Victims of trafficking and shamming the system: The violence against women act and the immigration marriage fraud amendments

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Abstract: This article studies the Violence against Women Act (VAWA) through discussion of heterosexual marriages of US citizens and LPRs to foreign nationals. Links will be drawn to the sections of the VAWA on battered immigrant women and human trafficking in the United States as it intersects the study of sham marriages, violence against women and loopholes in the VAWA that help promulgate marriage fraud (noting that in the green card process, some women willfully use their bodies as objects of bartering and some men use their citizen and LPR status in the US to perpetuate acts of violence in their marriages). The IMFA of 1986 will be overviewed in relation to the constitutionality of the CIS sham marriage investigation policies, the statutory definition of marriage and, by way of closing, the effectiveness of the IMFA of 1986 will be assessed.

Keywords: Violence against women act; sham marriage; immigrants; marriage fraud; domestic violence; human trafficking

Introduction

“The Violence against Women Act” (VAWA) makes provisions for battered immigrant women pursuing legal permanent residence (LPR) status in the United States of America. The VAWA has impacted immigration law in the United States; revisions in 2000 and 2005 have helped increase the reporting of violence against women who have been victims of human trafficking and domestic violence in the US. However, ‘loopholes’ created by the VAWA have also increased emigration marriage fraud (aka marriage sham) in the US despite the Immigration and Naturalization Service (INS, aka USCIS and CIS) amended laws on emigration and deportation through enactment of “The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.” And, though the IIRIRA of 1996 has impacted the system of immigration – deportation and detention of immigrants has been effective to an extent – continued review of the emigration and deportation laws in the US, study of the VAWA for loopholes and evaluation for effectiveness of the IMFA is essential to understanding the need for revisions to laws concerning green card marriage fraud also known as sham marriage.

“The Violence against Women Act (VAWA) of 1994” is a United States federal law signed by President Clinton in September of 1994. It was drafted by then-U.S. Senator Joseph Biden’s office; The National Organization for Women described the bill as “the greatest breakthrough in civil rights for women in nearly two decades.” It was reauthorized by Congress in 2000, and again in December 2005 and then signed into law by President George W. Bush. The bill was again reauthorized on March 19, 2013 and renamed “The Violence against Women Reauthorization Act 2013”.

The law was initially enacted by Congress: to respond to the inadequacies of state justice systems in dealing with violent crimes against women. Passed under the larger Omnibus Crime Control Act, this multi-faceted statute addressed the inequality that women victims of violence encounter in state justice systems. The statute provided funding to states for criminal law enforcement against perpetrators of violence, and for a variety of other assistance, taking into account the particular needs of women of
color and immigrant women. At a 1996 symposium, “A Promise Waiting to Be Fulfilled: The Violence against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements,” the VAWA was hailed as ‘a success of historic proportions on various political and social fronts…an undeniable victory for feminism…also a civil rights victory’ (Rivera, 1996; Kish Sklar and Lustig, 2001).

There are significant changes in 2013 to the 1994 bill. The National Network to End Domestic Violence outlines key changes in the 2013 reauthorization and the bill has been edited to increase protection of Native American women and LGBT survivors of domestic violence. Also, safe housing for victims of violence, the inclusion of date rape violence against women on university campuses, development of grant programs for community education and other assistance to victims of abuse have been added. A growing awareness of human trafficking in relation to domestic violence is evident in the VAWA changes which maintain important protections for immigrant survivors of abuse, while also making key improvements to existing provisions including strengthening the International Marriage Broker Regulation Act and the provisions around self-petition and U visas.” The history of the bill from 1994-to its reauthorization in 2013 concerning battered immigrant women’s rights, in relation to IIRIRA of 1996 and marriage fraud, provides a particularly interesting study of the VAWA document.

The VAWA Document

Women in the United States have been advocating for equal rights under the law and for protection of their bodies by law for centuries. Just in the past century the US has seen significant changes in laws that once gave husbands control over the bodies of their wives and children within a household. In the 19th century a man had the law on his side to beat his wife and children at his discretion without penalty. In 1923 the Equal Rights Amendment (ERA) was proposed to Congress. Passed out of Congress in 1972; the ERA has not yet become part of the United States Constitution. The 1994 VAWA addressed women’s civil rights and seemingly proposed to make violence against women a federal offense allowing state victims access to federal courts. This part of the 1994 VAWA was a bit controversial for some because it necessitated precedent rulings under the Fourteenth Amendment. Subsequently the federal court ruled against the connection of the 1994 VAWA with the 14th Amendment under the case US v Morrison. However the expiration deadline of the 1994 VAWA and increased death tolls due to domestic violence created an avenue for the review of the 1994 VAWA in 2000. In part the 2000 revision of the 1994 VAWA responded to the growing tide of violence against women and children and was also in response to US v Morrison. The revisions included new provisions under the law for victims of trafficking and prostitution. Further protection of children fell under the revisions as well. However, the separate roles of state and federal governments remained an issue in the 2000 revisions especially concerning whether or not domestic violence could be considered a federal offense.

