

U.S. IMMIGRATION LAW: WHERE ANTIQUATED VIEWS ON GENDER AND SEXUAL ORIENTATION GO TO DIE

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I. INTRODUCTION

This Essay examines the paradoxical approaches to gender and sexual orientation bias within the U.S. immigration system. On the one hand, the immigration system has managed to convey benefits to same-sex partners despite federal law prohibiting the recognition of same-sex unions for immigration purposes.¹ Immigration law also provides benefits for victims of crimes disproportionately committed against women, such as human trafficking and domestic violence,² although the systems in place for adjudicating these benefits are flawed. On the other hand, immigration law favors antiquated notions of gender roles that

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1. See 9 Foreign Affairs Manual 41.31 N14.4 (permitting cohabitating partners of long-term visa holders to accompany their partners as tourists).

2. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of U.S.C.) (providing protection and assistance to victims of trafficking and other crimes).

disadvantage U.S. citizen men and their children,³ and has failed to recognize domestic violence as a basis for asylum.⁴

Gender inequality in U.S. immigration law has a long history. It has taken the form of blatant discrimination on the basis of sex as well as facially neutral laws and policies that have a disparate impact based on sex.⁵ Until 1922, for example, women who married foreign nationals lost their U.S. citizenship.⁶ Prior to 1994, alien spouses who were abused by their U.S. citizen or lawful permanent resident spouses had little or no recourse but to remain in the abusive relationship if they wanted to obtain lawful permanent residency.⁷ Prior to 2000, women trafficked into the United States for sex and other forms of exploitative labor were not officially recognized as needing protection.⁸

Throughout the last several decades, immigration law has advanced towards gender equality.⁹ The last fifteen years have seen meaningful improvements to U.S. immigration law in terms of gender bias.¹⁰ Congress passed legislation allowing battered spouses to petition for lawful permanent residence¹¹ and providing relief to victims of

3. See 8 U.S.C.A. § 1409 (West 2009) (requiring disparate proof of relationship depending on whether the U.S. citizen parent is the mother or the father of an out-of-wedlock child seeking to acquire citizenship).

4. See *In re R-A-*, 22 I&N Dec. 906 at 917 (Bd. of Immigration Appeals 1999) (denying asylum to a victim of severe domestic violence).

5. See *infra* notes 6-8 and accompanying text.

6. Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228 § 3 (revoking the citizenship of U.S. citizen women who marry foreign nationals).

7. See Violence Against Women Act § 40701, 8 U.S.C.A. § 1154 (West 1994) (adding provisions to the Immigration and Nationality Act allowing immigrant victims of domestic violence perpetrated by their U.S. citizen or lawful permanent resident spouses to sponsor themselves for lawful permanent residency).

8. See Victims of Trafficking and Violence Protection Act of 2000 § 102(24), 22 U.S.C.A. § 7101(24) (West 2010). For the first time, the United States formally acknowledged the following:

To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral form to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.

9. See *infra* notes 11-13 and accompanying text.

10. See *infra* notes 11-13 and accompanying text.

11. Violence Against Women Act of 1994 § 40701, 8 U.S.C.A. § 1154 (reauthorized in 2000 and 2005).

trafficking and other crimes.¹² Immigration agencies began recognizing gender-based harm as a ground for political asylum.¹³ Each of these measures affects the disparate impact that immigration law and policy has had on members of both sexes. In some areas of immigration law, however, gender bias continues to flourish.¹⁴

Part II of this Essay explores recent legislative and policy changes to marriage-related immigration law and policy that indicate a commitment to minimizing sexual orientation discrimination and recognizing the exploitation to which individuals (mainly women) may be vulnerable when their spouse is a U.S. citizen or lawful permanent resident. Part III discusses humanitarian immigration law and policies where significant efforts have been made but where gender bias still exists, specifically in the areas of refugee law, relief for victims of human trafficking, and relief for victims of other crimes perpetrated against immigrant women. Part IV examines acquisition of citizenship, an area of immigration law still mired in gender bias and portending no movement towards equality. Part V concludes that future immigration reform measures should encourage continued attention to the unique needs of immigrant women and eliminate gender bias rooted in antiquated beliefs about women's and men's gender roles.

