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## The Predicament of the Immigrant Victim/Defendant: “Vawa Diversion” and Other Considerations in Support of Battered Women

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**THE PREDICAMENT OF THE IMMIGRANT VICTIM/DEFENDANT:  
“VAWA DIVERSION” AND OTHER CONSIDERATIONS IN  
SUPPORT OF BATTERED WOMEN\***

ZELDA B. HARRIS\*\*

The struggle to combat domestic violence has sustained a modern feminist movement that began over thirty years ago.<sup>1</sup> The push to prioritize domestic violence on the feminist agenda has yielded far-reaching and tangible results in a relatively short period. The passage of the Violence Against Women Act of 1994 (“VAWA”)<sup>2</sup> and the Battered Immigrant Women Protection Act of 2000 (“VAWA II”)<sup>3</sup> is a testament to this fact. VAWA and VAWA II are a culmination of efforts and collaborations made between and across members of the feminist and civil rights movement.<sup>4</sup> However, as the fanfare over the collective rewards fades, serious concerns remain regarding the impact of the policies and laws on non-white women who have been subjected to historical oppression based on race or national origin. Unfortunately, poor women of color have been left to bear the expense and debts owed from waging a war against gender inequality.<sup>5</sup>

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1. Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL’Y 463, 476 (1996).

2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902-55 (codified in various provisions of titles 8, 16, 18, and 42 of the United States Code).

3. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, tit. V, 114 Stat. 1464, 1518-37 (codified in title 8 of the United States Code).

4. Rivera, *supra* note 1, at 491.

5. *See generally id.* (providing a detailed discussion of the often conflicting interests of the feminist movement and the civil rights movement with respect to the Violence Against Women Act).

One example of the damage is the effect of mandatory misdemeanor domestic violence prosecution policies on women who have immigrated to the United States with abusive U.S. citizen or legal permanent resident spouses.<sup>6</sup> The mandatory policies, lobbied for by anti-domestic violence advocates, have effectively disabled immigrant women from securing the personal freedom needed to gain the very safety for themselves and their children that the movement promised.<sup>7</sup>

The following essay seeks to shed light on some of the unintended consequences of mandatory prosecution policies as gleaned from my experience representing battered women in the Domestic Violence Law Clinic in Tucson, Arizona.<sup>8</sup> Tucson is located in close proximity to the border of Mexico. Consequently, many of the clients served by the Clinic are recent immigrants from Mexico and other Latin American countries.<sup>9</sup>

Any interaction with the criminal justice system can have permanent consequences for immigrants seeking permanent residence or citizenship in this country.<sup>10</sup> The current domestic violence laws and policies, in an effort to effectuate color- and gender-blind justice, treat the female immigrant defendant the same as the male, non-immigrant defendant. The imposition of

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6. See Cecelia M. Espenoza, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 185-86 (1999) (arguing that VAWA encourages mandatory arrest practices and the arrest of the primary aggressor, which often results in the arrest of the immigrant woman due to police bias).

7. See *id.* at 188-89.

8. The Domestic Violence Law Clinic [hereinafter Clinic] is a teaching law office, staffed primarily by senior law students who are supervised by the Clinic Director. See The University of Arizona, James E. Rogers College of Law, *About the Domestic Violence Law Clinic*, at <http://www.law.arizona.edu/Depts/Clinics/DVC/clinic.htm> (last visited Jan. 6, 2004). The Clinic is part of the clinical course curriculum at The University of Arizona, James E. Rogers College of Law in Tucson, Arizona. *Id.* The Clinic provides direct legal representation and advice to victims of domestic violence in southern Arizona in collaboration with Southern Arizona Legal Aid, Inc. (the local civil legal service provider) and anti-domestic violence victim advocacy and shelter service providers in the community. *Id.* Initial client interviews are conducted on-site at battered women's shelters. *Id.* The clients are pre-screened by shelter advocates to meet baseline eligibility requirements for domestic violence services. *Id.* In 1998, when I began my work as the director of the Clinic, I expected that the great majority of clients interviewed and provided with legal representation would be women seeking various forms of civil relief from the court. While this expectation has held true, an unexpected observation emerged. The Clinic provided a notable amount of services to women who had been charged with criminal acts of misdemeanor domestic violence. Conversely, the same women had been identified by shelter advocates as victims of domestic violence, not perpetrators.

