarded as the primary caretakers. As a result, a “vicious cycle” is created. Women are forced to balance the duties of work and home by assuming inferior economic positions which, in turn, prevent them from being considered as equals within the home. The damage of gender images is not, however, limited to affecting women. What is becoming increasingly evident is that male interests are also thwarted.

The treatment of parents in U.S. immigration law perfectly illustrates how the injuries of gender images can cross gender lines. From the earliest legislation to the recent case of *Miller v. Albright*, immigration law has consistently adhered to the images which have

36. As noted by Carol Sanger, apart from demanding a financial duty, the role of fathers goes largely unnoticed, while mothers are continually measured against the tradition of maternal presence. See Sanger, supra note 6, at 378-79 n.11. For a sampling from the wealth of valuable scholarship, particularly on the role of mothers, see, for example, BERRY, supra note 6; FINEMAN, supra note 6; MOTHERS IN LAW, supra note 6; Murphy, supra note 6; Williams, supra note 6.

37. It should be noted that the value and basis of the female relational being is still debated in feminist circles. Cultural feminists have championed the interdependent female, relying heavily upon the 1982 work of psychologist CAROL GILLIGAN, IN A DIFFERENT VOICE, which positively portrays the female connection to others. See, e.g., Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1182-83 (1992); Sherry, supra note 23, at 50, 585-87; Robin West, Jurisprudence and Gender, in FEMINIST JURISPRUDENCE 493, 500-01 (Patricia Smith ed., 1993). For criticisms of this image of women as limiting female potential, see, for example, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 51 (1987).

38. According to statistics of the U.S. Bureau of Census, 58.8% of all women were in the work force by 1994. By contrast, 33.9% of women worked in 1950. Statistics about “working age” women are more revealing. In 1994, 75.3% of women in the 25 to 54 year age bracket worked. By comparison, 36.8% of the same age group worked in 1950. See DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN 80-82 (1996).

39. See SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 159 (1989). As acknowledged by Susan Moller Okin, monetary disparities between husbands and wives often result in the traditionally lesser-paid woman being regarded as subordinate to her husband within the marriage. See id. at 134-69. For further discussion of the cycle of female inferiority and the “Supermom” dilemma, see BERRY, supra note 6, at 4-5 (defining supermom and her limitations); Williams, supra note 6, at 1596-1610 (recognizing the inter-related nature of the work and family debates).
shaped the treatment of men, women and children in U.S. custody law.

(2) *Miller v. Albright*

(a) The Citizenship History of Children and Spouses

Paralleling the domestic treatment of parents and their children, coverture and its legacy continues to shape U.S. immigration law's treatment of both alien and citizen parents. The evolving doctrine of "jus sanguinis" or the right to citizenship by descent is a product of this legacy. Unlike "jus soli" citizenship, a constitutional right achieved by birth on U.S. soil, the doctrine of jus sanguinis offers no such protection. Consequently, the statutory privilege of jus sanguinis has shifted with changing conceptions of parental roles.

Given the early treatment of children as paternal property rights, it is not surprising that the first legislative recognition of jus sanguinis in 1790 required an alien child to depend on his father's status in the United States to obtain citizenship. A strict interpretation of the 1790 act might have suggested that a mother's citizenship conditionally entitled a child born abroad to U.S. citizenship.

40. Apart from citizenship rights, coverture's restrictive influence on lawful permanent residency privileges accorded on the basis of marriage to a United States citizen or resident has also been clearly delineated. See infra notes 87-104, 115-125 and accompanying text (discussing the family petitioning process and VAWA).

41. "Jus soli" translates as "right of land." This principle forms the basis of the right to a nation's citizenship by virtue of birth within that nation's territory and is explicitly protected by the 14th Amendment. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1 (1868). By contrast, "jus sanguinis" which translates as "right of blood" is the right of citizenship by virtue of being the descendant of citizens. The United States has historically recognized both principles. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1030-39 (2d ed. 1997).


42. The children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descent to persons whose fathers have never been resident in the United States.


43. The power of a mother's citizenship could have been interpreted through the acknowledgment that citizenship passed to "children of citizens of the United States" without any gender qualification except the condition that the father had resided in the United States. *Id.* For further discussion of this interpretation, see *Miller v. Albright*, 523 U.S. 420, 461-62, (1998) (Ginsburg, J., dissenting).
However, any theoretical, albeit limited, regard for the mother was soon eliminated. The legislation of 1855 clarified that citizenship would only pass to an alien born abroad when the father was a United States citizen.44

In addition to affecting the rights of children, coverture’s influence on the 1855 legislation also impacted more directly on women. As of 1855, an alien wife became an automatic citizen if her husband was or became a United States citizen.45 While the legislation was defended as a means of preventing alien wives from becoming stateless upon marriage and preserving their inheritance rights, the intent of the legislation was not to empower women. Indeed, the fact that marital naturalization was eliminated shortly after female citizens secured the constitutional right to vote refutes any argument that it was originally meant as anything other than an effort to maintain a woman’s dependence upon her husband.46

Perhaps more telling, several years after the legislation conferring automatic citizenship on the alien wives of U.S. citizen husbands, U.S. citizen women were subjected to coverture in an even starker form. As of 1907, a United States citizen woman who married an alien man was immediately stripped of her citizenship.47 Under a law which applied without exception, women were deemed to have “voluntarily expatriated” by choosing to marry an alien.48 Of course,

44. “All persons heretofore born or hereafter born out of the limits and jurisdictions of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.” Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604.

The 1855 legislation was in response to an act passed in 1802 which limited the citizenship rights of children born abroad to citizens because the legislation failed to apply to parents who were born or acquired citizenship after 1802. Despite an attempt by Daniel Webster to pass legislation allowing the children born abroad of United States citizen fathers or mothers to acquire citizenship, the remedial legislation of 1855 explicitly prevented mothers from conferring citizenship to their children. See CANDICE LEWIS BREDENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 18-19 (1998); FRANK GEORGE FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES: FROM THE REVOLUTIONARY WAR TO 1861 271-76 (1906).

See also Miller, 523 U.S. at 462 (Ginsburg, J., dissenting).

45. See Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604; see also Kelly v. Owen, 74 U.S. 496, 498 (1868) (holding that whether husband’s citizenship came before or after the 1855 act or before or after the marriage, his wife automatically became a citizen).

46. See Act of Sept. 22, 1922 (Cable Act), ch. 411, Pub. L. No. 67-346, 42 Stat. 1022. See also BREDENNER, supra note 44, at 20-22. For further discussion of how the 19th Amendment and the events of the early 20th century shaped the role of gender on immigration law, see infra notes 51-61 and accompanying text.

47. See Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228-29. Citizenship could be regained only after termination of the marriage and a successful application for naturalization by the former United States citizen.

the law placed no similar characterization upon men who married alien women. Instead, as the 1855 Act implied, alien women upon marriage to citizens were subsumed within their husband’s identity.\(^4\) Without apology, the Supreme Court invoked coverture to uphold the legislation expatriating U.S. citizen women, finding that an alien man and his U.S. citizen’s wife’s “intimate relation and unity of interests ... make it of public concern in many instances to merge their identity, and give dominance to the husband.”\(^5\)

Like the 1855 marital naturalization statute, the 1907 Act’s female expatriation provisions were largely repealed by the 1922 Cable Act and subsequent amendments.\(^5\) However, even after such welcomed corrections to gender inequality, a significant distinction persisted. Female citizens remained unable to secure citizenship for their foreign-born children.

As holds true throughout the feminist movement, divergent politics in the early 20th century prevented critical feminist groups from agreeing that the right to jus sanguinis citizenship was a matter demanding gender equality. Facing off during the 1930s, the National League of Women Voters (NLWV) and the National Woman’s Party (NWP) embodied the two warring viewpoints. The NLWV had emerged from the remains of the National American Woman Suffrage Association after the passage of the 19th Amendment and represented a much more republican, conservative strategy than its nemesis, the NWP. Like the NWP, the NLWV demanded gender equality in “political rights.” However, the NLWV believed that the non-political, or social and civil rights, could be gender-based and that a piecemeal legislative approach was the proper strategy.\(^5\) By contrast, the NWP’s post-suffrage agenda remained one of a

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\(^{49}\) See supra notes 44-46 and accompanying text (discussion of 1855 Act).

\(^{50}\) Mackenzie, 239 U.S. at 311 (1915). Reviewing the surge of coverture’s influence in immigration law in the mid 19th century may seem contrary to its declared demise over such domestic matters as child custody. However, the changes in law and society’s treatment of women were not a direct result of an interest in empowering women but rather simply an incidental byproduct of other forces. See supra notes 25-39 and accompanying text. Alternatively, Candice Lewis Bredbenner has argued that while coverture may have been slowly dying in the area of civil rights, in the political arena governing such matters as citizenship, it remained in full strength. Bredbenner, supra note 44, at 19.


\(^{52}\) With this perspective, the NLWV’s agenda included abolishing child labor, eliminating discrimination against women in the civil service and compulsory civic classes in public schools. See Bredbenner, supra note 44, at 153.
relentless pursuit of absolute equality through sweeping measures on the international and domestic fronts.  