Yet, increasingly the issue of the 1996 revision to US immigration and deportation laws under “The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)” brought lawmakers’ and feminists’ attention back to the 1994 VAWA. The VAWA section of the bill H.R. 3355, “The Violent Crime Control and Enforcement Act of 1994” is Title IV of the larger document passed at the 103rd Congress of the United States in January of 1994. The document, “The Violent Crime Control and Enforcement Act of 1994,” contains 30 titles that include the 1994 “Violence against Women Act,” but that title is not the document’s main focus. The Bill concerns itself with several issues of crime prevention within the United States and its borders. Titles from public safety and policing to protection of senior citizens against marketing scams are included in “The Violent Crime Control and Enforcement Act of 1994.” The confusing issue in this document concerns state and federal offenses and the use of federal courts for particular infringements of the law. While a senior citizen marketing scam might not be considered in federal court, a senior citizen marketing scam involving persons who are illegally in the US or who use US phone lines for overseas fraud might become a
case for federal decision and, though criminal acts against women, including murder, are addressed in “The Violent Crime Control and Enforcement Act of 1994,” they are considered civil and criminal cases which require state jurisdiction only. The case US v Morrison remains a precedent that most violent crimes against women in the US will fall under state jurisdiction.


Whereas “The Violence against Women Act 1994” was drafted to address several areas of domestic violence and the US v Morrison case stipulates that personal crimes against women do not fall under federal jurisdiction, revisions found in Title V, VAWA 2000 “Battered Immigrant Women Protection Act” are worth examining as they relate to The IIRIRA of 1996, in that issues of emigration, deportation and border control fall under federal supervision as it supports state government to enforce emigration laws. Also, importantly, marriage fraud by immigrant women against US men (and US women) is easier to commit due to loopholes in this version of the VAWA.

**Immigrant Women, Human Trafficking and the VAWA**

The 1994 VAWA includes a subsection within the “Violence against Women” title that provided for crimes against immigrant women and children. In the US, these immigrant women can take advantage of the provisions in the VAWA if they have begun a legal application for landed status in the US. The VAWA 2000 increased in length from the 1994 document as it added the “Battered Immigrant Women Protection Act of 2000” for ‘improved access’ and further ‘protections’ of battered immigrant women in the US. For example, section 1502 #3 provides the following not found in VAWA 1994: there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law (“Violence against Women Act 1994 Final”).

This further ‘protection’ of immigrant women under VAWA 2000 aids in releasing battered immigrant women from the red tape of revised language in The IIRIRA of 1996 which ‘grandfather clauses’ acts of felonies by immigrants who are in the application process or who have obtained legal alien status in the US. Based on the IIRIRA of 1996 alone, if an LPR immigrant male in the process of petitioning for his wife, fiancé or entire family was found to have served time in a US prison for a committed felony prior to 1996, he was subject to deportation proceedings once the CIS discovered his criminal record. Deportation proceedings mean that the immigrant can no longer petition for additional members of his family to enter the US. The harsher rationale for section 1502 #3 is related to “The IIRIRA of 1996” but can refer to acts of felony committed after 1996. Under the further ‘protections’ provided by VAWA 2000, a wife or fiancé who may have information regarding felonious acts committed by her mate and/or who may be suffering abuse at the hands of the petitioner is not obliged to remain in the relationship, will not undergo deportation proceedings and can continue with her application even if the mate is imprisoned, detained or deported. (SEC.827 “Protection of Domestic Violence and Crime Victims). This particular clause is important for women who are in sham marriages relating to human trafficking. If the woman’s husband is imprisoned for trafficking prior to the completion of the woman’s petition, she is not subject to deportation. Also, immigrant women victims of human trafficking and spousal abuse have more support in reporting crimes of spousal abuse without fear of deportation.
An important point to note in this case is that the wife or fiancé can become the ‘snitch’ exchanging information about known felonious acts that she may have been accessory to in exchange for withdrawal of deportation proceedings without using the VAWA petition for removal of deportation proceedings, but that is not usually the case. The VAWA provides free legal counsel, language translation services and access to women’s shelters that the immigrant battered woman (and any children she may have) might not be able to find on her own.

In the VAWA 2000 Section 1504, improved access to cancellation of removal and suspension of deportation under VAWA 1994 further ‘protects’ battered immigrant women as it provides advocacy for women who are divorced prior to the 2-year filing deadline for removal of conditional status. Under normal filing circumstances, the ‘landed’ immigrant files/petitions for his wife (visa k-3) or fiancé (visa k-1) to have LPR status in the US. The couple lives together without problem for 2-years, the immigrant wife is granted temporary status and can work during the 2 years. Ninety days prior to the 2-year deadline the couple files for removal of temporary status, the process goes under review and at 3-4 years into their marriage, both husband and wife have legal residency status in the US and are eligible for US citizenship application within a few more years. However, the immigrant woman is provided ‘protection’ if rupture of this procedure by domestic violence occurs. The VAWA 2000 provides battered immigrant women access to the Domestic Protection Order and advocacy.

VAWA 2000’s Battered Immigrant Women provision, and the 2005 reauthorization, provided the following benefits to an immigrant: removed the US residency requirement and “extreme hardship” requirements for immigrant women to receive VAWA protections; gave them the right to obtain lawful permanent residence without leaving the country; stops deportation proceedings if she claims she is a victim of abuse; strengthens VAWA confidentiality enforcement; guarantees access to legal services for immigrant victims; and mandated that all VAWA cases are to be adjudicated at the specially trained VAWA unit at the Vermont Service Center (2008 www.immigrationfraudvictims.com).