9. See generally TUCSON PLANNING DEPARTMENT, PIMA COUNTY/TUCSON RACE AND ETHNICITY 1999-2000 COMPARISONS REPORT (2001), available at <http://www.ci.tucson.az.us/planning/demo.htm>. The most recent census for the area reports that over 35% of the population in the City of Tucson is Hispanic. *Id.*

10. Espenoza, *supra* note 6, at 176.

mandatory prosecution policies on battered immigrant women who find themselves defendants in criminal court has overly harsh and unwarranted results.<sup>11</sup> The typical criminal defendant represented by the Clinic is a poor, recently immigrated, non-English speaking woman with children. That typical client is a survivor of domestic violence at the hands of the person who stands as a “victim” in criminal court.

The following article examines a representative case involving a battered immigrant woman facing prosecution for a misdemeanor crime of domestic violence. Sections II and III examine the debate regarding mandatory state intervention in violent relationships. Sections IV and V provide an overview of the current domestic violence laws and policies in place in Arizona and an examination of the application of the various policies to the representative case. Section VI analyzes the typical responses of battered immigrant women to an incident of violence. Section VII examines the consequences of an arrest for misdemeanor domestic violence for a battered immigrant woman. Finally, this article calls for the use of a strategy referred to as “VAWA diversion”<sup>12</sup> in misdemeanor cases of domestic violence involving battered immigrant women as defendants.

#### I. ROSA’S PROFILE: A CASE ILLUSTRATION<sup>13</sup>

Rosa, age twenty-two, was born in the city of Sonora, Mexico. Prior to her arrival in Tucson, Rosa resided in a small bungalow-style home with her mother, two of her brothers, and the brothers’ wives and children. Rosa completed six years of formal education in Mexico, spoke only Spanish, and worked primarily as a domestic worker for some of the wealthier families in her community. She had never been married and had no children before coming to the United States.

Rosa met Francisco, forty-one, three years ago when he was visiting friends in Sonora. Francisco had been married and divorced twice, but he had no children. He held dual citizenship in the U.S. and Mexico. Francisco easily convinced Rosa to leave the security of her family and all that was familiar to her to live with him in the U.S. Francisco had a job and a single-family home in Tucson. Rosa and Francisco were married in a religious and civil ceremony in Mexico. Despite her reluctance to leave her family, Francisco assured Rosa

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11. *See id.* at 175-81, 193-94 (discussing possible immigration consequences resulting from domestic abuse convictions).

12. VAWA diversion is a term this author first heard used by court advocates working at The Brewster Center Domestic Violence Services, Inc. in Tucson, Arizona. The concept is explained further at *infra* Section VII.

13. Rosa’s case is a hypothetical based on my experiences in the Clinic representing immigrant victims of domestic violence who are charged with acts of misdemeanor domestic violence in southern Arizona.

that he would help her acquire U.S. citizenship, allowing her to travel freely to and from Mexico.

Within the first two years of her arrival in Tucson, Rosa gave birth to two children. However, Francisco had either intentionally refused or neglected to file the requisite documents with the United States Bureau of Citizenship and Immigration Services<sup>14</sup> that would provide Rosa with a form of legal status in this country. When Rosa questioned Francisco about his lack of efforts to secure her legal status, he insisted that if she worked harder in the home and stopped being so concerned with learning to speak English, socializing with women in the neighborhood, or dressing, acting, and talking like an American, then maybe they could succeed in this country. Believing in the dream, Rosa retreated.

Domestic violence does not interrupt a relationship suddenly like an uninvited guest. Instead, it is a disease that grows steadily and consistently throughout our communities. It is regularly nurtured by racial and cultural oppression, misogyny, homophobia, and socially condoned violence in our community.<sup>15</sup> The pressures visited upon the newly immigrated family, including pressure to conform and assimilate while holding true to cultural traditions, can be overwhelming.<sup>16</sup> Although this stress is not an excuse or justification for domestic violence, it must be understood as the context in which violence occurs.

## II. THE PUSH FOR MANDATORY INTERVENTION TO COMBAT DOMESTIC VIOLENCE

Historically, violence in the home has been hidden from public view due to societal resistance, supported by law, against intrusion into the sphere of family privacy.<sup>17</sup> Advocates working in the anti-domestic violence movement viewed transferring domestic violence from a private concern to a public

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14. On March 1, 2003, the Immigration and Naturalization Service [hereinafter INS] became the United States Bureau of Citizenship and Immigration Services [hereinafter USCIS] and is now part of the Department of Homeland Security.

15. See generally MARTHA ALBERTSON FINEMAN & ROXANNE MYKITIUK, *THE PUBLIC NATURE OF PRIVATE VIOLENCE* (1994) (providing an exceptional compilation of feminist writings addressing domestic violence).