Despite such differing perspectives, the two groups had agreed on independent citizenship for married women—the NLWV characterizing the issue as a political right, while the NWP found it to be progress toward its equal rights ideal. However, the issue of jus sanguinis presented a more complicated matter. In 1932, the NWP presented its proposal for the rights of U.S. citizen mothers to confer citizenship on their foreign-born children. The NLWV made its opposition clear. By abolishing all distinctions between men and women, the NWP's latest proposal was "blanket action" which would create "utter confusion."

The NLWV was joined in its opposition to the NWP's equal nationality proposal not only by members of Congress but also by the Executive Department. As Professor Bredbenner recounts, the State Department became the proposal's most "formidable ally." Expressing reservations about multiple and absentee citizens, when the matter came before the 73rd Congress in 1933, Assistant Secretary of State Wilbur Carr warned that the right of jus sanguinis for women would produce "alien citizens." When a woman married an alien and moved abroad "the national character of that country is likely to be stamped upon the children, so that from the standpoint of the United States they are essentially alien in character." The proposal also met with criticism, not as a feminist equal nationality bill but as an immigration bill which would increase immigration.

53. See id. For an in depth analysis of the distinctive approaches of the NLWV and NWP on the international front and their involvement in such post World War I conferences such as those of the League of Nations and the Pan-American Union, see id. at 195-242.

54. See id. at 154. Despite different political and strategic agendas succinctly explained through the timeless equality vs. difference feminist debate, the divergent groups were in agreement on the issue of federal legislation for ensuring independent citizenship for married women. For an excellent analysis of the feminist politics surrounding the women's nationality measures of the early 1930s, see id. at 151-71.

55. This view was expressed in a letter by the NLWV's president, Belle Sherwin, delivered to the House Committee on Immigration and Nationality. As always, the explanation for such antagonism was the NLWV's fundamental belief that any measure which hinted at progress towards an equal rights amendment must be opposed. See id. at 228-30 (quoting Hearings Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality, before the House Committee on Immigration and Naturalization, 72d Cong., 1st sess., Jan. 7, 1932, at 19; Sherwin letter dated Jan. 7, 1932).

56. Id. at 230.

57. Id. (quoting Letter of Assistant Secretary of State Wilbur Carr, House Hearing, Mar. 28, 1933, Relating to Naturalization and Citizenship States, 9-11).

58. These concerns were raised in the remarks made by Congressmen Charles Kramer
With little support, the NWP's proposed bill was likely to be defeated.\(^5\) However, coinciding with the domestic debates on the bill was a successful international effort to pass an equal-nationality treaty. In December, 1933, the Pan-American Conference at Montevideo produced an equal-nationality treaty which contained a resolution urging its signatories to pursue "the maximum equality between men and women in all matters pertaining to the possession, enjoyment, and exercise of civil and political rights."\(^6\) Under growing public pressure to endorse the measure, the Senate ratified the equal nationality treaty on the same day President Roosevelt signed legislation equalizing the doctrine of jus sanguinis between the sexes.\(^6\)

While the events of 1934 were a victory, particularly for equalitarian feminists, it was a short-lived celebration. Images of republican mothers and bastards' fathers quickly crept back into the halls of Congress and immigration law. By 1940, the influence of these stereotypes was evident in new amendments which, for the first time, distinguished the law's treatment of illegitimate children. Pursuant to these provisions, children born overseas and out of wedlock could only become citizens if their mothers were U.S. citizens and paternity was not established during minority.\(^6\)

(\(CA\)) and Martin Dies (\(TX\)) who, not surprisingly represented states which have historically had amongst the largest immigrant populations. See \textit{id.} at 232-33 (relying on House Hearing, \textit{supra} note 57, at 37).

\(^5\) Despite the NLWV refusal to support the bill, other organizations in support of the measure included the American Institute of International Law, the National Association of Women Lawyers and other local associations of female lawyers. See \textit{id.} at 230.

\(^6\) \textit{Id.} at 238 (quoting U.S. \textit{DEPARTMENT} OF \textit{STATE}, \textit{REPORT} OF \textit{THE} \textit{DELEGATES} OF \textit{THE} \textit{UNITED} \textit{STATES} OF \textit{AMERICAN} TO \textit{THE} \textit{SEVENTH} \textit{INTERNATIONAL} \textit{CONFERENCE} OF \textit{AMERICAN} \textit{STATES}, \textit{MONTEVIDEO, URUGUAY, DECEMBER} 3-26, 1933 (\textit{Wash., D.C.: G.P.O.: 1934})).

\(^6\) Having stated that the U.S. refusal to sign the 1930 treaty produced at the Hague Conference on the Codification of International Law was due in part for its failure to address equal nationality rights for the sexes, the United States was ultimately shamed into endorsing the Montevideo convention. For a discussion of the Hague Conference, see \textit{id.} at 202-16.

For the legislation, see \textit{Act} of May 24, 1934, 48 Stat. 797. The legislation also corrected another disparity in nationality rights by allowing alien husbands to enjoy the same expedited naturalization process available for alien wives. This was the single other significant gender disparity which remained after the Cable Act. For further discussion of the Montevideo convention and the parallel U.S. legislation, see BREDBENNER, \textit{supra} note 44, at 238-41.

\(^6\) See \textit{Nationality Act of 1940}, Pub. L. No. 76-876, §§ 201, 205, 54 Stat. 1137, 1138-40. Pursuant to the 1940 act "minor" was defined as an individual under twenty-one years of age. See \textit{id.} § 101(g). Regardless of whether a child was born in or out of wedlock, when only one parent was a United States citizen, a residency requirement was also imposed on the child and parent. Typically, the parent had to have ten years of U.S. residency prior to
a father's historic preferential treatment in the nationality rights of legitimate children, such changes made perfect sense. As opposed to the powerful image of a wed father and his consequent rights, a bastard's father travelled under a negative image, entitling him to limited paternal rights. The bastard's father could only be redeemed and entitled to confer citizenship on his out of wedlock, overseas child if he made an affirmative, formal acknowledgment of paternity by the act of legitimation or adjudication by a competent court. By placing this demand only on the citizen father, the measure also confirmed the image of republican mothers as “natural caretakers,” who would care for their children without any legal prodding. However, despite this legal favoring of women, notions of coverture endured within these provisions. If a father was legally found, a mother and her right to confer citizenship could be ignored.

Legislation in 1952 eliminated the provision allowing mothers to confer citizenship only when paternity had not been established. Such a change appeared to be a promising move away from the traditional notion that mothers are secondary parents, entitled to parenting privileges by default when the fathers fail to assume responsibility. However, despite this development in equal nationality rights and such coinciding events as the much publicized abrogation of the “tender years” doctrine in custody law, the traditional gender biases were confirmed once again in the 1986 immigration amendments. Although easing the requirement that a father must affirmatively, formally acknowledge paternity, the law also now demands that U.S. citizen fathers agree to financially support their out of wedlock, foreign-born, minor children. Such

63. For discussion of the varying imagery and legal treatment of fathers, see supra notes 18-19, 33-35 and accompanying text.


65. For a discussion of such images of mothers and fathers, particularly in custody and bastardy law, see supra notes 27-36 and accompanying text.


67. For a discussion of how the role of republican mothers only developed when fathers had to assume more significant roles outside the home, see supra notes 27-29 and accompanying text.

68. For a discussion of the abrogation of the “tender years” doctrine by courts and legislatures, see, for example, GROSSBERG, supra note 19, at 248-53; HARRIS, supra note 17, at 604-09.

legislation reaffirms the imagery of republican mothers as natural caretakers and bastards' fathers as debtors and criminals.

(b) Analyzing Miller

Because Miller attempted to combat the images of fathers and mothers so firmly embedded in U.S. law and culture, the outcome was predictable. Announcing the judgement of the Court upholding disparate nationality rights for fathers, Justice Stevens revealed the persistent influence of gender biases. Placing paternity requirements solely on citizen fathers of out of wedlock children served the interests of encouraging a parent-child relationship and fostering a relationship between the child and the United States in the child's youth. Unlike citizen fathers, citizen mothers would "typically" have immediate custody of a child born out of wedlock. As a result, a citizen mother would naturally have a relationship with her child by virtue of the birth. Citizen fathers, on the other hand, needed to develop such relationships. Hence, the imposition of requirements on citizen fathers was justified. In reaching this decision, Justice Stevens felt he had adhered to the Court's position against relying on gender stereotypes. For Justice Stevens, "biological differences," which did not amount to stereotyping, made women the inherent caretakers.

The transparency of the Court's decision is readily evident. As recognized by Justice Ginsburg in her dissent, the majority had relied upon the traditional stereotype that "mothers, as a rule, are responsible for a child born out of wedlock; fathers unmarried to the child's mother, ordinarily, are not." The majority's failed attempt to distinguish biological realities from societal stereotypes fits a history of nonsensical gender distinctions. Such distinctions are as destructive

id. Pursuant to these provisions, fathers must also now establish paternity and agree to financial support prior to the child's eighteenth birthday. This is a further restriction to the Act of 1940 which required establishment of paternity by twenty-one years.