In 2013, the VAWA reauthorization passed with amendments that included protection and grant assistance for victims of human trafficking. The increase in human trafficking in the United States necessitates that it be addressed in the VAWA particularly when immigrant women are involved because they tend to underreport their abuse. Immigrant women who are being trafficked and physically abused are unlikely to report their abuse at all to authorities for fear of being deported. Additionally, women who are trafficked are sometimes involved in sham marriages that cover the trafficking crime. Immigrant victims of human trafficking sham marriages have entered into contracts of marriage based on promises of citizenship by the person who has purchased them. Though the VAWA amendments include legal protection for human trafficking victims, it is more difficult to identify them. Victims of human trafficking involved in sham marriages could find protection under the VAWA sooner than those who are not married if more attention under the law is paid to marriage fraud in cases of violence against women. When the human trafficking victim is a US citizen sold to an immigrant by trafficking gangs or scams, protection under the VAWA is a bit more difficult, but there is some relief under the revised sections for protection of battered women.

**Marriage Fraud and the VAWA**

The 2000 VAWA was meant in part to address problems for battered immigrant women filing for LPR status in the IIRIRA of 1996, but it failed to consider The Immigration and Marriage Fraud Amendment (IMFA) of 1986 as enacted by congress.

The Amendment required immigrants seeking citizenship as spouses of US citizens or LPRs to fulfill a 2-year conditional residency requirement before being granted full lawful permanent residence. The law required that a joint petition be filed ninety days before the expiration of the 2-year conditional resident status, possibly followed by a joint interview with a CIS official. Prior to 2000, immigrant domestic abuse survivors found the joint filing requirement to be problematic. Immigrant “victims felt compelled to stay in dangerous and abusive situations to fulfill the joint filing requirement” (Orloff, Story, Lin, Angel, and Birnbaum, 2013).
Where the 1994 VAWA failed to provide adequate protection for the battered immigrant woman, the 2000 and 2005 revisions provided victims of abuse with stronger grounds for cancellation of deportation through the use of the VAWA self-petition and its narrative attachment. This added protection is useful for immigrant women who are victims of human trafficking.

Most women who are eligible under VAWA’s jurisdiction would have been able to receive family-based immigration status if not for their abusive spouses. To self-petition under VAWA, the applicant must include a narrative affidavit with her application: “she must demonstrate her powerlessness in the face of abuse, her moral rectitude, and her self-sufficiency” (Berger, 2009). That narrative, along with any supporting information, is sent to the Vermont Service Center, which is staffed with government employees who have received special training in domestic violence. “If an individual is already in removal proceedings and she applies for a stay of removal and redefinition of status under VAWA, she must submit her narrative and petition to an immigration judge. In either case, if an applicant succeeds in persuading Vermont Service Center staff or immigration judge through her narrative affidavit and/or testimony that she is a victim, she will be able to stay in the United States, get a job, and support her family” (Berger, 2009).

Protection under the VAWA for domestic violence and spousal abuse has been a refuge for battered immigrant woman. Unfortunately the problems of marriage fraud that the IMFA was created to solve, and the nightmare of facing abuse and deportation that the 2000 and 2005 VAWA did resolve, may possibly have rendered the changes less effective. Marriage fraud in the US (aka sham marriages) committed by immigrant women often cause a more stringent process for real victims of abuse.

A Harvard Review study of the 1986 IMF, “The constitutionality of the INS sham marriage investigation policy,” (1986) defines sham marriages as either “contractual” or… unilateral’ in form. In contractual fraud cases, both parties to the marriage agree at the outset to enter the marriage solely for immigration purposes. In cases of unilateral fraud, an alien deceives an unsuspecting citizen or resident of the United States into marriage; upon acquiring preferential or immediate relative status, the alien beneficiary abandons the citizen or resident spouse who petitioned for adjustment of status on his behalf.

Sham marriages are numerous in type and pose a threat to the gains of the VAWA in that women who enter into such marriages either as contractual fraud partners or perpetrators of unilateral fraud generally use the VAWA self-petition to avoid prosecution and to end the marriage before the 2-year period required by CIS law. According to Winston (2012), approximately 274,358 immigrants sought LPR status through marriage in 2007.

Borchers and Kurkjian (2011) provide the most common marriage shams which include: Cash-for-vows (Americans are paid to marry foreign nationals) Friends-and-family plans, where someone pitches in to help get someone else’s spouse [or sister, or cousin or aunt] to the US “I do, I don’t, I do” marriages where foreign nationals divorce their spouses in their home countries, marry Americans…get green cards…divorce the Americans, remarry their original spouses and petition to bring them to the United States.