II. U.S. IMMIGRATION LAW AND MARRIAGES

U.S. immigration law has seen significant changes with respect to the treatment of marriages. Department of State rules have long provided some benefits to same-sex partners, despite federal law prohibiting outright recognition of such unions.¹⁵ Since 1994, immigration law has provided relief to individuals trapped in abusive relationships;¹⁶ in some respects, the relief is even more beneficial than that which they would

12. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of U.S.C.) (reauthorized in 2005 and 2008).

13. See Supplemental Brief of Dep't of Homeland Sec. at 12, *In re L-R-*, 22 I&N Dec. 906 (Apr. 13, 2009) (stating that victims of domestic violence may be eligible for asylum as members of a persecuted social group).

14. See discussion *infra* Parts III and IV.

15. Telegram from Sec'y of State Colin Powell to all diplomatic and consular posts (July 9, 2001), available at http://travel.state.gov/visa/laws/telegrams-telegrams_1414.html (reminding consular officers that cohabitating partners of long-term visa holders may apply for renewable tourist visas, and that the policy applies to "both opposite and same-sex partners").

16. See Violence Against Women Act of 1994 § 40701, 8 U.S.C.A. § 1154 (reauthorized in 2000 and 2005).

have received under normal laws governing family-based immigration.¹⁷ These provisions have flaws and limitations, but overall demonstrate that immigration law can indeed respect gender and sexual orientation equality.

A. Same-Sex Unions

The Defense of Marriage Act¹⁸ prohibits U.S. immigration law and regulations from recognizing same-sex unions as a basis for conferring immigration benefits through marriage.¹⁹ Lesbian and gay citizens thus do not have the right to sponsor their same-sex partners for lawful permanent residency, and lesbian and gay partners of U.S. visa holders do not have the right to receive derivative visa status.²⁰

Despite these restrictions, immigration policy does allow unmarried partners of visa holders to accompany their partners and reside with them in the United States.²¹ A State Department rule, characterized as “longstanding” in 2001 by Secretary of State Colin Powell,²² pertains to

17. See 8 U.S.C.A. § 1154(a)(1)(D)(i)(IV) (providing a form of immigration relief called “deferred action” and authorizing employment for abused spouses whose self-petitions are approved). The law pertaining to regular spousal sponsorship does not provide such relief, nor does it authorize employment. The law limits the number of spouses of lawful permanent residents who may receive an immigrant visa allowing them to adjust their status to lawful permanent residency. See 8 U.S.C.A. § 1153(a)(2)(B) (West 1994) (limiting the number of immigrant visas to 114,000). Spouses of lawful permanent residents who have approved spousal petitions are therefore not eligible to work in the United States or to receive any immigration benefits pursuant to the approved petition until one of the limited numbers of immigrant visas are available to them. See *id.* Currently, spouses of lawful permanent residents have a four- to six-year wait for an immigrant visa. See State Department, Visa Bulletin for February 2010, available at http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4611.html (reporting that the State Department is currently issuing visas to spouses of permanent residents whose sponsorship petitions were filed in March 2006, and to Mexican spouses of permanent residents whose sponsorship petitions were filed in March 2004).

18. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in scattered sections of 1 U.S.C. and 28 U.S.C.).

19. See 1 U.S.C.A. § 7 (West 2000). In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife. See *id.*; see also 9 Foreign Affairs Manual 40.1 N11 (referring to the DOMA’s definition of marriage).

20. Derivative status allows the family member to accompany the principal visa holder and remain in the United States for the duration of the principal visa holder’s stay.

21. See 9 Foreign Affairs Manual 41.31 N14.4 (allowing “cohabitating partners, extended family members, and other household members not eligible for derivative status” to apply for a tourist visa).

22. Telegram from Sec’y of State Colin Powell, *supra* note 15.

cohabitating partners and applies to same-sex as well as opposite-sex couples.²³ Unlike the opposite-sex spouses of visa holders, however, cohabitating partners do not receive derivative status under the partner's visa.²⁴ Instead, they receive a separate tourist visa that they must apply to renew periodically.²⁵

Given the restrictions of the Defense of Marriage Act, it is unlikely that the Department of State or any other agency that implements U.S. immigration law will be able to go much further in conferring rights to same-sex partners unless the Act is repealed or found to be unconstitutional as applied to immigration law.²⁶ In areas where such statutory restrictions do not apply, however, Congress and U.S. Citizenship and Immigration Services have shown themselves capable of reshaping immigration law to address gender-based inequity effectively.²⁷