Additionally, the 1986 amendments altered the residency requirements on mothers. Now, mothers are required to reside in the U.S. or its territorial possessions for at least one year prior to a child's birth. See Act of Nov. 14, 1986, sec. 13, § 309(a)(3), (4) 100 Stat. 3655, 3657 (1986) (codified as amended at 8 U.S.C. § 1409(a)(3),(4)).

70. See Miller, 523 U.S. at 438.
71. See id.
72. See id. at 443.
73. As recognized when the Supreme Court ended the all-male student practice of the Virginia Military Institute, the government "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" United States v. Virginia, 518 U.S. 515, 541 (1996) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).
74. See Miller, 523 U.S. at 445.
75. See id. at 460 (Ginsburg, J., dissenting).
as they are distracting. As the feminist movement learned in 1907 when a woman lost citizenship by virtue of marrying an alien, disparate images of men and women prevent gender equality. In 1907, such images most clearly injured women. However, ninety years later, the effect of Miller is to discard citizen fathers and their children. Like Miller and its history, other legislative and judicial developments in immigration law reveal the continuing impact negative gender images have upon the rights of women, men and children.

B. Petitioning for Residency—The Legal Corollary to Gendered Nationality

Consistent with the gender disparities evident in the right to confer citizenship, the ability of fathers to secure lawful permanent residency for children born out of wedlock is also more restricted than the rights of mothers. Again, the difference stems from legal imagery—that mothers possess a “natural capacity to nurture and protect” while fathers must affirmatively prove their parenting capabilities. Announcing Fiallo v. Bell in 1977, the Supreme Court upheld sections of the INA which excluded both citizen and lawful permanent resident fathers from petitioning for the residency of their foreign children born out of wedlock. While the legislation placed no restrictions whatsoever on the right of mothers to petition for their illegitimate, foreign-born children, the Court found no equal protection violation. Raising Congress’ inherent sovereign power to exclude aliens, the Court deemed the matter “largely immune” from

76. See supra notes 47-51 and accompanying text (regarding the 1907 Act and its history).

77. I am grateful for Professor Bredbenner’s use of the term “discardable American” to highlight the severity of the nationality provisions which have discriminated based upon gender. See BREDBENNER, supra note 44, at 6 (discussing the 1940 Act’s discrimination against women).

78. Murphy, supra note 6, at 713 (quoting Dorothy E. Roberts, Motherhood and Crime, 79 IOWA L. REV. 95, 111 (1993)).

79. Fiallo’s plaintiffs were fathers and their out of wedlock children. See Fiallo v. Bell, 430 U.S. 787 (1977) (upholding INA §§ 101(b)(1)(D), 101(b)(2) (1952)).

Securing lawful permanent residency for one’s child through the family petitioning process of the INA is clearly a lesser privilege than a child’s right to secure citizenship based upon the citizenship of his parent through the derivative citizenship provisions. However, both processes are necessary as a child is not eligible for derivative citizenship unless the parent was a U.S. citizen at the time of the child’s birth and the relevant U.S. residency criterion are met. Consequently, the children of lawful permanent residents have no right to derivative citizenship and therefore must rely upon the family petitioning process. See supra note 2 and accompanying text (discussing the elements of derivative citizenship). For a general discussion of the INA’s family petitioning process, see LEGOMSKY, supra note 41, at 131-70.
judicial control. Rights of citizens as well as lawful permanent resident fathers simply were discarded again, this time through the plenary power doctrine. The Court ignored the principle applied in all other contexts, that the parental right to rear children is limited only by a “compelling governmental interest.” Only Justice Marshall’s dissent acknowledged the glaring disparity. “When Congress grants a fundamental right to all but an invidiously selected class of citizens, and it is abundantly clear that such discrimination

80. See Fiallo, 430 U.S. at 792 n.5. At best, there has been a willingness to recognize some limited judicial responsibility in immigration matters. Yet despite such recognition, restrictive laws, like that in Fiallo, have generally been upheld. See, e.g., Jean v. Nelson, 472 U.S. 846 (1985) (avoiding the constitutional issue of an equal protection guarantee for Haitians asserting discrimination in detention conditions because of statutory obligations); Landon v. Plasencia, 459 U.S. 21, 35 (1982) (recognizing lawful permanent resident’s right to procedural due process); Kleindienst v. Mandel, 408 U.S. 753, 766-67 (1972) (upholding exclusion of alien and denying First Amendment challenge while recognizing due process restrictions on congressional sovereign power); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) (defeating constitutional challenge, finding immigration power “largely immune from judicial inquiry or interference”).

81. While Miller would later also uphold a gender disparity, the majority opinion acknowledged that the rights of potential U.S. citizen children and their fathers required higher scrutiny than the plenary power doctrine afforded. Although the father of the plaintiff in Miller was not a party to the suit when it reached the Supreme Court, the majority found the plaintiff had the right to raise the alleged discrimination against her father as well as against herself. See Miller, 523 U.S. at 433. While Justice Breyer in his dissenting opinion agreed with the daughter’s right to raise her father’s claim as well as her own, see id. (Breyer, J., dissenting), Justice O’Connor in her concurrence rejected the daughter’s third party standing right, see id. at 446 (O’Connor, J., concurring). The plaintiff’s father had originally been a plaintiff but was dismissed for lack of standing when the case originated before the United States District Court for the Eastern District of Texas. See Miller v. Christopher, C.A. No. 6:93 CV 39 (E.D. Tex. June 2, 1993).

82. See Fiallo, 430 U.S. at 807-09, 816 (Marshall, J., dissenting).

Through a host of cases, the Court continues to vigilantly protect “a private realm of family life which the state cannot enter.” Prince v. Massachusetts, 321 U.S. 158, 166 (1944). That fathers and mothers merit equal protection unencumbered by gender stereotypes is most evident in Stanley v. Illinois in which the Court rejected legislation permitting unwed fathers to lose custody rights without a hearing. See Stanley v. Illinois, 405 U.S. 645 (1972). For further cases protecting the familial rights of fathers, see, for example, Zablocki v. Redhail, 434 U.S. 374 (1978) (rejecting restrictions on a father’s right to marry); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (rejecting efforts to sterilize male criminals). Of course, the issues of gender equality and fundamental familial rights do not need to be conflated in order to legitimately criticize the Fiallo decision. As Justice Marshall argued in his dissent, the immigration provisions challenged in Fiallo were vulnerable under the intermediary test for gender or legitimacy classification or as a result of violating fundamental familial rights. See Fiallo, 430 U.S. at 809-10 (Marshall, J., dissenting).

would be intolerable in any context but immigration, it is our duty to strike the legislation down."83

Faced with such pressure, Congress amended the discriminatory provisions challenged in *Fiallo.*84 The change, however, was not complete. Petitioning rights of unwed fathers remain more restricted than the rights of mothers. According to statute, an unwed father may only successfully petition for his undocumented children upon showing he "has or had a bona fide parent-child relationship."85 Unwed mothers face no similar distinction. The disparate pattern and all its imagery is once more illustrated.

As the citizenship and residency provisions consistently reveal, immigration law continues to insist upon promoting mothers as natural nurturers while presuming that fathers are insignificant, if not absent, figures. Such characterizations seem steadfast despite the slow rejection of gender stereotyping in other areas of law.86 Unfortunately, the gender biases of immigration law are not limited to parental images. The myth of feminine goodness underlying the woman-as-nurturer image has clearly affected other aspects of immigration law. Most notably, provisions intended to protect women from spousal assault, rape, and other forms of gender violence adhere to images which not only challenge women seeking relief, but also prevent progress toward gender equality.

II. Good Victims

A. The Violence Against Women Act

(1) Immigration's History of Domestic Violence

The 1994 passage of the Violence Against Women Act (VAWA) was a significant milestone in immigration history.87 For the first
time, battered aliens were given the statutory means to independently secure lawful permanent residency. Fashioning a "self-petitioning" process for battered aliens who are either the spouses or children of U.S. citizens or lawful permanent residents, VAWA removed the need for a domestic violence survivor to depend upon her batterer in the family petitioning process.88

Changes to the family petitioning process for battered aliens had been needed for many years. As Janet Calvo explained in an important work shortly before VAWA’s passage, the process continued to toil under "the legacies of coverture."89 Like the treatment of derivative citizenship rights based upon family ties, the first residency provisions of the twentieth century clearly demonstrated coverture’s influence. These provisions created a means for otherwise inadmissible female aliens to secure lawful permanent residency in the United States upon marriage to a U.S.


citizen while making no similar exception for alien husbands. More recent provisions continued the gender bias, albeit in a less overt manner. The Immigration and Nationality Act of 1952, the foundation of our current law, removed explicit gender distinctions but continued the practice of allowing the U.S. citizen or lawful permanent resident to unilaterally control the process of petitioning for his spouse's residency. For battered alien wives, the effect was to perpetuate coverture's basic principal that a woman belongs to her husband. Only he could provide for her residency.