Heartbreakers, where foreigners dupe Americans into believing their intentions are true, when they actually just want a green card (Seminara, 2010). “Cash for vows” and “friends and family plans” shams are contractual and physical abuse does not usually occur in these types of shams because the couple usually does not even live together under the same roof or even in the same city, rather they share a common address where the LPR resides. An easy way to “cash-in” and leave without much work is for the woman to file a VAWA self-petition within a few months after the marriage. An immigrant woman in a contractual sham marriage often ends the ‘contract’ early by falsely accusing her partner of physical abuse. The male partner, aware of a sham, has been paid, is usually a US citizen and understands that he will have an ‘incident’ of domestic violence on his record. The VAWA self-petition application and narrative process allow the woman to continue her residency petition without her contractual partner’s affidavit of support. The act of one party ending the ‘contract’ early constitutes fraud; it also leaves the partner in the ‘contract’ with a criminal record. If the contractual partner
is a resident alien and not a US citizen, the unsuspecting partner could be subject to deportation rulings under the United States Code §1227: Deportable Aliens. This scenario is rare, but can happen when the fraud deal goes bad and the woman wants to avoid impending prosecution, or she simply wants an even earlier ‘out’ of the contract.

The “I do, I don’t, I do” and “Heartbreakers” shams are unilateral and more complex for the unsuspecting US citizen and LPR. These shams are often ended by using the VAWA self-petition clause, but as in the case of the contractual sham, the duped spouse (usually a US citizen) could be left with a criminal record of domestic abuse in addition to a broken heart. The LPR victim could face serious legal problems as he fights deportation for crime he did not commit. Marriage fraud weakens the VAWA self-petition process validity for immigrant women who are true victims of domestic violence.

**VAWA Loopholes for Marriage Shams**

In a report titled, “VAWA-Funded Immigration Fraud Costs American Taxpayers $170 Million a Year” (2008) published by the group, Respecting Accuracy in Domestic Abuse Reporting (RADAR)implications of VAWA loopholes that are used in marriage fraud are outlined:

The Violence against Women Act facilitates immigration fraud in eight ways:

1. Provides Free Legal Services to Those who Claim to be Victims
2. Broadens the Definition of Extreme Cruelty
3. Eliminates the Need for Hard Evidence
4. Removes the “Substantial Connection” Requirement
5. Bans Evidence by the Alleged Abuser Showing that the Petitioner is Illegal
6. Educates Persons on How to Work the System
7. Affords a Loophole for Persons Undergoing Deportation Hearings
8. Eliminates Penalties for Illegal Aliens Who Fail to Leave

The RADAR article details the eight loopholes and though all eight of the loopholes presented by RADAR are of equal importance, of note is #7 because the immigrant spouse is effectively clause out of accusations of illegal activity such as drug or sex trafficking or even past criminal activity in her country of origin. In addition, while processing through the stay of deportation in the VAWA, history of criminal activity or any other fraudulent activity is waived. “Alien spouses benefit from waivers of excludability on the grounds of illiteracy, mental retardation, tuberculosis, prostitution, criminal convictions, and visa fraud” (ASISTA News, 2006; www.mediarradar.com). The battered spouse waiver does not consider marriage fraud in the VAWA self-petition application process at all thus creating a unique loophole for immigrant women who commit marriage fraud and then wish to leave a marriage based on allegations of abuse while still in the green card application process. Arguably, marriage sham prevents victims of human trafficking who have been sold into marriage and abuse from finding protection because they are least likely to report.

Women who “sham the system” are protected by the law even if they are suspected of marriage fraud. The recourse that the CIS has against marriage scams has been limited by advocates of the domestic violence revisions in the 2000 and 2005 VAWA as well as in the 2013 Reauthorization. Those who scrutinize the constitutionality of the CIS marriage interviews help to expand the loopholes in the VAWA for marriage fraud. Subsequently immigrant women who are marriage shimmers’ can be protected by the VAWA if they understand how to (mis) use the system. The IMFA of 1986, an almost 35 year-old document is due for reevaluation.

**IMFA 1986 Overview**

On July 26, 1985 a hearing of The Subcommittee on Immigration and Refugee Policy was held. Members of the Committee on the Judiciary United States Senate, Ninety-Ninth Congress, were present and the first session was on fraudulent “sham” marriages and fiancé arrangements to obtain per-
manent resident immigration status. This hearing would result in the passing of Public Law 99-639, a law “to deter immigration-related marriage fraud:"

Its major provision stipulates that aliens deriving their immigrant status based on a marriage of less than two years are conditional immigrants. To remove their conditional status the immigrants must apply at a US Citizenship and Immigration Services office during the 90 day period before their second-year anniversary of receiving conditional status. If the aliens cannot show that the marriage through which the status was obtained was and is a valid one, their conditional immigrant status may be terminated and they may become deportable.

Support of marriage law in the US led to the hearing for it seemed that many US citizens were not largely aware that marriage to a US citizen practically guaranteed entry into the US for foreign nationals and thus they were more susceptible to becoming victims of unilateral marriage fraud or marriage sham. In fact, prior to 1986, there were no intrusions or interviews for US citizens and no real process or waiting periods at all for US servicemen marrying non-US born individuals.