B. VAWA Self-Petitioning Process

Prior to 1994, alien spouses were only eligible for lawful permanent residency if their U.S. citizen or lawful permanent resident spouses sponsored them.²⁸ Abusive spouses could use this sponsorship and adjustment process as yet another weapon in their arsenal of control tactics. An abusive spouse could use each step in the process to threaten delays or refuse to cooperate, or even refuse to initiate the sponsorship process. Maintaining the alien spouse in unlawful immigration status gave the abusive spouse the power to threaten her with deportation if she left him, disobeyed him or otherwise challenged his authority. Even when the sponsorship petition was approved, the alien spouse still had to depend on her abusive U.S. citizen or lawful permanent resident spouse in order to adjust her status to lawful permanent residency.²⁹ the marriage

23. See *id.* (reminding consular officers that the Foreign Affairs Manual note addressing cohabitating partners of long-term visa holders applies to “both opposite and same-sex partners”).

24. 9 Foreign Affairs Manual 41.31 N11.4.

25. See *id.*

26. See generally Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. CIV. RTS. L.J. 455 (2008) (arguing that the Defense of Marriage Act as applied to immigration law “impermissibly treats two classes of individuals differently under the law, infringes on the fundamental rights of American citizens, and cannot pass the United States Supreme Court’s test for constitutionality under the Fourteenth Amendment’s Equal Protection Clause”).

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

28. 8 U.S.C.A. § 1154 (West 1993), amended by 8 U.S.C.A. § 1154 (West 1994).

29. See 8 U.S.C.A. § 1154 (West 1993).

still had to be intact and the parties living together at the time of adjustment, and the U.S. citizen or lawful permanent resident had to attest that he or she would provide financial support to the alien spouse.³⁰

Congress responded to this issue with the Violence Against Women Act (VAWA) of 1994,³¹ which established, *inter alia*, a mechanism through which aliens subjected to physical abuse or extreme mental cruelty by their U.S. citizen or lawful permanent resident spouses could remain eligible for lawful permanent residency without requiring the abusive spouses to sponsor the aliens.³² An alien spouse who demonstrates that she married her abuser in good faith, was subjected to physical abuse or extreme mental cruelty in the United States during her marriage, and is a person of good moral character is eligible for approval of a VAWA self-petition.³³ If she is or was married to a U.S. citizen, she may concurrently apply to adjust her status to lawful permanent residency.³⁴ If she is or was married to a lawful permanent resident, she may remain in the United States in a lawful status called “deferred action,” which allows her to reside and work in the United States while she waits for a visa allocation.³⁵ Abusive spouses are thereby eliminated from the sponsorship and adjustment process, and abused spouses no longer have to remain in abusive relationships in order to obtain lawful permanent residency.

One significant limitation of the VAWA self-petition is that it is only available to abuse victims who are married to their abusers, and only if the abusive spouses are U.S. citizens or lawful permanent residents.³⁶ It is not available to women who are in abusive relationships with non-spouses, or with spouses who are not lawful permanent residents of

30. *See* 8 U.S.C.A. § 1183a (West 2010) (requiring sponsor of relative to provide an affidavit of support).

31. Violence Against Women Act of 1994, Pub. L. No. 103-322.

32. Violence Against Women Act § 40701, 8 U.S.C.A. § 1154 (West 2009) (amending the Immigration and Nationality Act to include a provision by which abused spouses of U.S. citizens and lawful permanent residents may self-petition). Prior to amendments made to VAWA in 2000, the alien spouse had to remain married to the abusive spouse in order to qualify for a VAWA self-petition. *See* Violence Against Women Act of 2000 § 1503, 8 U.S.C.A. § 1154(a)(1)(A)(iii)(II)(CC)(ccc) (West 2000) (amending the Immigration and Nationality Act to permit divorced battered spouses to self-petition within two years of the divorce if the divorce was connected to the battering). The current statute permits divorced spouses to self-petition within two years of divorce. *See id.*

33. 8 U.S.C.A. § 1154(a)(1)(A)(iii) (West 1994).

34. 8 C.F.R. § 245.2(a)(2)(C) (1994).

35. 8 U.S.C.A. § 1154(a)(1)(D)(i)(IV) (West 2009).