16. See generally George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICAGO-LATINO L. REV. 1 (1999) (discussing assimilation as a powerful force in America and arguing that the law should not demand full assimilation at the expense of cultural traditions).

17. See FINEMAN & MYKITIUK, *supra* note 15, at xiii. The parameters of the family institution “traditionally set aside as paradigmatically ‘private’ have historically defined a more or less bright line across which state or ‘public’ intervention and regulation are considered problematic.” *Id.*

responsibility as central to systemic reform.<sup>18</sup> The creation of laws and policies to combat domestic violence could not have developed without public acceptance that domestic violence is a societal problem that affects the community at large. One such example of these laws is mandatory intervention policies, which are those policies developed by prosecutorial offices requiring the arrest of abusers, despite the willingness of the victim to press charges.<sup>19</sup>

Mandatory policies were sought to address two prevailing difficulties in combating domestic violence: (1) coercive control tactics used by the abuser to prevent the victim from seeking assistance, and (2) resistance by state actors<sup>20</sup> to intervene.<sup>21</sup> Laws requiring mandatory intervention, in theory, would diminish the abuser's control over the victim by taking the decision to intervene out of the hands of the victim and placing that power in the hands of the state.<sup>22</sup> Accordingly, no amount of coercion directed against the victim could prevent the state from seeking punishment of the abuser for his criminal conduct.

Similarly, it was commonly viewed that resistance by law enforcement officers to make arrests and prosecutors to pursue charges was tied to the victim's lack of cooperation in the process, most likely due to the abuser's coercion.<sup>23</sup> Additionally, the lack of arrests and prosecutions was tied to personal biases of individual state actors resulting in institutional gender bias.<sup>24</sup> Again, mandatory policies were seen as a measure to ensure punishment of the offender despite his attempts to exert control over the victim or resistance by state actors to take action against the abuser.<sup>25</sup>

Ultimately, it can be argued that mandatory intervention policies have effectively removed the shield of privacy covering domestic violence.

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18. See Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 *UCLA WOMEN'S L.J.* 173, 173-74 (1997) (arguing in favor of aggressive prosecution because domestic violence is a public safety issue, domestic violence victims cannot be relied upon to appropriately vindicate the state's interest in holding batterers responsible for their violence, and prosecutor intervention is necessary to prevent further batterer intimidation and coercion).

19. *Id.* at 173.

20. By "state actors," I mean those persons and institutions in positions of legal authority that are required, by law, to respond to domestic violence. These individuals include law enforcement officers, prosecutors, and judges.

21. See generally Wills, *supra* note 18 (analyzing the arguments in favor of mandatory prosecution policies); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 *J. CRIM L. & CRIMINOLOGY* 46 (1992) (providing a historical account of the development of misdemeanor domestic violence policies).

22. Wills, *supra* note 18, at 180.

23. *Id.* at 179-80.

24. Espenosa, *supra* note 6, at 186.

25. Wills, *supra* note 18, at 180.

Domestic violence is now viewed as a legitimate and serious public problem.<sup>26</sup> State laws and policies have clearly defined a level of conduct and behavior in intimate relationships that will not be tolerated.<sup>27</sup> Finally the abuser's ability to control the outcome of state intervention has been curtailed as decision-making power has been transferred from the individual victim to the state.<sup>28</sup>

### III. RESPONSES IN OPPOSITION TO MANDATORY INTERVENTION POLICIES

Despite general agreement by advocates in the anti-domestic violence movement that family violence issues should be viewed as a public concern, there is disagreement over how such public intervention should occur.<sup>29</sup> Responses in opposition to mandatory intervention fall under two central themes. First, victim self-determination and trust in her decision-making abilities are not recognized under a mandatory intervention scheme.<sup>30</sup> Second, the mandatory policies harm minority communities that have suffered historical oppression based on race and national origin to the detriment of both abuser and victim.<sup>31</sup>

First, with regard to victim self-determination, mandatory policies admittedly move the decision to take action against the abuser from the victim to the state. However, to the extent that these policies were constructed in response to perceived coercive control tactics utilized by the abuser over the victim, the policies fail to acknowledge other reasons for the victim's reluctance to participate in the process. Particularly, it has been asserted that

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26. Cf. American Bar Association Commission on Domestic Violence, *Organization Resource Information*, at <http://www.abanet.org/domviol/resourceinformation.html> (last visited Jan. 6, 2004) (listing state-wide domestic violence coalitions in all fifty states, Puerto Rico, and the Virgin Islands).