The hearing testimony of the Senate committee presented eight recommendations for the IMFA amending language in the INS spousal petition application document and The Immigration and Nationality Act 1952, 1965 (Section 201b):

- Strengthen the language of the statute; marriage fraud is a crime
- The Law must clearly serve intent
- The marriage relationship must be statutorily defined
- A 2-year conditional residency requirement for all spouses will best serve to deter fraud
- [The] burdens placed on the Government to prove fraudulent intent must be eased to assure that the aliens who participate in marriage fraud are more easily deported
- Section 241(f) should be amended to indicate that no equities can be claimed through a spouse or a child unless that spouse or child resides with the alien and is fully supported financially
- A new deportation charge to mirror the exclusion charge in other sections of the law [should be added]. This will render an alien deportable for attempting to procure a visa or other documentation by fraud. Currently, section 204(c) only penalizes the alien if he has already received a visa; there is no penalty at present, apart from the criminal sanctions, for trying
- Section 245(c)i should be changed to indicate that an alien may not adjust through a marriage contracted after an order to show cause or notice of voluntary departure has been issued to him. Further, he should not be able to use the marriage to reenter the United States unless he has resided overseas for a full year.

The eight recommendations create a strong document. In particular, #4 added the 2-year conditional residency requirement. This requirement, in its ideal purpose, helps to deter sham marriages. Couples involved in contractual sham marriages generally do not know each other; the marriage is simply a means of economic gain for LPR and for the foreign national. In unilateral sham marriages, the foreign national has also married to gain LPR status. In both scenarios 2 years of residence with a total stranger with whom a love relationship does not exist is unappealing.

The IMFA 1986 was scrutinized by some members of congress and state lawmakers mostly due to recommendations #3 and #5 being read as ‘intrusions’ on private marriages of US citizens and as reports of domestic violence against immigrant women increased. Later, the 1994 VAWA and its revisions in 2000 and 2005 sought to adjust the perceived problems of the IMFA, but were not as useful in deterring marriage fraud as legislators had hoped. The 2013 Reauthorization still opens loopholes for sham marriages and issues of the ‘constitutionality’ of investigating fraud arise. Employment and family-sponsored applications can take between six months to several years to process and are subject to annual quota restrictions set by Congress. By contrast, martial applications are immediately eligible for immigration benefits and not limited by quotas.

“The Constitutionality of the INS (CIS) Sham Marriage Investigation Policy” (Harvard Law Review)
The legal loopholes found in the VAWA are not well-hidden, but they are difficult to circumvent. The Supreme Court has explicitly recognized a fundamental right to marry as well as a right of marital privacy…The Court, however, has also recognized the authority of the Immigration and Naturalization Service (INS)[CIS] to prevent the entry or to secure the deportation of aliens who enter into fraudulent or "sham" marriages solely for the purpose of circumventing United States immigration law. The current policy of the INS is to scrutinize carefully the bona fides of any marriage between an alien and a citizen or resident alien of the United States through procedures it has prescribed under the authority delegated to it by Congress. Typically, the INS subjects the couple to procedures that include intensive interrogation and post-marital surveillance. (“The Constitutionality,” 1986, p. 1239).

However, given the number of marriages each year and the backlog of immigration applications compared to availability of staff to process the applications, it seems that marriage has more rights than the individuals who enter into the contract. Marriage in the US is constitutionally protected. “Notes” published in The Harvard Law Review (1986) reveal that though the “INS (USCIS) [CIS] procedures permit unjustified governmental intrusions into intimate, constitutionally protected areas of marriage,” (p.1239). Current practice of detecting marriage sham is case-by-case and usually self reporting. Some marriage shams are not revealed until they are detected as criminal cells.

In May 2010 a ‘naturalized’ immigrant was found guilty of marriage sham. The Houston, Texas resident, born in Nigeria, had arranged marriages between US citizens and Nigerian nationals. The US citizens received payment for their contractual participation in marriage scams set-up by the Houston man. It was only because of the US Immigration Customs and Enforcement (ICE) ‘intrusion’ in these marriages that the scam was discovered (“Naturalized Nigerian,” 2010). Though it may seem that marriage sham is not the norm, it could help to note that in 2002, “Immigration officials described fraud as rampant in a…GAO report. Marriage fraud accounted for approximately half of all immigration fraud cases, the agency reported.”(ICE, DHS).

Marriage shams can be found by the CIS through the interview process; it is a necessary intrusion. During the application process for a fiancé visa (K-1) the couple is asked to provide ‘proof’ or verification of their relationship and courtship. They may be asked to submit with their application, photos of vacations together, airfare receipts for visits and narratives or affidavits of support for their relationship from friends, family and neighbors. This evidence becomes part of the application and is used to grant the K-1 visa for the immigrant. Once the fiancé visa has been approved, the couple must marry within 90 days of the 2-year marriage anniversary and file for conditional residence which is also subject to an interview process and or request for submission of proof that the couple lives together as a bona-fide married couple. Joint residency, bank accounts and neighbor affidavits may be included in the request for information that establishes the couple as a truly married unit. Conditional residency status may be revoked if the marriage is determined to be fraudulent. The process protects both parties in the marriage. The immigrant and the US citizen or resident is protected from unilateral marriage fraud. The investigation process for the K-1 application also protects the future rights of the immigrant. The spouse visa (K-3) is a bit more difficult to process and takes more time than does the K-1 visa application. The K-3 application can only be filed by a US citizen and the wait can be from 3 months to 1 year. The personal interview process at the US Embassy in the spouse’s country of origin is a strong step in the procedure, however and the time to reunification may be shorter based on the strength of the family ties, the length of the relationship and the country of origin for the spouse who is being petitioned for by the US citizen. In the case of the immigrant woman, if she later encounters an abusive husband, her VAWA self-petition application is protected by the validity of her marriage application process approval.