In 1986, the Immigration and Marriage Fraud Amendments (IMFA) exacerbated the power differential. Passed in reaction to widespread legislative and administrative fear of marriage-based fraud, the provisions complicated the petitioning process by requiring the alien and petitioning spouse to complete the petitioning process approximately two years after the alien was awarded "conditional residency" in the initial processing phase. By extending the petitioning spouse's involvement in further petitions and interviews, an abusive spouse was legally provided with the opportunity to continue the battering.

Responding to the "gender-specific impacts" of IMFA's "gender-neutral" terms, Congress corrected IMFA's harshest measures by providing an exception to the two-year joint filing requirement for battered spouses through the Immigration Act of 1990. Pursuant to this change, battered spouses who had already acquired conditional residency became entitled to file petitions individually for the

90. Female spouses of U.S. citizens and residents remained admissible despite health-related exclusionary grounds and national and numeric quotas. See id. at 598-603 (discussing immigration law from the early 1900s through 1950s). For a discussion of other earlier gender disparities for alien spouses, see supra notes 45-51 and accompanying text.
93. While a "conditional resident" is entitled to all the privileges of residency, 90 days prior to the expiration of the two year conditional period, an alien and her spouse must file a petition to remove conditions on residency. This process may include an additional interview of both spouses. See INA § 216(a), (g), 8 U.S.C. § 1186a(a), (g) (1994). The legislation was based upon INS' assertions that at least 30% of the marriages in marriage-based immigrant petitions were fraudulent. While such claims later were deemed inaccurate, the conditional residency process remains. For more on conditional residency and its legislative history, see, for example, Calvo, supra note 89, at 606-12; Linda Kelly, Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act, 92 NW. U. L. REV. 665, 669-71, 688 n.119 (1998), LEGOMSKY, supra note 41, at 148-49.
removal of the condition on residency. However, such changes did not eliminate coverture's influence. The 1990 amendments only applied to battered alien spouses who had first acquired conditional residency with their lawful spouses' assistance. As a result, after the 1990 amendments, a battered alien spouse remained unable to self-initiate the residency process. Undocumented battered spouses thus remained married and subject to physical and emotional abuse, choosing this hostage-like alternative over the possibility of deportation and poverty which awaited them if they left.

After years of proposals, VAWA was passed. Without question, the legislation has been responsible for allowing many women to achieve residency. However, despite this relief, the particular requirements of VAWA reveal persistent, and familiar, attitudes toward women. If a VAWA applicant fails to personify a stereotypical image of a battered woman, her application will be denied. Consequently, through VAWA, immigration law once again reveals the damage of inflexible legal imagery.

(2) VAWA's Requirements and Biases

To establish a successful VAWA claim, an applicant must meet four basic criteria:

1) ABUSE—during the marriage the alien spouse or child has been "battered by or has been the subject of extreme cruelty perpetrated by the alien's spouse;"

95. The exception to joint filing requires proof of "good faith marriage" and that the alien spouse or child was "battered or subject to extreme cruelty." The waiver is gender neutral. See INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C). For more on IMFA, see Calvo, supra note 89, at 612-13; Kelly, supra note 93, at 670-71.


97. See H.R. 1133, 103d Cong. (1993); H.R. REP. NO. 103-395 (1993); see also Janet Calvo & Martha Davis, Congress Nears Approval of Legislation to Protect Abused Aliens, 70 INTERPRETER RELEASES 1665 (1993).

98. While VAWA's feminine title reveals its intent to help battered wives, the statutory provisions are gender-neutral, thereby also allowing battered husbands to rely upon them to achieve residency. In this article, discussion of domestic violence will refer to the man as the abuser and the woman as the abused. This intuitive characterization is consistent with a study finding that 95 to 98% of the victims of spousal battery are women. Of the 2 to 5% of female perpetrators, a majority have been found to be engaging self-defense. See MICHAEL MCKENZIE, DOMESTIC VIOLENCE IN AMERICA 9 (1995); R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES (1979); see also LENORE WALKER, THE BATTERED WOMAN (1979).

99. The provision allows alien spouses to achieve residency whether they or their children are subject to abuse. See INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii); INA § 204(a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii). A battered alien child is also independently able to secure residency without the assistance of his parent. See INA §
2) VALID MARRIAGE WITH THE QUALIFYING SPOUSE—the alien entered the marriage with either a U.S. citizen or lawful permanent resident¹⁰⁰ in "good faith"¹⁰¹ and has resided in the United States with the qualifying spouse;¹⁰²

3) GOOD MORAL CHARACTER—the alien has been a person of good moral character;¹⁰³ and

4) EXTREME HARDSHIP—the alien’s removal would be an “extreme hardship” to the alien or the alien’s child.¹⁰⁴

(a) The Skepticism of Abuse and Good Faith Marriage

The need to demonstrate abuse and good faith marriage may seem appropriate requirements. However, a battered alien’s ability to satisfy such conditions is impeded by supplemental regulatory instructions which virtually insist upon formal, public records to prove both the abuse and validity of the marriage.¹⁰⁵ Caught at the intersection of domestic violence and immigration, battered aliens are uniquely challenged by this request. Given the private nature of domestic violence, a battered woman often does not seek the public assistance evidenced by the police reports, hospital records and court orders which are necessary to demonstrate abuse.¹⁰⁶ Additionally, the


¹⁰⁵. See 8 C.F.R. § 204.2.

controlling dynamic of domestic violence dissuades battered spouses from seeking help for fear of further reprisals.\textsuperscript{107} This power dynamic also makes it difficult to prove good faith marriage. Unlike a traditional "healthy" marriage, replete with joint assets and debts, in an abusive marriage, the abuser is likely to maintain all records in his name alone. Such conditions which challenge a battered wife's ability to demonstrate the abuse and good faith marriage are further exacerbated by her lack of immigration status. Undocumented and fearing deportation, a battered alien is understandably unwilling to surface before any official or person who may contact immigration officials.\textsuperscript{108}

The abuse and good faith marriage requirements are likely based upon combined skepticisms regarding the honesty of aliens and the pervasiveness of domestic abuse.\textsuperscript{109} From the earliest immigration law and its stereotyping of Chinese immigrants, there has been a willingness to portray aliens as forever foreign, unassimilable, and untrustworthy.\textsuperscript{110} More recent judicial and legislative expectations that aliens must "Americanize" perpetuate this sentiment of distrust. The result is to limit an alien's ability to secure residency or other legal remedies.\textsuperscript{111} For battered aliens, the challenge of such
misperceptions is aggravated by the addition of negative societal biases toward battered women.

As part of the effort to deny the extent of intimate violence, societal and legal attitudes toward domestic violence remain laden with insinuations regarding battered women. Characterizing the battered woman as a “pushy bitch” who must have been “asking for it” is a common stereotype often evident in an abuser’s defense to domestic violence charges. Maintaining the negative imagery, the alternative popular defense is to charge the battered woman as a liar, who is only alleging spousal assault in order to get a “quick fix” response to her request for exclusive right to the home, child custody or other legal sympathies.

(b) The Good Victim of Good Moral Character and Extreme Hardship

Recognizing the inherent distrust of both aliens and battered women, the rationale of VAWA’s good moral character and extreme hardship requirements seems evident. Combined, these two criteria force battered aliens to overcome society’s negative presumptions. By requiring good moral character and extreme hardship, VAWA awards relief only to those women who have legally redeemed themselves as “good victims.” Such a demand is in keeping with a U.S. jurisprudential tradition of only awarding relief to female litigants who personify the image of feminine goodness. In U.S. domestic laws governing not only domestic violence but others forms of gender violence such as rape and sexual harassment, the successful good victim is helpless, virginal, and completely without fault. The
demand for such traits is dramatically evident in the VAWA criteria of good moral character and extreme hardship.

Statutorily defined, the good moral character prong is prima facie evidence that the law insists successful VAWA applicants be scrupulous individuals. This may be a legitimate condition placed on aliens seeking residence in the United States. However, VAWA applicants are the only aliens achieving residency through the family petitioning process who must demonstrate this quality. Why is this condition not placed upon aliens who secure residency with the cooperation of their nonabusive spouses or other family members? To suggest that placing this requirement on VAWA applicants is in response to the supposed threat of increased fraud in a self-petitioning process seems misplaced. An alien able to successfully file a VAWA claim which fraudulently asserts a good faith, but abusive marriage will not be discovered simply by requiring proof of good moral character. Instead, the good moral character requirement seems part of the common willingness to blame and discredit the battered women. VAWA's demand for good moral character thus ensures that the successful battered alien will not only overcome these negative presumptions—she will radiate an unblemished image.

Like the good moral character requirement, the extreme hardship requirement is uniquely imposed on VAWA applicants in the family petitioning process. Reviewing the definition of extreme hardship utilized for VAWA once again reveals the stereotypical reasoning underlying this criterion. Extreme hardship has traditionally been a requirement for other forms of statutory relief.