27. See Wills, *supra* note 18, at 182.

28. *Id.* at 180.

29. Compare Linda G. Mills, *Mills on Mandates, Reel Two*, 6 DOMESTIC VIOLENCE REP. 17 (2001), and Linda G. Mills, *The Case Against Mandatory State Interventions: A Reply to Evan Stark*, 6 DOMESTIC VIOLENCE REP. 1 (2000) [hereinafter Mills, *Reply to Evan Stark*], and Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) [hereinafter Mills, *Killing Her Softly*] (arguing that mandatory intervention needs to be reconsidered and that battered women are safest when they are given the choice as to whether or not to prosecute their batterer), with Evan Stark, *Do Mandated State Interventions Contribute to Woman Battering?*, 5 DOMESTIC VIOLENCE REP. 65 (2000) (criticizing Mills's arguments against mandatory state intervention as lacking evidential support).

30. Mills, *Reply to Evan Stark*, *supra* note 29, at 14.

31. See generally Mills, *Killing Her Softly*, *supra* note 29 (providing extensive treatment of the arguments against mandatory prosecution); Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183 (1997) [hereinafter Mills, *Intuition and Insight*], Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996) [hereinafter Mills, *Affective Lawyering*].

victims do not seek state intervention due to their mistrust in the system.<sup>32</sup> Victim lack of confidence in state intervention is rational given that traditional methods of addressing domestic violence (i.e. mediation, cite and release, delay)<sup>33</sup> may have led to increased risk of violence to the victim.<sup>34</sup> Critics of mandatory intervention argue that the policies do not defer to the victim when pursuing punishment against the abuser that will have consequences for the victim and her family.<sup>35</sup> For example, policies resulting in the abuser having a criminal record of arrest and conviction may have a direct impact on his ability to secure employment and provide support for the victim and her children. Further, it has been argued that mandatory policies entrench negative stereotypes of women and their ability to make rational decisions concerning family violence.<sup>36</sup> On the one hand, mandatory intervention is seen as necessary to address the problem of women dropping charges because of coercion by the abuser.<sup>37</sup> On the other hand, the policies may be overly controlling by dictating a certain outcome without regard to the legitimate reasons women may have for not seeking relief through the criminal justice system.<sup>38</sup>

Second, there are concerns about the impact of mandatory prosecution policies on communities of racial and ethnic minorities that have suffered historical oppression through the operation of discriminatory laws and policies.<sup>39</sup> Although mandatory intervention policies are facially non-discriminatory, it can be argued that to the extent that the policies are based on a criminal justice model, they have a greater impact on members of minority communities.<sup>40</sup> Addressing racially discriminatory practices by state actors has long been on the agenda of civil rights organizations.<sup>41</sup> Accordingly, reliance on a criminal justice model to address domestic violence does not recognize the oppression faced by minority communities that include not only

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32. See Mills, *Affective Lawyering*, *supra* note 31, at 1226-27 (noting that only 14% of women who are severely abused ever call the police).

33. Zorza, *supra* note 21, at 47-48.

34. See *id.* at 50.

35. See Mills, *Intuition and Insight*, *supra* note 31, at 184 (explaining that minority women in particular may be ostracized by their community and family for reporting domestic violence).

36. *Id.*

37. Wills, *supra* note 18, at 181-82.

38. See Mills, *Intuition and Insight*, *supra* note 29, at 184-85 (noting various reasons why a woman may choose not to prosecute her abuser beyond coercion).

39. See Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 49-50 (1998).

40. See Mills, *Reply to Evan Stark*, *supra* note 6, at 2, 14.

41. See Rivera, *supra* note 1, at 506 (arguing that mandatory prosecution furthers the invasive state law model, which has proved “debilitating for communities of color and women”).



abusers but victims and their children as well.<sup>42</sup> Mandatory policies do not take into account the reluctance of minority women to trust that the criminal justice system will mete out justice in a fashion that is both fair and just.<sup>43</sup>

#### IV. THE LEGAL DEFINITION OF DOMESTIC VIOLENCE IN ARIZONA

The determination of whether a particular crime will be labeled an act of domestic violence depends on the relationship between the victim and offender. The Arizona Criminal Code lists some eighteen separate offenses that can be classified as acts of domestic violence.<sup>44</sup> The crimes include assault and aggravated assault,<sup>45</sup> harassment and aggravated harassment,<sup>46</sup> stalking,<sup>47</sup> threatening and intimidating,<sup>48</sup> using the telephone to harass,<sup>49</sup> disorderly conduct,<sup>50</sup> kidnapping,<sup>51</sup> unlawful imprisonment,<sup>52</sup> trespass,<sup>53</sup> criminal damage,<sup>54</sup> endangerment,<sup>55</sup> dangerous crimes against children,<sup>56</sup>

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42. See Fenton, *supra* note 39, at 49.