The K-1 and K-3 visa processes are necessary intrusions supported by the IMFA of 1986. However the IMFA, though amended from its original ‘loose’ policy of family sponsorship, still needs revisions that will control the current rise in marriage fraud. Unfortunately, an understaffed CIS assures that even using the K-1 and K-3 visa process, most marriage shams will never be detected, though it is a step in the right direction.
Before 1986, the INS merely interviewed applicants who desired residence to determine the validity of the marriage. If the immigration officer determined that the marriage was entered into in good faith, the immigrant beneficiary qualified for unconditional permanent residence. In 1986, Congress passed the Immigration Marriage Fraud Amendments (IMFA) to counter the perceived problem of immigrants entering into sham marriages to receive priority immigration status.

One reason sham marriages go undetected by ICE is that the IMFA has been unable to clarify what constitutes a marriage for the purpose of applying for LPR. Though Congress initially recommended that the “marriage relationship...be statutorily defined,” the IMFA of 1986 was created without any strong definition of marriage thus allowing for rough definitions to be constructed from INS documents dating as far back as The Immigration Act of 1924 and the War Brides Act of 1952; documents that do not clearly define marriage, however:

Congress’ purpose in not providing this definition can be interpreted as a recognition of the validity of the courts’ criticism of the Service’s [CIS] viability requirement…any enactment to establish a definition of marriage in terms of viability for immigration purposes ‘would subvert traditional modes of domestic violence relations law and would thus raise substantial constitutional problems’ (Lopez, 2006; Jones, 1997).

Yet there is still a need for a statutory definition for CIS purposes. Pulling together various phrases in the IMFA and other CIS documents’ definitions of what constitutes a viable marriage for CIS purposes can look like a bit confusing to even a trained CIS interviewer: …two parties...establish a life together and assume certain duties and obligations...[they have]good faith intention to marry and consummate the marriage even for a day...the marriage [must]be viable...valid according to the law where it was celebrated...valid under immigration law, i.e. the parties must intend to establish a life together...it should conform to a traditional American marriage where husband and wife live together and assume the customary marriage roles and duties (IMFA 1984, Tingle, 1989).

Thus the ‘burden of proof’ of viability lies with the CIS. At the 2-year adjustment of status meeting, interviewers construct definitions of marriage and design questions that will help to determine the ‘viability’ of the marriage application noting also that what does not constitute as a marriage for the CIS may be acceptable according to the state in which the couple resides. In some cases these questions and the interview process itself might seem intrusive. In order to determine that the couple has established a life together very personal questions must be asked. Questions about the couple’s sex life and preferences, questions that relate to domestic matters and that fall under the tenth amendment and are restricted by State laws may be asked by the interviewer. If the interviewer has reason to believe the marriage is not valid, s/he can deny the petition for adjustment of status. The CIS interviewer can also report the couple to ICE for investigation. But, generally petitions are not denied and cases of fraud go unreported. “Per the 2006 GAO Report: Immigration Benefits, a USCIS attorney stated that the provision of INA(Immigration and Nationality Act) that pertains to marriage fraud is rarely used because, due to the significant commitment of resources necessary to establish a finding of fraud, enforcing it might not be cost-effective” (Tingle, 1989).

Even more alarming is the fact that the VAWA “Protection of Battered Immigrant Women” section was designed in part to “correct flaws in the IMFA” but in instead “the regulations regarding battery and extreme cruelty loosen some of the tighter restrictions of the IMFA (Jones, 1997) and leaves loopholes. Often, human traffickers marry their victims in order to lure them into a life of prostitution and physical abuse. Marriage fraud covers the more heinous crime of human trafficking and both go undetected.

The Effectiveness of the IMFA 1986 against Marriage Sham
The major complaint advocates of the VAWA and of the self-petition process for immigrant women have with the IMFA of 1986 is in an under-examined issue: Recommendation #3, “The marriage relationship must be statutorily defined,” and Recommendation #5, “[The] burdens placed on the Government to prove fraudulent intent must be eased to assure that the aliens who participate in marriage
fraud are more easily deported, have not reached full compliance.” Prior to IMFA 1986, The Immigration and Nationality Act provisioned that: An alien who marries a United States citizen...does not need to wait...and normally will acquire immigrant status within several months. Similarly, an alien fiancé indicating intent to marry a United States citizen need not await a number and can readily obtain a fiancé visa. For alien visitors in the United States, marriage to a United States citizen waives the bar to adjustment of status imposed by Section 245(c) on individuals who have accepted unauthorized employment in the United States. This gives a significant economic advantage to an alien who accepted unauthorized employment, spousal relationships also exempt aliens [from] the labor certification requirements of Section 212(a) (14) (IMFA, 1986).