36. *See* 8 U.S.C.A. § 1151(2)(A)(i) (West 2009).

citizens of the United States.³⁷ It was not until 2000, when the issue of human trafficking led to a focus on helping immigrant victims of crime, that relief became available to victims of domestic violence, human trafficking, and other crimes disproportionately perpetrated against women.³⁸

III. IMMIGRATION RELIEF FOR VICTIMS OF HUMAN TRAFFICKING, CRIME AND PERSECUTION

U.S. immigration law has become increasingly sensitive to women's unique vulnerability to certain crimes and forms of persecution. Human trafficking, domestic violence, and rape are committed predominantly against women, and immigration law has adapted to provide protection to victims.³⁹ Despite the efforts of Congress and the courts, however, humanitarian immigration relief for women is often elusive.

A. Protection for Victims of Human Trafficking and Other Crimes

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act (VTVPA) in an effort to prevent and combat trafficking.⁴⁰ The United States has had laws against domestic sex trafficking for over a century,⁴¹ but transnational sex trafficking went largely unrecognized and unaddressed in the United States until the dawn of the twenty-first century.⁴² Women arrested for prostitution were identified and treated as criminals—prosecuted and deported—with little if any regard for the circumstances in which they had been brought to and kept in the United

37. *See id.*

38. Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women, & Global Rights, *Human Rights Standards for the Treatment of Trafficked Persons* (1999) at 3.

39. *See* Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C.A. § 7101 (recognizing that “[i]mmigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained”).

40. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464.

41. *See* Mann Act, 18 U.S.C.A. §§ 2421–24 (West 1910).

42. *See* Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 BOSTON U. L. REV. 157, 167-168 (2007) (noting that there had been various efforts to build awareness of and prevent human trafficking since the early 20th century, but that it was not until “President Clinton issued an anti-trafficking directive on March 11, 1998” that “[h]uman trafficking first garnered mainstream attention in the United States”).

States.⁴³ Fear of arrest, imprisonment and deportation thus became a powerful tool for traffickers.

By the 1990s, the reality that the age-old practice of human trafficking had reemerged in a modern form—and that it was occurring in the United States—began to be apparent to U.S. lawmakers and policymakers.⁴⁴ Sex trafficking in particular, which disproportionately affects women and girls,⁴⁵ has emerged as the most brutal form of human trafficking. Victims are forced or coerced into submission, then kept submissive through rape, beatings, and threats against their lives or the lives of loved ones.⁴⁶

Victims of crimes other than trafficking—especially the crime of domestic violence—face similar brutality and coercion at the hands of their perpetrators, and law enforcement encounters similar resistance to reporting and prosecuting the perpetrators. Undocumented immigrant victims of crimes such as domestic violence fear deportation and all that it may entail—such as separation from their children, families and communities.⁴⁷ Batterers, even when they themselves are undocumented, can use this fear as a way of preventing their victims from calling the police and cooperating with prosecutors.⁴⁸

Recognizing the unique situations of trafficking victims, domestic violence survivors, and victims of other crimes, the VTVPA sought to help the victims of trafficking and crime directly.⁴⁹ One of the provisions dealing directly with aiding victims was the establishment of two new visas.⁵⁰ The “T” visa and “U” visa, as they came to be known, confer

43. See Dep’t of Health and Human Services, Trafficking Victims protection Act of 2000 Fact Sheet, *available at* http://www.acf.hhs.gov/trafficking/about/TVPA_2000.pdf (stating that prior to the enactment of the Trafficking Victims Protection Act, “no comprehensive Federal law existed to protect victims of trafficking and prosecute their traffickers”).

44. See 22 U.S.C.A. § 7101 (West 2010).

45. See 22 U.S.C.A. § 7101(b)(4) (noting that “[t]raffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin”).

46. 22 U.S.C.A. § 7101(b)(6).

47. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 201(11), 119 Stat. 2960, 2994 (2005).

48. See VTVPA, Pub. L. No. 106-386, § 1502(a)(2), 114 Stat. 1464, 1518 (2000) (identifying as one of the goals of the VTVPA freeing victims of domestic violence “to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser’s control”).