43. See *id.* at 51-54 (explaining that minority communities embrace a general distrust for the justice system).

44. ARIZ. REV. STAT. § 13-3601 (2003).

"Domestic violence" means any act which is a dangerous crime against children as defined in section 13-604.01 or an offense defined in sections 13-1201 through 13-1204, 13-1302 through 13-1304, 13-1502 through 13-1504 or 13-1602, § 13-2810, section 13-2904, subsection A, paragraph 1, 2, 3, or 6, § 13-2916 or sections 13-2921, 13-2921.01, 13-2923, 13-3019, 13-3601.02 or 13-3623, if any of the following applies: (1) The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household, (2) The victim and the defendant have a child in common, (3) The victim or the defendant is pregnant by the other party, (4) The victim is related to the defendant or the defendant's spouse by blood or court order as a parent, grandparent, child, grandchild, brother or sister or by marriage as a parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law, or (5) The victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.

ARIZ. REV. STAT. § 13-3601(A) (2003).

45. *Id.* §§ 13-1203 – 13-1204.

46. *Id.* §§ 13-2921 – 13-2921.01.

47. *Id.* § 13-2923.

48. *Id.* § 13-1202.

49. ARIZ. REV. STAT. § 13-2916 (2003).

50. *Id.* § 13-2904.

51. *Id.* § 13-1304.

52. *Id.* § 13-1303.

53. *Id.* §§ 13-1502 – 13-1504.

54. ARIZ. REV. STAT. § 13-1602 (2003).

55. *Id.* § 13-1201.

56. *Id.* § 13-604.01.

custodial interference,<sup>57</sup> child abuse,<sup>58</sup> and interfering with judicial proceedings.<sup>59</sup> In addition, contributing to the delinquency or dependency of a minor is a crime frequently charged in connection with acts of domestic violence that occur in the presence of children.<sup>60</sup>

#### V. MANDATORY INTERVENTION LAWS AND POLICIES IN PLACE IN ARIZONA

The following section outlines the mandatory intervention laws and policies in place in Arizona concerning domestic violence in the areas of reporting, arrest, prosecution, and sentencing.

##### A. Reporting

Arizona law does not specifically mandate the reporting of acts of domestic violence committed against an adult victim.<sup>61</sup> Instead, physicians are under a legal obligation to report to law enforcement any “material injury” that appears to be the result of an unlawful act.<sup>62</sup> Therefore, only adult domestic violence victims who are present at a hospital or emergency room with serious physical injuries and are willing to disclose the origin of their injuries are likely to have their cases reported to law enforcement by a physician. As the majority of domestic violence incidents do not involve serious physical injury,<sup>63</sup> it is safe to assume that most cases of domestic violence observed by physicians and hospital staff are not reported to law enforcement. However, in the service area of the Clinic, many health care facilities have adopted a universal domestic violence screening protocol for female patients.<sup>64</sup> Women who are not suffering a material injury but disclose the existence of domestic violence during the screening process are referred to professionals within the institution or the larger community who are experienced in the field of

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57. *Id.* § 13-1302.

58. *Id.* §§ 8-201, 13-3623.

59. ARIZ. REV. STAT. § 13-2810 (2003).

60. *Id.* § 13-3612.

61. *See, e.g., id.* § 13-3806.

62. *Id.*

63. RONE BACHMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 8 (1994). Table 14 of the study reports that 34% of single-offender violent crime victimizations of women involved injury, but only 3% could be classified as serious (gunshots or knife wounds, broken bones, loss of teeth, internal injuries, loss of consciousness, and undetermined injuries requiring two or more days of hospitalization). *Id.*

64. *See* Memorandum from the Arizona Coalition Against Domestic Violence, Health Care Provider/Hospital Reporting of Domestic Violence and Sexual Assault to Law Enforcement (May 1997) (on file with author) (explaining the duties of a health care provider in assisting victims of domestic violence or sexual assault).

domestic violence.<sup>65</sup> Attempts have been made by anti-domestic violence advocates to secure the enactment of mandatory domestic violence reporting legislation, but the attempts have not yielded results to date.<sup>66</sup>