Recommendation #4 has been rendered almost ineffective (in the case of immigrant sham marriages) due to loopholes in the VAWA that allow for battered immigrant women to leave a marriage and still self-petition before the 2-year conditional residency requirement has ended. This is necessary if the spouse is being abused. However, most fraud criminals find this loophole to be their “way out” clause because they understand that the VAWA system does not report to ICE:

Under VAWA, a claim of abuse can cancel...deportation proceedings. Currently, cases are not being specifically referred for removal. Even if the immigrant had previously been ordered to leave the country and re-entered illegally, VSC [Vermont Service Center] is not passing them on to ICE Further, emotional abuse accusations are difficult to disprove. Orders of protection are routinely issued with no hard evidence of abuse...such orders are available even to persons who entered the country illegally...A finding of extreme cruelty involves the examination of the dynamics of the relationship, the victim’s sense of well-being before the abuse, the specific acts during the period of abuse, and the victim’s quality of life and ability to function after the abuse. The self-petitioner’s own declarations should cover these factors.

The problem is there are sham marriages in the US both unilateral and contractual. The contractual marriage shams create a black-market that is difficult to monitor by the INS only (mediaradar.com; USA Today, 2009). The burden on the CIS to process applications and to police them necessitates work hours and finances that the office simply does not have. As more and more US dollars are being directed to issues of illegal immigration, marriage sham slips through the cracks of bureaucracy as it gets dodged through the VAWA. Clear definition of what exactly constitutes a legal marriage between a US citizen or LPR and a foreign national has not yet become statute and included in state and federal law. The CIS still straddles the fence between the loose family sponsorship process prior to IMFA 1986 and current protections found under the VAWA.

In the 21st century, foreign nationals on visitor visas in the US are still being approved for adjustment in status through marriage without leaving the country, despite specific regulation in the IMFA 1986 and in The IIRIRA of 1996, it’s easy to understand how foreign students and workers in the United States might meet Americans and get married without wanting to return to their home countries to apply for immigrant visas. But it is unclear why USCIS allows foreign “tourists” who allegedly fall in love while on vacation in the United States to remain indefinitely via adjustment of status...In practice, adjustment of status is most convenient for tourists who are intent on entering into a fraudulent marriage (Seminara, 2010).

There are estimates of fraud marriage: According to Winston (2012), in New York City alone. In addition, ICE made 223 arrests in 2008 and, nation-wide and 20,000 naturalization applications...[were]denied on suspicion of fraud in 2005” (Winston, 2012). But, the CIS has not been able to sufficiently track those numbers nationwide due to the embedding of contractual and unilateral sham marriages in the VAWA reporting process of violence against immigrant women through the self-petition. It is a fact that the VAWA may indeed subvert the ability of the INS to track sham marriages. They liberally estimate that at most only 10% of VAWA self-petitions represent battering or extreme cruelty between intimate partners. According to their records, approximately 90% of the 15,590 residents, (from 2002 to 2006) were admitted to the United States under fraudulent circumstances” (www.mediaradar.com, 2009).
However, because ICE is greatly understaffed, reports from individuals who claim to be victims of unilateral shams are difficult to investigate. Winston (2012) asserts that ICE prefers investigating large scale crime ring shams which assures that if potential scammers stay under the radar, they can easily avoid prosecution. For human traffickers, it means maintaining physical and or mental control over their victims until the conditional status has ended. Staying under the radar simply means marrying and sponsoring once, remaining in the marriage for the 2-year conditional status and if at all possible sticking to the contractual “friends and family plan” sham.

The article “What’s a Little Marriage Fraud Between Amigos?” by columnist and contributing editor of The Los Angeles Times, Gustavo Arellano (2010) shares interview stories about friends who sham marry using the ‘friend and family plan sham. In one story, two long-time friends marry because one has been denied LPR even though his parents were approved. The reason: though the family LPR application took 13 years to be approved, a clause in American immigration law stated that anyone who turned 21 while awaiting notification on a joint petition with their family had to re-file on their own. By the end of Arellano’s article, the two friends marry, sham the system, and remain friends.

But not all sham marriages are amicable. There are also problems with impatience with proper procedure, greed, and criminal mentality in US marriage shams. Arellano’s article refers to another contractual sham that ended in blackmail (Arellano, 2010). A few of the contractual shams end in reports of domestic violence to the VAWA. However, the unilateral sham marriage most often subverts the system. US citizens and LPRs unwittingly enter into unilateral sham marriages with foreign nationals. Unfortunately once they discover the sham, it is too late because US citizens and LPRs tend to report unilateral marriage fraud after the fact. Thus the numbers of unilateral marriage fraud cases may not ever come to light as the CIS is overburdened and most often unable to investigate accusations of fraud after the immigrant has been granted LPR status because their caseload has caused too much time to lapse and they are unable to prosecute due to statutes of limitations in CIS law. A 1996 case, Bamidele v Immigration and Naturalization Service establishes that: If, at any time within five years after the status of a person has been otherwise adjusted…or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made (www.caselaw.findlaw.com).