49. See VTVPA, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

50. 8 U.S.C.A. § 1101(a)(15)(T)(i) (West 2010); 8 U.S.C.A. § 1101(a)(15)(v)(i).

nonimmigrant status on victims who have cooperated with law enforcement in the investigation or prosecution of the traffickers or perpetrators.⁵¹ After maintaining T or U visa status for three years, the visa holder may apply for lawful permanent residency and eventually citizenship.⁵²

Law enforcement officials and immigration advocates have hailed the T and U visas as effective tools in combating human trafficking and other crimes.⁵³ The availability of the visas encourages victims who might otherwise remain silent to cooperate with law enforcement in the investigation and/or prosecution of traffickers and perpetrators of other crimes.⁵⁴ In return for the cooperation, the visas eliminate the fear of deportation for victims and their immediate family members.⁵⁵

Despite its promise, the T and U visa programs suffer from serious flaws, some of which reflect gender bias. For example, in the sex trafficking industry, which affects predominantly women and girls, predetermined notions of what Professor Jayashri Srikantiah calls the “iconic victim” may be impeding the accurate identification of victims.⁵⁶ Victims of force, fraud, or coercion may be misidentified as willing prostitutes because of their age, apparent willingness to engage in sex work, or hostility towards law enforcement officials.⁵⁷ Images of the innocent young girl “chained to a bed in a brothel” dominate perceptions of victimhood, and obscure the realities of human trafficking.⁵⁸ A similar

51. See VTPA, 8 U.S.C.A. § 1101(a)(15)(T)(i)(I)-(III) (establishing a visa for trafficking victims who cooperate with law enforcement officials). See 8 U.S.C.A. § 1101(a)(15)(V)(i)(I)-(III) (establishing a visa for victims of certain crimes who cooperate with law enforcement officials).

52. 8 U.S.C.A. § 1255(I)(1)(A) (West 2010).

53. See, e.g., Stacey Ivie and Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, Oct. 2009, available at http://www.fbi.gov/publications/leb/-2009/october2009/visa_feature.htm (authored by a police detective and immigration advocate, and asserting that the U visa is an avenue to achieve the dual goals of protecting crime victims and strengthening law enforcement); see also Letter from National District Attorneys Association to Senators Leahy and Specter, Jan. 22, 2008, available at <http://www.justice.gov/olp/pdf/ndaa.pdf> (stating that “[t]he measures necessary to prevent this deplorable offense, assist victims, and thoroughly investigate and prosecute using coordinated responses of and resources from State, local and Federal authorities, were provided as a result of the passage of the Trafficking Victims Protection Act of 2000”).

54. See Ivie & Nanasi, *supra* note 53.

55. See *id.*

56. Srikantiah, *supra* note 42, at 158.

57. See *id.* at 161.

58. Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal and Procedural Failures Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 349 (2007).

obfuscation occurs in refugee law, where images of the classic refugee, i.e., the outspoken political dissident, do not conform to the reality of persecution as experienced by women.⁵⁹

B. Refugee Protection

U.S. asylum law is based on the principles of the 1951 Convention Relating to the Status of Refugees,⁶⁰ the most recent update of which occurred in 1967 via the Protocol Relating to the Status of Refugees.⁶¹ The 1951 Convention and 1967 Protocol require states to provide protection to individuals fleeing persecution committed on account of race, religion, nationality, membership in a particular social group, or political opinion.⁶² Gender is conspicuously absent from this list of protected grounds.⁶³

Fortunately, despite the 1951 Convention and 1967 Protocol's failure specifically to acknowledge that gender is often a motivating factor in the persecution of women, the United States has frequently interpreted its duties under those instruments to include the protection of women fleeing gender-based or gender-specific violence.⁶⁴ In 1993, the Board of Immigration Appeals rejected arguments that rape was a form of generalized violence that did not amount to persecution.⁶⁵ In 1996, the Board of Immigration Appeals overturned an immigration judge order denying asylum to a woman who feared female genital mutilation (FGM), holding that FGM amounts to persecution on account of membership in a particular social group.⁶⁶

The United States has been reluctant, however, to extend its recognition of gender-based violence as a ground for refugee protection in cases involving domestic violence.⁶⁷ In *In re R-A-*,⁶⁸ a 2000 Board of Immigration Appeals case, the Board reversed an immigration judge grant of asylum to Rodi Alvarado, a Guatemalan woman who had

59. See *infra* Part B.

60. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

61. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

62. 1951 Convention, *supra* note 60, at art. I(A)(2), 19 U.S.T. at 6259, 189 U.N.T.S. at 150.