116. A person may be found to lack good moral character if she 1) is a habitual drunkard; 2) is engaging in prostitution; 3) is smuggling; 4) is practicing polygamy; 5) has been convicted of or has admitted to certain crimes of moral turpitude; 6) has given false testimony for immigration benefits; or 7) is denied for discretionary reasons not specifically enumerated. See INA § 101(f), 8 U.S.C. § 1101(f). For a regulatory discussion of the application of the good moral character requirement to VAWA applicants see 8 C.F.R. § 204.2(c)(2)(v), (e)(1)(vii). For a critical analysis of the requirement in VAWA cases, see Kelly, supra note 93, at 686-87.

117. See generally INA § 204, 8 U.S.C. § 1154.


119. Characterizing battered women as liars ignores the reality that domestic violence is underreported, not overreported. See WALKER, supra note 98, at 19. As recognized by U.S. Health and Human Services Secretary Donna Shalala, "Domestic violence is an unacknowledged epidemic in our society." Jill Smolowe, When Violence Hits Home, TIME, July 4, 1994, at 20.


121. Extreme hardship was traditionally associated with a form of relief known as "suspension of deportation." See INA § 244(a)(1), 8 U.S.C. § 1254 (1995). However, since
Without a statutory definition, the definition of extreme hardship evolved through judicial and administrative reasoning, with a successful showing dependent upon the circumstances of each case and the ingenuity of the alien and his advocate. Yet despite this amorphous history, the administrative test of extreme hardship applied to VAWA applicants has been narrowly tailored to the circumstances surrounding the domestic violence. Pursuant to regulation, VAWA applicants are encouraged to base their extreme hardship showing upon evidence regarding the length and severity of the violence, the need to access U.S. medical, social and legal services for battered women and children, the lack of similar services in the home country, and the attitudes the battered woman would encounter in her home country because of the domestic violence stigma. Moreover, when the INS is inclined to deny a VAWA application because of an insufficient showing of extreme hardship, the request for further information accompanying the "Notice of Intent to Deny" (NOID) recites a boilerplate list of conditions which all associate the test of extreme hardship with the domestic violence endured.

Like the good moral character requirement, imposing the extreme hardship requirement upon VAWA applicants in the family petitioning process does not reduce fraud. Showing the availability of victim services in the United States and the lack of such services at


The "exceptional and extremely unusual hardship" test of cancellation of removal for non-VAWA applicants is clearly a higher burden than the "extreme hardship" test utilized for VAWA self-petitioners and cancellation of removal applicants. On the VAWA extreme hardship test, see INA § 204(a)(1), 8 U.S.C. § 1154(a)(1); INA § 240A(b), 8 U.S.C. § 1229b(b) (1996). On waivers utilizing extreme hardship, see, for example, INA § 212(h)-(i), 8 U.S.C. § 1182(h)-(i). For further history of the extreme hardship test and its uses, see Kelly, supra note 93, at n.105.

122. See, e.g., In re O-J-O, Int. Dec. 3280 (BIA 1996). VAWA regulations also recognize in non-VAWA cases that "extreme hardship" must be shown on a case-by-case basis, but such regulations also acknowledge such conditions as an alien's age, infirmity, ties to the United States and lack of ties abroad as common to establishing extreme hardship. See Self-Petitioning, 61 Fed. Reg. 13,061, 13,067 (1996).

123. See 8 C.F.R. § 204.2(c)(1)(viii), (c)(2)(vi); Self-Petitioning, 61 Fed. Reg. at 13,067.

124. As a professor supervising the VAWA cases of the St. Thomas University School of Law Immigration Clinic, I have received numerous NOIDs related to extreme hardship. Each one contains an identical list of factors, all related to linking extreme hardship with the domestic violence. Anticipating such requests, the Clinic now successfully preempts such letters by submitting in the original VAWA application a memorandum of law which argues the existence of each factor typically seen on the NOID.
home has no bearing on credibility. Rather than exposing fraudulent applicants, the extreme hardship requirement seems to serve another purpose. The extreme hardship requirement ensures that the only successful VAWA applicants will be victims who demonstrate a critical dependence upon the services of the United States in order to survive. By insisting that a successful VAWA applicant embody the stereotypical, helpless woman, VAWA's extreme hardship requirement perpetuates the good victim image that permeates U.S. laws intended to assist battered women. Weakness is rewarded, while strength is denied. Through VAWA's requirements, the U.S. government simply steps in and replaces the batterer as the stereotypical controlling, needed presence in the battered woman's life.

B. Deporting Domestic Violence Offenders

(1) The Amendments of 1996

Encouraging domestic violence survivors to be victims, entirely dependent upon the U.S. government, is not only perpetuated by the changes made by VAWA in 1994. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress again addressed domestic violence in immigration. A major overhaul of immigration law, IIRIRA expanded the grounds for removing aliens and attempted to increase the absolute nonreviewability of federal action in immigration matters. Amongst the amendments was the creation of a new

125. Common to earlier understandings of domestic violence was the notion of "learned helplessness" which suggested that a battered woman was unable to leave a battering relationship because over time she had been conditioned to be weak and subservient. Mahoney, supra note 6, at 39 n.170 and accompanying text. For discussions of how this characteristic is still evident and the consequences of failing to portray this image in the domestic violence context see supra note 6 and accompanying text (discussing defenses toward domestic violence). The need to personify the good victim is also evident in laws governing the gender violence crimes of rape and sexual harassment. See Iglesias, supra note 6, at 902-43; Ronner, supra note 6.


grounds of removability for any alien who is convicted of a crime of
domestic violence or has been found in violation of certain provisions
of a domestic violence protection order.\footnote{128} Introducing the measure,
Senator Bob Dole straightforwardly stated its purpose. "\[O\]ur society
will not tolerate crimes against women and children."\footnote{129}

Despite the publicity surrounding IIRIRA, scant attention has
been given to the provision allowing domestic violence offenders to
be deported.\footnote{130} However, for several reasons this provision is more
aggressive than many of the changes made. Unlike the grounds of
deportability for "crimes of moral turpitude," deportability for a
domestic violence offense is not limited by any consideration of the
length of sentence or how many years after admissibility the crime
was committed.\footnote{131} More striking, an individual found by a court to
have violated the terms of a domestic violence injunction which
enjoins further violence does not have to be convicted in a criminal
court in order to be deported. An individual may be deportable upon
a finding of contempt \textit{by either} a civil or criminal court.\footnote{132}
Deportability for all other criminal offenses statutorily requires
convictions.\footnote{133}

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deporation provisions of the INA, see \textsc{Legomsky}, \textit{supra} note 41, at 408-53. For a review
of the waivers available in exclusion and expulsion proceedings for family members of
U.S. citizens and lawful permanent residents prior to IIRIRA and a comparison to
German immigration provisions see Hiroshi Motomura, \textit{The Family and Immigration: A

128. This provision applies equally to lawful permanent residents and undocumented
1227(a)(2)(E)). Also included in this new ground is deportability for crimes against
children, such as child abuse, child neglect or child abandonment. \textit{See id.}

129. Bob Dole, \textit{Children Deportable Offenses}, \textsc{Congressional Press Release},
April 25, 1996. For a history of the Senate's bill, S. 1664, 104th Cong. 2d Sess. (1996), see
Paul Coverdell, \textit{Coverdell-Dole Introduce Deportation Amendment}, \textsc{Congressional
Press Release}, April 24, 1996; Paul Coverdell, \textit{Update: Senate Approves Coverdell-Dole
Deportation Amendment}, \textsc{Congressional Press Release}, April 25, 1996; Bob Dole,
\textit{Illegal Immigration Reform Passes}, \textsc{Congressional Press Release}, May 2, 1996;
Republican Platform Committee Adopts Coverdell-Dole Measure to Protect Women and
Children, 1996 \textsc{Presidential Campaign Press Materials}, August 7, 1996 (available
on Lexis); \textit{see also} Linda Kelly, \textit{Domestic Violence Survivors: Surviving the Beatings of

130. For further discussion of the deportability of domestic violence offenders, see
Kelly, \textit{supra} note 129.

131. An alien is deportable for being convicted of one crime of moral turpitude "for
which a sentence of one year or longer may be imposed" generally only if such crime is
committed within five years after the date of admission. INA § 237(a)(2)(A)(i)(ii), 8
U.S.C. § 1227(a)(2)(A)(i)(ii). There is no consideration of sentence or time of commission
1227(a)(2)(E).


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Revictimizing Women

The unequivocal nature of the domestic violence ground of deportability may be hailed as a bold step away from the traditional focus in U.S. domestic violence laws on the victim and the consequent implication that she is the problem. By redirecting the focus, the immigration ground explicitly acknowledges that the cause of domestic violence is the perpetrator. Yet despite this strong stance, the commitment of the measure to battered women should be questioned. By creating an absolute ground of deportability, Congress "revictimizes" the very population of battered women it seeks to assist. In so doing, this provision adheres to the rationale supporting other gender-driven immigration measures. Because women are dependent creatures, unable to care for themselves, they must rely upon the U.S. government for their survival. Such characterizations are not only untrue, but risk placing women and their children in greater danger.