Revision of the IMFA 1986 concerning the LPR process of the K-1 and K-3 visas and the use of self-petition and narratives might reveal more valid statistics of marriage fraud cases in the US, but who investigates the fraud is still a major strategic and financial problem. When the VAWA and IIRIRA of 1996 were created, support offices, programs and centers were designed to help facilitate cases of domestic violence. The VAWA revisions in 2000 and 2005 and 2013 created even more resources for battered immigrant women. The IMFA of 1986 has no such support system in place beyond the inadequate support of ICE. In New York City’s more efficient CIS location, ICE has a 12 person “Document and Benefit Fraud Task Force.” The task force handles cases of ‘reported’ fraud from CIS among other duties. The task force was established in 2006 (Winston, 2012).

According to the 2009 media radar report, sham already costs American taxpayers $170 million each year and the amount is increasing. “The financial burden of VAWA immigration fraud to US taxpayers was estimated at $131.3 million in 2006… and will balloon to $210 million in 2010” (www.mediaradar.com, 2009). The VAWA re-authorization of 2013 is still being tested, yet many advocates of revision to the IMFA of 1986 are ready to repeal VAWA sections on battered immigrant women. But the problem may not lie in the VAWA document as much as the problem resides in the IMFA of 1986.
The VAWA is a safe zone for battered immigrant women who present real cases of domestic violence. In order to maintain its integrity as a service to victims of domestic violence, the reporting system of the VAWA support offices (VSC) cannot be used entirely for detecting and reporting marriage sham.

According to the 2013 document, here is what the VAWA support offices (VSC) can do:

- Background checks of all battered immigrant women who report domestic violence
  This is simple. The VSC is a federal agency and has access to FBI, Interpol and other reporting services. In cooperation with the CIS, the VSC can also be made aware of immigrant women who claim abuse but have multiple entry denials on file. A history of entry attempts that have been denied, coupled with criminal records in the US as illegal or records from their country of origin can make them ineligible for VAWA support.

- Create a record of all battered immigrant women self-petitions and open the records to the CIS
  Advocates of the VAWA may see this cooperation with CIS as a deterrent to battered immigrant-women who are reluctant to report domestic violence for fear of deportation, but this is not the case. In fact, a file like this helps to strengthen the self-petition as repeat male abusers and human traffickers can be found in this file by the VSC as well as the CIS. Repeat abusers who are LPRs can be deported and US citizen repeat offenders can be imprisoned without complications.

- Allow spouses of battered immigrant women to testify
  “Under VAWA immigration provisions, a person accused of partner abuse has no legal standing to refute the claim. Indeed, as a result of VAWA confidentiality provisions, the alleged abuser often is not informed that the allegations were made” (www.mediaradar.com, 2009).

The US Government has already spent billions of dollars in the fight against illegal immigration and border control and general Homeland Security. The increased funding needed to address sham marriage is not available. What can be done, involves closer reading of the IMFA of 1986 document and consideration of the steps that follow.

Steps to a more effective IMFA:

- Statutorily define marriage for CIS purposes
  Though it may offend supporters of marriage law and the 10th amendment of the US, it cannot be denied that since 9/11 reasons to define marriage for the CIS may help to decrease sham marriages. Currently CIS interview questions are arbitrarily constructed by the interviewer based on loose definitions of marriage found in CIS documents. This means that every interview is different and based on the interviewer, a sham couple may or may not be discovered.

- Release the CIS from establishing the burden of proof for fraudulent marriages
  Placing the burden of proof of valid marriage on the couple can help decrease sham. “Marriage fraud is a felony punishable by five years’ imprisonment and $250,000 fine for US citizens. Immigrants found guilty of marriage fraud can be entered into deportation procedures (Winston, 2012). An example of LPR marriage burden of proof could be that, in addition to bringing photos and proof of cohabitation, couples should be required to bring live witnesses who swear under oath that they have actually seen proof of cohabitation. Fear of felony prosecution for false testimony could make live witnesses difficult to acquire.

Conclusion – What is Marriage?
Marriage is a contract “chiefly regulated by the states”. According to the United States Statute of Marriage, a US citizen in his or her right mind can enter into a consensual marriage contract with anyone s/he wishes. “The Supreme Court has held that…One power that the states do not have…is that of prohibiting marriage in the absence of a valid reason.” Lawmakers become uneasy when the Federal Marriage Act is challenged and people attempt to ignore rights of states and rights of citizens under the 10th and 14th amendments (IMFA, 1985).
But, it could be reasoned that a US citizen or LPR desirous of marrying a foreign national has the legal right to do so whether or not the CIS believes the marriage is a sham. And, further, if the statute of marriage is taken simply, a US citizen or LPR can knowingly enter into a sham marriage by right of law. Yet, CIS regulations prohibit fraud marriage and they are supported by the same Federal entity that supports a citizens’ right to marry whomever s/he pleases. Sham marriages are felonies in the US. That the laws can be so conflicting makes it easy for foreign nationals seeking an end run to LPR status in the US to sham the system. The VAWA of 1994 and its 2000 and 2005 revisions along with the 2013 reauthorization help aid marriage shimmers’ to bypass the CIS and the IMFA of 1986. Specifically, “The Battered Immigrant Women Protection Act” is a loophole that renders parts of the IMFA of 1986 ineffective. Statutorily defining marriage for CIS purposes is the place to begin strengthening the IMFA of 1986 and closing loopholes created by the VAWA.

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