### B. Arrest

Mandatory arrest of domestic violence offenders is required in Arizona where probable cause exists to believe that a victim has been physically injured and/or a weapon is found on the scene.<sup>67</sup> Further, law enforcement officers have discretion to make an arrest without a warrant whenever they believe probable cause exists to support any act of domestic violence.<sup>68</sup> Police officers are not required to delay taking action by seeking a warrant.<sup>69</sup> Also, officers do not have to personally observe the incident in order to affect an arrest without a warrant.<sup>70</sup> The Arizona law in this regard is in line with national trends to treat domestic violence as a crime to be addressed rigorously through the criminal justice system, instead of mediated through temporary separation of the parties.<sup>71</sup> It is the routine practice of law enforcement agencies in Tucson to make arrests without warrants where they possess probable cause to believe an incident of domestic violence has occurred.<sup>72</sup> However, state and local advocates have raised concern over implementation of the mandatory arrest laws.<sup>73</sup>

Additionally, the law mandates that police officers take domestic violence offenders into custody once arrested, as opposed to issuing a citation and releasing the abuser from the scene.<sup>74</sup> Again, the law in this regard is in line with national trends and is directly responsive to criticisms raised by the anti-

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65. Sandy Davenport, Address to the Domestic Violence Law Clinic, James E. Rogers College of Law, The University of Arizona (Mar. 22, 2001) (materials provided by speaker on file with author).

66. See Memorandum from the Arizona Coalition Against Domestic Violence, *supra* note 64, at 1.

67. See ARIZ. REV. STAT. § 13-3601(B) (2003).

68. See *id.*

69. See *id.*

70. *Id.*

71. For an exceptional historical analysis of the lobbying for mandatory arrest policies by the anti-domestic violence movement see generally Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281 (1997).

72. See Tucson Police Department General Orders, 2 General Operating Procedures, Arrest Policy No. 2100, § 2112.7 (May 2001) (on file with author).

73. See GOVERNOR'S TASK FORCE AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE IN ARIZONA EXECUTIVE SUMMARY REPORT AND RECOMMENDATIONS 10 (Feb. 1988); see generally CLEGG & ASSOCIATES, TUCSON/PIMA COUNTY DOMESTIC VIOLENCE SYSTEM DESIGN (Dec. 1995) (on file with author).

74. ARIZ. REV. STAT. § 13-3601(I) (2003).

domestic violence movement that police officers were not treating abusers as criminal actors when they were released from the scene without citation or detention.<sup>75</sup>

### C. Prosecution

In the service area of the Clinic, domestic violence misdemeanor prosecutions are handled by two separate prosecution agencies.<sup>76</sup> Generally, domestic violence prosecution policies can be divided into three categories: (1) hard/no-drop policies where victims can be forced to testify against their abusers; (2) pro-prosecution jurisdictions where victim participation is encouraged, and a case may proceed in her absence if the evidence can support such action; and (3) soft prosecution policies which provide a victim with supportive services to encourage her participation, but which ultimately yield to the victim's decision on whether or not to proceed.<sup>77</sup> Both prosecuting agencies in the Clinic service area are committed to "pro-prosecution" policies with intermittent use of hard/no-drop practices. In other words, when the evidence in a case of domestic violence supports the likelihood of a conviction, prosecution of the offender will be sought despite any request made by the victim that the case be dropped. At times, individual prosecutors may seek to invoke the contempt power of the court to compel or punish reluctant victims who fail to appear at trial to testify against their abusers as required by subpoena.

### D. Sentencing

A criminal defendant entering the system on a misdemeanor domestic violence assault charge as a first time offender could, in theory, be allowed to compromise the case or participate in an approved diversion program.<sup>78</sup>

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75. Fedders, *supra* note 71, at 287-90.

76. The Office of the Pima County Attorney is responsible for the prosecution of misdemeanor crimes that occur within the county of Pima. The Office of the Tucson City Attorney is responsible for the prosecution of misdemeanor offenses that occur within the city limits of Tucson.