By subjecting domestic violence offenders unconditionally to deportation, the immigration provision is vulnerable to the same criticism levied against such criminal law practices as mandatory arrest and coerced victim participation in prosecutions. Once the need for the survivor's cooperation in the legal process is removed, the government effectively replaces the abusive spouse as the

134. See generally Mahoney, supra note 6. See also Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions [hereinafter "No Right to Choose"], 109 HARV. L. REV. 1849, 1879-80 (1996); Meier, supra note 106, at 1317-18; McKenzie, supra note 98, at 53.

135. See Kelly, supra note 129, at 305.

136. For discussions of "revictimization" in other areas of law, see, for example, Meier, supra note 106, at 1333-34 (defining role of a domestic violence advocate as an attentive, empathetic listener to prevent "usurping [the battered woman's] autonomy and decisionmaking." Compare with Hanna, supra note 134, at 1884 (suggesting a battered woman's resilience and strength prevents revictimization when the government unilaterally prosecutes).

137. See supra notes 40-125 and accompanying text (discussing conferring citizenship, the family-petitioning process and VAWA) and infra notes 145-193 and accompanying text (discussing asylum).

138. See supra notes 45-51, 116-125 and accompanying text (discussing nationality and VAWA provisions, respectively, which reflect such dependency and duty to care).

controlling agent.\textsuperscript{140} Deporting the batterer also jeopardizes other legitimate interests of a survivor. Rather than protecting the survivor, the provision places her at further risk. The threat of "separation assault" is magnified. Now that the abuser faces deportation, he may resort to more desperate and violent measures in response to his imminent loss of power and control over his spouse.\textsuperscript{141} In other respects, the survivor's physical well-being is also jeopardized. Despite being battered, the survivor often relies upon her batterer for her needs and the attendant needs of her children.\textsuperscript{142} Such needs may include such basic necessities as food and shelter.\textsuperscript{143} Beyond physical demands, unilaterally deporting abusers ignores the very real emotional ties a battered woman may still have to her mate. Love and other feelings such as the desire to help and protect her abuser (despite his behavior) are strong emotions that do not simply end when the abuse begins.\textsuperscript{144}

The deportation of domestic violence offenders has serious consequences. Not only does it undermine the image of women, it attacks their physical and emotional well-being. Moreover, despite

\textsuperscript{140} I have previously suggested that such control could be eliminated by allowing a battered woman's participation in the deportation proceedings of her abuser. Kelly, \textit{supra} note 129, at 324-26.

\textsuperscript{141} Because the time of separating from one's abuser can be the most dangerous, separation assault is a dynamic of domestic violence that can not be ignored. As Mahoney explains the term:

\textit{Separation assault} is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.

Mahoney, \textit{supra} note 6, at 65-66.

\textsuperscript{142} Children are cited as the most common reason a battered woman stays with her abuser. See \textit{DOBASH \& DOBASH, supra} note 98, at 148. Such rationale remains controversial as children are subject to emotional and physical harm by remaining in a violence household. See, e.g., \textit{WALKER, supra} note 98, at 27-28 (citing study in which one third of wife batterers beat their children); \textit{DOBASH \& DOBASH, supra} note 98, at 105-52 (discussing the risk toward children).


\textsuperscript{144} See \textit{WALKER, supra} note 98, at 27 (countering the myth of a battered woman as masochistic with the "cycle of violence" and the kind qualities a batterer exhibits during period of contrition). See also Crenshaw, \textit{supra} note 143, at 893; \textit{DOBASH \& DOBASH, supra} note 98, at 145-46.
being embedded in U.S. immigration law, the provision again reaches beyond aliens as the battered spouses of aliens may be either U.S. citizens or aliens. Consequently, in denying a battered woman’s agency and her right to resolve her private relationship in the manner she deems most appropriate, U.S. immigration law strikes a devastating blow against gender equality.

As evident in VAWA’s good moral character and extreme hardship requirements as well as in the provision mandating the deportation of domestic violence offenders, women are both treated and expected to behave like victims. Yet such gender biases in U.S. immigration law are not limited to women living inside the U.S. border. The good victim and all the complications she embodies extends into the area of asylum.

C. Asylum’s Good Victim

By acceding to the U.N. Protocol Relating to the Status of Refugees and indirectly to the 1951 U.N. Convention Relating to the Status of Refugees, the United States has made the U.N. definition of refugee the basis for U.S. asylum and refugee law.\textsuperscript{145} Women and young girls are reported by the United Nations High Commissioner


Essentially, a refugee is defined as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

To qualify as an asylee one must also meet the refugee definition. The terms refugee and asylee are often used interchangeably as the only fundamental difference is that a refugee is an individual who secures refugee status outside of the United States (such as at a U.S. embassy), while an asylee is someone who secures refugee status only after applying once inside the United States. INA § 208(a), 8 U.S.C. § 1158.

for Refugees to constitute the majority of the world's refugees.\textsuperscript{146} However, because the persecution women suffer often is not deemed to fit into the refugee definition, women are less likely to gain asylum than are men.\textsuperscript{147}

The case of \textit{Kasinga} illustrates how gender images and biases are at the root of this challenge facing female asylum seekers.\textsuperscript{148} In granting asylum to Fauziya Kasinga, the BIA outlined the image a woman must imitate in order to be successful. Its decision also signaled the direction of more recent efforts which have further narrowed the ability of women to seek asylum.

(1) \textit{Kasinga: Awarding Asylum to FGM Victims}

(a) Kasinga's Story

At the age of 17, Fauziya Kasinga fled her country of Togo in order to escape female genital mutilation (FGM). The ancient ritual of FGM involves removing all or part of the female genitalia. Following the procedure, the remaining wound may be sewn shut, leaving only a small passage for blood or urine. While Kasinga's Tchamba-Kunsuntu tribe usually performed FGM on its younger female members, Kasinga had been able to avoid the practice due to her father's opposition and his influential tribal position. Yet when Kasinga's father died and her mother was driven away according to tribal custom, Kasinga came under the control of her paternal aunt who supported FGM. It was the aunt's efforts to arrange Kasinga's marriage to a man who agreed that FGM must be performed prior to the marriage's consummation which ultimately caused Kasinga to flee.\textsuperscript{149}


\textsuperscript{147} Additionally, women are less mobile than men, thus lessening their chances of leaving their countries of persecution. Fox, supra note 145, at 122-23.

\textsuperscript{148} In re Kasinga, Int. Dec. 3278 (BIA 1996). For an earlier discussion of how the challenges of Kasinga and images of women have been addressed in a law school clinical setting see Kelly, supra note 115. For a discussion of the unique evidentiary problems faced by women seeking asylum on account of gender violence, see Nancy Kelly et al., \textit{Guidelines for Women's Asylum Claims}, 71 \textit{INTERPRETER RELEASES} 813, 813-24 (1994).

While the alien's name is properly spelled "Kassindja," it was misspelled throughout legal and media accounts of her story. \textit{See infra} note 149 reflecting alien's proper spelling of name in her personal account.

\textsuperscript{149} \textit{See Kasinga}, at 3-4. For Kasinga's own account of long struggle to flee Togo and
Given the severity of FGM and the rudimentary conditions under which it may be performed, FGM is known to cause injuries ranging from psychological trauma to pain, hemorrhaging and death. Yet despite such dangers, the practice is not one which has been universally dismissed. Countering the typical Western attitude of immediate repulsion, cultural relativists raise the legitimate need to be sensitive toward the practice's sexual, cultural, religious and social justifications. By ignoring these concerns, efforts to eradicate the practice in the interest of empowering women risk the opposite effect of marginalizing women by denying the voice of women who support some aspect of the practice. Aware of this dilemma, feminists continue to struggle with the proper response toward FGM. This ongoing dialogue is built upon an awareness that singular responses toward other complex gender issues have often ignored such important factors as race, class and immigration status.

Despite such complications, the BIA's response to FGM in Kasinga was swift and absolute. Reversing the Immigration Judge's denial of asylum, the BIA determined Kasinga's risk of imminent subjection to FGM was sufficient to establish the various prongs of the asylum definition. With the concession of the INS opposing counsel, the BIA unconditionally denounced FGM as a tool of finally secure asylum see FAUZIYA KASSINDIA & LAYLI MILLER BASHIR, DO THEY HEAR YOU WHEN YOU CRY (1998). For an account written by Kasinga's attorney see Karen Musalo, In Re Kasinga: A Big Step Forward for Gender-Based Asylum Claims, 73 INTERPRETER RELEASES 893 (1996).

150. FGM is estimated to continue to be performed in 40 countries, 28 of which are in Africa. For further discussion of the physical aspects of the practice see Jennifer A. des Grosseilliers, Note, In Re Kasinga: “When the Axe Came into the Forest, the Trees Said: Is the Handle One of Us?”, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 101-07 (1998); Amede L. Obiora, The Issue of Female Circumcision: Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision, 47 CASE W. RES. L. REV. 275, 284-95 (1997); Erika Sussman, Note, Contending with Culture: An Analysis of Female Genital Mutilation Act of 1996, 31 CORNELL INT'L L. J. 193, 196-203 (1996).