63. *Id.*

64. See *supra* notes 60-62 and accompanying text.

65. *In re D- V-*, 21 I&N Dec. 77, 79 (BIA 1993).

66. *In re Kasinga*, 21 I&N Dec. 357, 369-70 (BIA 1996).

67. See *In re R-A-*, 22 I&N Dec. 906 (BIA 1999).

68. *In re R-A-*, 22 I&N Dec. 906 (BIA 1999).

suffered years of severe abuse at the hands of her husband.⁶⁹ The Board failed to recognize as a protected social group wives or domestic partners whose governments cannot protect them from domestic violence, and held that the persecutor was motivated by personal animus rather than any protected ground.⁷⁰

The *In re R-A-* decision was significantly flawed in terms of its understanding of the dynamics of abusive relationships and the motivation of abusers. Domestic violence is a means of achieving power and control over an intimate partner, and is often strengthened by societal cues that men are dominant over women.⁷¹ The Board, by characterizing the persecutor's actions as random and personal, reduced the profound societal and political implications of domestic violence to one woman's poor choice of a mate.

Fortunately, the Board's decision in *In re R-A-* was not the final word on this issue.⁷² In subsequent briefs, the Department of Homeland Security supported domestic violence-based asylum, first in the narrow case of Rodi Alvarado,⁷³ and later more broadly.⁷⁴ The most recent social group proposed by the Department of Justice recognizes the societal implications of domestic violence and its roots in male dominance and female subordination.⁷⁵ These developments are too recent to herald a definitive significant change in the overall treatment of domestic violence-based asylum claims, but they at least signal some evolution in the conceptual approach to such claims. In other areas of immigration law, however, change does not seem to be on the horizon.

69. *Id.* at 927-28.

70. *Id.* at 926-27.

71. See NEIL JACOBSON AND JOHN GOTTMAN, WHEN MEN BATTER WOMEN 269 (Simon & Schuster 1998) (asserting that battering is a direct consequence of male dominance, and "an exaggerated version of the power and control that remain the norm in American marriages").

72. Rodi Alvarado was never removed from the United States, thanks to a stay issued by Attorney General Janet Reno. After many procedural delays and false starts, she ultimately received a final grant of asylum in 2009. For a full account of the procedural history of the case, see the Center for Gender and Refugee Studies website, available at <http://cgrs.uchastings.edu/> (last visited June 9, 2010).

73. See Brief for Department of Homeland Security's Position on Respondent's Eligibility for Relief at 2, *In re R-A-*, 22 I.&N. Dec. 906 (BIA Feb. 19, 2004), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (arguing that "under some limited circumstances a victim of domestic violence can establish eligibility for asylum on this basis, and that the applicant in this case has established such eligibility").

74. See Department of Homeland Security's Supplemental Brief, *In re L-R-* (BIA Apr. 13, 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%-20brief%20on%20PSG.pdf>.

75. *Id.* at 14.

IV. ACQUISITION OF CITIZENSHIP

The United States has come a long way from the days when women who married citizens of foreign countries automatically lost their U.S. citizenship.⁷⁶ Nevertheless, the laws governing citizenship still retain vestiges of sexism, specifically those pertaining to acquisition of citizenship through birth to a U.S. citizen parent. An individual's entitlement to U.S. citizenship by birth varies depending on whether the U.S. citizen parent is the mother or father,⁷⁷ and on whether the individual's parents are married.⁷⁸ As the case of *Nguyen v. Immigration & Naturalization Service*⁷⁹ demonstrates, U.S. immigration law still views mothers as the more nurturing, influential parent, and thus more entitled to confer U.S. citizenship to their children.⁸⁰

Tuan Anh Nguyen was born in 1969 in Vietnam to Joseph Boulais, a U.S. citizen working in Vietnam, and Mr. Boulais's Vietnamese girlfriend.⁸¹ For reasons that may have been related to war and displacement, Tuan's mother abandoned the relationship and Tuan when Tuan was still an infant.⁸² Tuan lived with the family of Mr. Boulais's new Vietnamese girlfriend, whom Mr. Boulais eventually married.⁸³ When Tuan was six, he left Vietnam as a refugee with the family of Mr. Boulais's wife.⁸⁴ The family went to the United States, where Tuan was raised by his father and stepmother.⁸⁵ Tuan became a lawful permanent resident but never applied for naturalization.⁸⁶ When he was convicted of a crime that rendered him deportable from the United States for life, he and his father argued that Tuan had acquired U.S. citizenship through Mr. Boulais.⁸⁷

U.S. law governing the acquisition of citizenship in cases of "out-of-wedlock" births requires that the children of U.S. citizen fathers sustain a

76. See Act of March 2, 1907 § 3, 34 Stat. 1228 (1907) (revoking the citizenship of U.S.-citizen women who marry foreign nationals).