77. See Gena L. Durham, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 650-57 (1998). See generally Casey Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 298, 308-11 (1993); Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

78. The law concerning misdemeanor compromise in Arizona can be found at Arizona Revised Statute section 13-3981. Pursuant to subsection (B) of that code provision, "If a defendant is accused of an act involving assault, threatening or intimidating or a misdemeanor offense of domestic violence . . . the offense shall not be compromised *except on recommendation of the prosecuting attorney.*" ARIZ. REV. STAT. § 13-3981(B) (2003) (emphasis added). The

Mandatory jail time is required for abusers who have been convicted of two or more separate offenses of domestic violence within five years.<sup>79</sup> Further, all persons convicted, either through trial or plea bargain, of an act of domestic violence must complete a domestic violence offender treatment program approved by the Department of Health Services or a probation department.<sup>80</sup> Both prosecuting agencies in Tucson have internal office policies that strongly deter the use of the compromise process in domestic violence cases.<sup>81</sup>

The plea bargaining process in domestic violence cases, which includes diversion, has received a mixed response from the advocate community.<sup>82</sup> Statewide, anti-domestic violence advocates made a recommendation against the use of plea-bargaining and compromise in domestic violence cases.<sup>83</sup> However, Tucson advocates called for the encouragement of better evidence collection efforts to encourage plea bargaining by offenders.<sup>84</sup> The difference in recommendations could be explained by the realization among Tucson advocates, some eight years after the initial state-wide recommendation, that the criminal justice system may not have been able to effectively or efficiently conduct a trial for every misdemeanor domestic violence case pursued by the

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statutory scheme regarding diversion in domestic violence cases is found at Arizona Revised Statutes section 13-3601, subsection (M). The relevant portions of that subsection read as follows:

If the defendant is found guilty of an offense included in domestic violence and if probation is otherwise available for that offense, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation or intensive probation, as provided in this subsection.

*Id.* § 13-3601(M).

79. *See id.* §13-3601.02.

80. *See id.* §13-3601.01.

81. A statement from the Tucson City Attorney's Office includes the following language: "TYPES OF CASES THAT CANNOT BE DISMISSED PURSUANT TO A MISDEMEANOR COMPROMISE: Assaults against police officers; Any case involving DOMESTIC VIOLENCE or INDECENT EXPOSURE; Violations of Protective or Harassment Orders; Custodial or Visitation Interference; and crimes in which the victim is a child." Statement from the Tucson City Attorney's Office, Criminal Misdemeanor Compromise Instructions (1994) (on file with author) (emphasis in original). The Office of the Pima County Attorney has a similar written policy regarding misdemeanor compromise. Statement from the Office of the Pima County Attorney (on file with author). That policy includes the following statement: "Misdemeanor compromise does not automatically apply to assault or domestic violence cases. However, it may apply in some of those cases. Prior approval of the prosecutor must be obtained before such will be allowed." *Id.* (emphasis removed).

82. The practice of plea bargaining typically involves the defendant pleading guilty to one or more offenses in exchange for the state dropping other charges and recommending a lenient sentence.

83. *See* GOVERNOR'S TASK FORCE AGAINST DOMESTIC VIOLENCE, *supra* note 73, at 5.

84. *See* CLEGG & ASSOCIATES, *supra* note 73, at 56.

prosecutor's office.<sup>85</sup> Therefore, the encouragement of plea bargaining may have been viewed as a way to reduce the burden on an overloaded judicial system while simultaneously resulting in criminal consequences and punishment for offenders.

The remaining sections of this article address the impact of the mandatory domestic violence intervention policies on immigrant women. In particular, the article addresses the impact of mandatory misdemeanor prosecution policies on the battered immigrant victim in terms of citizenship status, employment, and child custody. While many of the consequences for battered immigrant women are suffered comparably by non-immigrant women, the plight of immigrant women highlights some of the difficulties inherent in enforcing mandatory policies in a manner that is responsive to community needs of safety and stability. The article does not attempt to address the question of whether intervention is necessary or required by the state as an initial step toward combating domestic violence. Rather, it assumes that some degree of state intervention will occur once the violence in the home is publicly disclosed.

#### VI. BATTERED IMMIGRANT WOMEN'S RESPONSES TO DOMESTIC VIOLENCE

A composite picture can be developed to illustrate some of the common responses to domestic violence by battered immigrant Latinas based on the collective experience of myself, other clinical faculty members, staff, and students.<sup>86</sup>

The most common responses of battered immigrant women to domestic violence fall into five areas: (1) calling a relative or friend to report abuse by intimate partners; (2) leaving the home for a brief period; (3) remaining in the home and attempting to pacify the abuser; (4) using methods of self-defense against the abuser; and (5) communicating with law enforcement after officers have been called to the scene by the abuser or another party. The composite responses, based on experiences in the Clinic, are in line with research studies