151. See Obiora, supra note 150, at 298-307.

152. For criticisms of “essential” feminist positions see, for example, DRUSCILLA CORNELL, THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT 6 (1995), Crenshaw, supra note 96, Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984).

I use the term “female genital mutilation” rather than less provocative terms as “female genital surgery,” “female circumcision,” or the traditional term, “irua.” For a discussion of the significance of the terminology used, see Hope Lewis, Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide, 8 HARV. HUM. RTS. J. 1 (1995); Obiora, supra note 150, at 289-90.

153. For the statutory definition of refugee which an asylum seeker must meet, see supra note 145.
As the BIA declared, "The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it. . . . [T]here is no legitimate reason for the practice." Indeed, in supporting the BIA's opposition to the practice, the INS took the unusual step of asserting that the severity of FGM eliminated any need for the alien to prove the persecutor's punitive intent. After discarding the need for punishment, establishing FGM as a tool of persecution and finding Kasinga's fear of persecution to be "well-founded," the remaining hurdle to granting asylum was to find the well-founded fear of persecution to be "on account of" one of the five established grounds.

(b) The Gender Challenge of Asylum's Social Group

Linking persecution to an asylum seeker's race, religion, nationality, membership in a particular social group or political opinion often proves to be the deciding factor. This test uniquely challenges women seeking asylum on account of gender violence. It is only recently that rape has been recognized as a weapon which may be used to punish a woman for her political opinion. Establishing "on account of" when there is no readily apparent political opinion has proven more difficult. The limits of that category, and the more obvious limits of the race, religion and nationality categories has brought feminists and advocates to turn by necessity to claiming that gender violence is "on account of social group." Yet how is "social group" to be defined?

Traditionally, social groups recognized in asylum law have been

154. See Kasinga, at 19-20.
155. See id. at 22-23.
157. Kasinga, at 22.
158. For the Supreme Court's most recent and illuminating discussion of the "on account of" factor, see INS v. Elias-Zacharias, 502 U.S. 478 (1992).
159. In re D-V-, Int. Dec. 3252 (BIA 1993) (awarding asylum to a Haitian woman who was raped by soldiers opposed to her support of President Jean-Bertrand Aristide).
160. See, e.g., Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993) (support of feminism may constitute "political opinion"); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987) (upholding BIA denial of imputed political opinion asylum claim of woman related to a murdered agrarian reform activist); Lazo-Majano v. INS, 813 F.2d 1432, 1435-36 (9th Cir. 1987) (granting asylum to a Salvadoran woman sexually abused by an army officer based on political opinion imputed to her through officer's threat to publicly denounce her as a subversive). See also Pamela Goldberg, U.S. Law and Women Asylum Seekers: Where Are They and Where Are They Going?, 73 INTERPRETER RELEASES 889 (1996); Nancy Kelly, supra note 148, at 813.
identified through a "shared immutable characteristic" which a person cannot or should not be required to change.\textsuperscript{161} In setting this definition, the BIA suggested that such an "innate" characteristic as sex could be sufficient to define a social group.\textsuperscript{162} However, "women" per se, remain unrecognized as a social group. Women have not simply been able to argue that gender violence is directed at women, on account of their gender.\textsuperscript{163} Instead, it has been necessary to link gender with another characteristic in order for a woman to advance a successful claim based on gender violence.

Meeting this test of "gender-plus," \textit{Kasinga} was built on a social group defined as "young women" of Kasinga's tribe "who have not been, and do not wish to be, subjected to FGM."\textsuperscript{164} Yet by ignoring the traditional "immutable characteristic" test and conflating social group with political opinion conditions, the BIA heightened the asylum standard for women.\textsuperscript{165} There seems to be no acceptable explanation for the BIA's failure to simply define \textit{Kasinga's} social group as "women." Kasinga had already established the prong of "well-founded fear" by choosing to flee rather than undergo FGM. To require her to show an opposition to the practice within the social group criteria was unnecessary. As Judge Rosenberg reminded the

\begin{footnotes}
\item[162] The social group common characteristic "might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." Matter of Acosta, 19 I. & N. Dec., 211, 233-34. For a discussion of how the social group standard set by \textit{Acosta} may have been curtailed, at least for women by \textit{In re R-A-}, Int. Dec. 3403 (BIA 1999), see \textit{infra} notes 172-193 and accompanying text.
\item[163] See, \textit{e.g.}, \textit{Fatin}, 12 F.3d at 1241 (finding Iranian women who refuse to conform to government's gender specific laws and social norms may constitute a social group); \textit{Safaie v. INS}, 25 F.3d 636, 640 (8th Cir. 1994) (dismissing claim of Iranian woman based on social group due to shared sex); \textit{Klatwitter v. INS}, 970 F.2d 149, 152 (6th Cir. 1992) (finding harm or threat based on sexual attraction does not constitute persecution, despite fact persecutor was a high-ranking government official able to abuse his position of power); Matter of Pierre, 15 I. & N. Dec. 461 (BIA 1975) (finding husband's threats and efforts to kill his wife insufficient to award withholding of deportation). \textit{See also Goldberg, supra} note 160.
\item[165] See \textit{id.} at 43-50 (Rosenberg, J, concurring) (criticizing majority for imposing a dual requirement on female claims based on gender).
\end{footnotes}
Board in her concurrence, the "catch-all" social group category was intended to have a broad scope.166 Less than two weeks earlier, the Board had awarded asylum to a man simply based upon his membership in a Somali tribe that was being systematically attacked by other tribes.167 There was no imposition of any additional requirement that the asylee demonstrate how his individual opinion invited such wrath.168 As Judge Rosenberg candidly charged, Kasinga was subjected to a higher standard because she was a woman.169 The consequence of such a distinction is to force female asylum seekers to conform to the image of a good victim.

For Kasinga, the BIA's demand that she demonstrate an opposition to FGM allowed her to confirm her image as an innocent victim.170 Of course, Kasinga's youth, virginal status and sympathetic New York Times front page story and photograph also conveniently contributed to this image.171 However, for a woman subject to gender violence other than the practice of FGM, satisfying the good victim image becomes more difficult. By narrowing the social group category available for women, the Kasinga decision successfully restricted women from seeking asylum as a result of alternative forms of gender violence.

(2) R-A-: Limiting Asylum for Domestic Violence Survivors

(a) R-A-'s Story

Like Kasinga, Rodi Alvarado-Peña was a target of gender violence.172 However, unlike Kasinga, Alvarado-Peña was forced to suffer another type of abuse. A native and citizen of Guatemala, Alvarado-Peña had fled to the United States, seeking asylum after

166. See id. at 43-44 (Rosenberg, J., concurring).
168. See Kasinga, at 45 (Rosenberg, J., concurring) (discussing In re H-).
169. See id. at 47 (Rosenberg, J., concurring).
170. Shortly after the Board's unequivocal denunciation of the practice, federal legislation was passed criminalizing the practice of FGM and imposing sanctions on foreign governments who were not working to prevent the practice. 18 U.S.C. § 116 (Sept. 30, 1996), 22 U.S.C. § 262K-2 (Sept. 30, 1996). For more on federal and state legislation see Sussman, supra note 150, at 194-95 nn.2-7. For more on the Board's position on FGM see supra notes 154-157 and accompanying text.
suffering from ten years of horrific spousal abuse. From the moment she was married at age 16, her husband mistreated her. Alvarado-Peña was severely raped by her husband on an almost daily basis. Forceful sodomy caused "the most severe pain" and was also committed on a regular basis. After being kicked in the genitalia on one occasion, Alvarado-Peña bled for eight days. On another occasion, when her menstrual period was 15 days late, her husband broke her jaw bone. She was violently kicked in the spine when she refused to abort her three to four month fetus. Other unthinkable acts of violence also regularly occurred. Alvarado-Peña was kicked, dragged and beaten "for no reason at all ... whenever he felt like it." When she tried to run away she was pistol-whipped, thrashed with an electrical cord, and threatened with defacement and bodily mutilation by a machete. Multiple attempts to seek the protection of the Guatemalan police and courts failed. As her husband had told her, "You’re my woman, you do what I say." Through this declaration of power, Alvarado-Peña testified her husband saw her "as something that belonged to him and he could do anything he wanted."

In response to this record, the Board declared it was a “struggle to describe how deplorable we find the husband’s conduct to have been.” Yet such a finding did not prevent the Board from denying Alvarado-Peña’s claim, determining that her abuse was unrelated to any legitimate social group.