77. See 8 U.S.C.A. § 1409 (West 2010) (requiring disparate proof of relationship depending on whether the U.S. citizen parent is the mother or the father of an out-of-wedlock child seeking to acquire citizenship).

78. See 8 U.S.C.A. § 1401(g) (West 2010) (setting forth the requirements for acquisition of citizenship for children whose parents are married).

79. *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001).

80. *Id.* at 57.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Nguyen*, 533 U.S. at 57.

86. *Id.*

87. *Id.* at 57-58.

higher burden to prove their relationship than children of U.S. citizen mothers.⁸⁸ Children with U.S. citizen mothers may acquire citizenship so long as they provide proof of the following: (1) the parties' blood relationship, (2) the mother's U.S. citizenship at the time of the child's birth, and (3) the mother's presence on U.S. soil for one year at some point in her life.⁸⁹ Children with U.S. citizen fathers, however, must show the following in addition to the three requirements listed supra: (1) that the father has agreed in writing to provide financial support to the child and (2) that the father or a court has established paternity.⁹⁰ Thus, even though DNA evidence proved that Mr. Nguyen was the biological son of Mr. Bolais, and even though Mr. Bolais had raised Mr. Nguyen in the United States from the age of six, U.S. law prevented Mr. Nguyen from acquiring citizenship through his father because his father had never "legitimated" him.⁹¹

The Supreme Court, in a five-to-four decision, ruled that the gender-based distinctions in the law were substantially related to an important government interest.⁹² Specifically, the Court held that:

Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process.⁹³

The Court then leapt to the conclusion that "the event of birth itself provides for the mother and child" the opportunity for this citizenship-solidifying relationship to develop.⁹⁴ The Court assumed that a mother who gives birth to her child has more opportunity for a relationship with that child than the absent unwed father.⁹⁵ Clearly present in this assumption are the stereotypes that the unwed father is absent and uninterested, and that the unwed mother desires a relationship with her child.⁹⁶ The Court made these gender-based assumptions despite the fact that the very facts of the case defied them.

88. 8 U.S.C.A. § 1409(c) (West 2010).

89. *Id.*

90. *Id.* § 1409(a).

91. *Nguyen*, 533 U.S. at 71.

92. *Id.* at 73.

93. *Id.*

94. *Id.*

95. *Id.* at 65.

96. *See id.*

In its enthusiasm to endorse gender stereotypes, the Court failed to acknowledge the lack of assurance that the requirements of 8 U.S.C. § 1409 actually further the purported governmental interest.⁹⁷ An absent father may acknowledge paternity and send a monthly support check to his child, but still have little, if any, meaningful relationship with his child. In the actual case, the father not only had a relationship with his child, but raised him in the United States, whereas the biological mother abandoned him.⁹⁸

Congress has the authority to change the laws governing the acquisition of citizenship, but seems content to rely on the stereotypes celebrated by the narrow majority of the *Nguyen* Court. Despite the availability of DNA evidence, the stereotypical presumptions of the nature and strength of bonds between mother and child and father and child still govern the acquisition of U.S. citizenship.

V. CONCLUSION

Immigration reform, if it arrives at all, will likely have a slow and difficult journey. Immigration law and policy is a vast arena burdened by politicization at its most vitriolic, and bureaucracy at its most inconvenient. It is unlikely that the elimination of gender and sexual orientation bias will be a priority in the struggle to achieve comprehensive changes to a system that is broken in so many ways. Nevertheless, many inroads have already been made in the elimination of gender and sexual orientation bias. Whatever direction comprehensive immigration reform takes when it eventually arrives, the preservation of those efforts should be one of its goals.

97. See *Nguyen*, 553 U.S. 53; 8 U.S.C.A. § 1409 (West 2010).

98. See Rayminh Ngo, *America's Forgotten Progeny: Taking Nguyen v. INS a Step Beyond the Court Opinion*, 2006 UTAH L. REV. 1209, 1213-14 (2006).