(b) Restricting Social Group for Gender Violence

Granting her case at trial, the Immigration Judge accepted Alvarado-Peña’s social group as “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” The BIA conceded that this group contained the prerequisite “immutable characteristic.” However, despite years of adhering to this basic formulation for social group, the BIA announced that additional showings must now be made. To fall into the social group category,

173. R-A-, at 19.
174. Id. at 5.
175. Id. at 7.
176. Id. at 8.
177. An argument for asylum based on an actual or imputed political opinion that she wished to be free from harm or did not believe women should be controlled by men was also denied. See id. at 19-27. For the difficulties women have traditionally had construing gender violence as persecution on account of political opinion, see supra notes 158-163 and accompanying text.
178. R-A-, at 27.
179. Id. at 28.
Alvarado-Peña had to demonstrate how the social group characteristic was understood by the alien’s society so that the BIA could understand the persecutor’s motives. 180 To qualify as a member of a social group, the battered woman would also be required to show a social expectation that women be abused or that “adverse consequences” result when they are not abused. 181 Alvarado-Peña’s claim failed as she had not shown “that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.” 182 Moreover, the appellant failed to demonstrate the nexus between her purported social group and the abuse since only her husband abused her. For the Board, social group membership for victims of domestic violence implied that a persecutor would target other members of the group besides his wife. 183

While the Kasinga decision had been hailed as a “big step forward” for women seeking asylum, it was ultimately the “gender-plus” definition of social group created in Kasinga which allowed the Board to justify creating such an insurmountable test for battered women seeking asylum. 184 Minimizing the claim in R-A- in comparison to Kasinga, the Board held:

The respondent in this case has not demonstrated that domestic violence is as pervasive in Guatemala as FGM is among the Tchamba-Kunsuntu Tribe, or, more importantly, that domestic violence is a practice encouraged and viewed as societally important in Guatemala. She has not shown that women are expected to undergo abuse from their husbands, or that husbands who do not abuse their wives, or the nonabused wives themselves, face social ostracization or other threats to make them conform to a societal expectation of abuse. 185

By contorting a disparate definition of social group for women, the Board effectively limited the number of gender violence cases which would be eligible for asylum. In so doing, the Board neatly addressed several concerns. First, by creating a difficult test for battered women, the BIA pacified any fear that simply demonstrating the “immutable characteristic” of social group would encourage large numbers of battered women to pass through our “golden door.” 186

180. See id. at 27-28. The BIA also found that the appellant failed the less expansive test imposed by the 9th Circuit of demonstrating “a voluntary associational relationship.” Matter of R-A-, at 27 (relying on Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986), Li v. INS, 92 F.3d 985 (9th Cir. 1996); De Valle v. INS, 901 F.2d 787 (9th Cir. 1990)).
182. Id. at 29-30.
183. Id. at 33-34.
184. Musalo, supra note 149.
185. R-A-, at 43-44.
186. “But the social group concept would virtually swallow the entire refugee definition
Indeed, one week after R-A- was denied, the Board was able to deny asylum to a young girl seeking protection from the abuse of her father. Unlike such pervasive forms of gender violence, FGM is a relatively limited practice, generating fewer cases than would conceivably come forward if asylum was awarded based upon the type of spousal abuse suffered in R-A-. Yet, more than just playing a numbers game, denying asylum in R-A- preserved societal norms. In contrast to its attitude toward FGM, the U.S. is not socially or legally prepared to so vehemently denounce gender violence when it takes its more common (and Western) form of domestic violence. The underlying cultural belief that such crimes are private actions is as prevalent in asylum law as it is in U.S. domestic law.

if common characteristics, coupled with a meaningful level of harm, were all that need be shown.” Id. at 31.

187. Such abuse was often a result of the girl’s efforts to intervene when her father was beating her mother. As the case is an unpublished decision, only newspaper accounts are available. See Tulsky, supra note 172, at A3. For later criticisms of the inconsistency in asylum law regarding domestic violence, see Advocates Point to Inconsistency in Adjudication of Domestic Violence Cases, 71 INTERPRETER RELEASES 205 (2000).

188. For the BIA’s recognition that the number of potential asylees does not affect a legal interpretation of the standard, see In re H-, Int. Dec. 3276, 11, n.5 (BIA 1996).

189. See, e.g., Reva B. Seigel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L. J. 2117, 2180 (1996) (arguing that domestic violence has undergone “preservation through transformation”). See also Honorable Karen Burnstein, Naming the Violence: Destroying the Myth, 58 ALB. L. REV. 961, 964-65 (1995) (arguing that the failure to recognize domestic violence as a public issue may serve to condone it); Mahoney, supra note 6, at 12-13 (arguing that support for privacy may explain efforts to protect the institution of marriage and the practice of subordinating women).

190. As stated by the majority, despite a record revealing the Guatemalan government’s “tolerance of abuse at levels we find appalling . . . construing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the ‘on account of’ requirement in the statute.” R-A-, at 38, 40. Relying on the Department of Justice’s (DOJ) own guidelines for granting asylum to battered wives, the dissent charged: “This type of differentiation between the supposedly more private forms of persecution, typically suffered by women, and the more public forms of persecution, typically suffered by men, is exactly the type of outdated and improper distinction that the DOJ Guidelines were intended to overcome.” Id. at 87-88 (Guendelsberger, J., dissenting). For more on the DOJ guidelines and their basis in UNHCR instructions, see Phyllis Coven, Department of Justice, Memorandum on Consideration for Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995). See also Nancy Kelly, supra note 148.

For more on the treatment of spousal abuse and rape as private acts in asylum law, see, for example, Angoucheva v. INS, 106 F.3d 781, 790 (7th Cir. 1997) (remanded) (characterizing intimate abuse as done for the abuser’s “personal edification”); Matter of Pierre, 15 I. & N. Dec. 461 (BIA 1975) (denying asylum to wife of high ranking Haitian police officer). See also Kelly, supra note 115 (discussing the challenged posed by the private/public dichotomy in a law school clinic and advocacy setting).

Outside of immigration law, the public/private distinction and its encouragement of governmental inaction has been widely acknowledged by feminists as a tool utilized over such diverse issues as abortion, sexual harassment, rape and spousal abuse to “fortify
To liberally award asylum based on domestic violence would necessitate recognizing that gender violence in any form is a tool wielded to subordinate women. In deciding R-A-, the Board evidenced its failure to understand that domestic violence is about "doing power" within the confines of a relationship. At the core of the Board's ignorance was its demands that a survivor of domestic violence prove: 1) she was abused by men other than her husband; 2) her husband abused other women besides his wife; 3) the violence was motivated by something more than her husband's belief that "You're my woman, you do what I say."

Common to a most basic understanding of domestic violence, a primer on the subject begins by recognizing that: "The use of physical violence against women in their position as wives is not the only means by which they are controlled and oppressed but it is one of the most brutal and explicit expressions of patriarchal domination." The Board's inability to appreciate this most fundamental notion once again reminds us of the gender stereotypes, biases and prejudices underlying immigration law. The effect of such images is to destroy the potential of asylum and the strength of other forms of relief available through U.S. immigration law.

Conclusion

Combined, the laws governing rights of citizenship, residency and asylum all demonstrate consistent attitudes toward gender and desirable gender roles. Mothers remain natural caretakers and are provided with inherent rights to confer citizenship and petition for the residency of their children. Such imagery contrasts sharply with that of the father who is understood to have no natural caregiving ability and retains only a financial obligation. As a result, immigration law mandates that fathers meet such obligations before they may exercise the right to their children. Images of feminine goodness also manifest themselves through the demand for virtuous, helpless victims in the private relationships of power." MACKINNON, supra note 37, at 97. For a discussion of the dichotomy's impact on the treatment of domestic violence, see, for example, Elizabeth Schneider, The Violence of Privacy, 23 CONN. L. REV. 973 (1991); Malinda L. Seymore, Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence, 90 NW. U. L. REV. 1032, 1070-73 (1996) (analyzing how the spousal immunity doctrine has affected the public/private debate in the domestic violence context); Siegel, supra note 189 (discussing the "modernization" of domestic violence as a right of marital privacy).

For a discussion of rape's portrayal as a private sexual act see Iglesias, supra note 6, at 891-97; MACKINNON, supra note 37, at 87-88.

191. Mahoney, supra note 6, at 93 (quoting JAN E. STETS, DOMESTIC VIOLENCE AND CONTROL 109 (1988)).


193. DOBASH & DOBASH, supra note 98, at ix.
laws governing VAWA, gender-based asylum and the deportation of domestic violence offenders.

Faced with such images and the realization of their societal prevalence, it seems futile to hope that immigration law can effectively change upon legal challenge. Invoking such guarantees as the right to equal protection will not prove successful. In other contexts, institutional biases toward gender traditionally have not been removed despite the apparent availability of legal remedies. Earlier legal contests in the immigration context confirm the limits of judicial and legislative appeals. For citizens, such as the parents and children in *Miller*, that Court’s declared position against gender stereotyping did not prevent it from accepting that citizen fathers’ could be disparately treated. With *Fiallo* as a stark reminder, it is clear that the plenary power doctrine makes reliance on equal protection in the immigration sphere even more tenuous. Legislative amendments following the failure of *Fiallo* evidence that political solutions are also not immune to gender biases. Other distinctions, such as those confronting women in their quest for residency and asylum and men facing deportation for domestic violence will also predictably not be remedied by legal appeals. In the final analysis, negative images of gender roles will only be eliminated in immigration law as in other areas of law when society is prepared to change.