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85. During fiscal year 1999-2000, 47,000 criminal misdemeanor cases were processed by the municipal court in Tucson. Hon. Margarita Bernal, Address at the Domestic Violence Law Seminar, James E. Rogers College of Law, The University of Arizona (Nov. 5, 2002) (materials provided by speaker on file with author). Additionally, the municipal court is responsible for handling civil traffic cases, parking tickets, civil ordinance violations, certain DUI cases, and civil domestic violence orders of protection (5,600 processed during reporting period). *Id.*

86. During the period between 1999 and 2001, the Clinic scheduled initial client intake appointments with an average of 428 clients per year. An examination of 331 cases during that time period revealed that 163 clients reported not having United States Citizenship status when they sought assistance from the Clinic. Further, of those 163 clients, 122 reported that Spanish was their first language.

performed in this area.<sup>87</sup> Additionally, Clinic clients generally report that they have never or rarely sought the assistance of law enforcement or other state institutions due to fear of being reported to the United States Bureau of Citizenship and Immigration Services (“USCIS”). The concerns expressed by immigrant women in this regard are completely justified given the severity of harms that can result from interaction with the criminal justice system.<sup>88</sup>

Another common experience shared by Clinic clients is that their arrest for an act of domestic violence was precipitated by an act of violence against them by their intimate partner, who then contacted law enforcement in an attempt to carry out threats to have the immigrant woman deported. The threat to have a woman deported is recognized as a particular form of domestic violence deployed by abusive United States citizen and legal permanent resident spouses against their immigrant spouses.<sup>89</sup>

And so, we return to Rosa. The coercive control tactics exercised by Francisco with regard to her citizenship are in full cycle. He promises to file, but he does not. She asks for her papers; he refuses. She leaves with the children to stay with her in-laws; he promises her that he will file the requisite papers. She returns. Rosa takes work outside the home as a childcare worker at a local daycare center to supplement the increasingly limited family income and begins to learn a small amount of English. Francisco’s control is waning, and he grows angrier at each argument and threatens physical harm. He accuses Rosa of adultery and other transgressions. Now he no longer threatens physical violence; he uses it against her. Rosa experiences open-handed slaps to the face, pushing and shoving, and sexual contact against her consent committed by Francisco. She does not seek outside assistance for the harms. Francisco tells Rosa to conform to his demands or risk further harm, deportation, and loss of custody of their American-born children. During a particularly intense episode, Francisco attempts to block the exit to the home as Rosa tries to leave with the children, carrying the youngest in her arms. In response, Rosa yells at Francisco, demanding that he let her leave the home. She pushes him away from the door and scratches him in the face. When the monolingual English-speaking police finally arrive, they find Rosa afraid and unable to communicate effectively with them. Francisco, a fluent English speaker, is able to tell his story to the police with clarity and conviction.

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87. Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 248 (2000).

88. For an exceptional analysis of the collision between domestic violence policies and immigration law, see generally Espenosa, *supra* note 6.

89. See Dutton et al., *supra* note 87, at 250-53. For an appellate court decision detailing this particular form of abuse, see *Vega-Zazueta v. INS*, No. 95-70856, 1997 U.S. App. LEXIS 17439, at \*2 (9th Cir. July 10, 1997).

## VII. UNINTENDED CONSEQUENCES

A. *Arrest and Prosecution of Rosa*

The combined effect of mandatory arrest and prosecution policies results in the filing of criminal charges against Rosa. She is charged with misdemeanor assault, disorderly conduct, and contributing to the delinquency and dependency of a minor.<sup>90</sup>

Perhaps better, culturally-appropriate training would have prevented the arrest of Rosa. However, Rosa's arrest, detention, and prosecution will serve to add credibility to Francisco's threats of deportation and loss of child custody.

In Tucson, persons in Rosa's position as defendants accused of misdemeanor domestic violence are typically not afforded legal representation through the public defender's office.<sup>91</sup> Accordingly, it is safe to assume that Rosa will not be aware of the myriad of negative consequences that can result from her prosecution. Additionally, given the mandatory prosecution policies in place, any efforts made by Francisco to prevent the prosecution of Rosa, albeit not entirely for benevolent reasons, will not be effective. In fact, Francisco may be subject to criminal punishment himself if he fails to testify against Rosa at trial. In order to terminate her involvement in the criminal justice system, Rosa will either have to accept a plea offer, including diversion, or seek a trial.<sup>92</sup>

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90. Arizona Revised Statute section 13-1203 provides:

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

ARIZ. REV. STAT. § 13-1203 (2003).

91. Jeff Klotz, Address at the Domestic Violence Law Clinic, James E. Rogers College of Law, The University of Arizona (Feb. 8, 2000) (materials provided by speaker on file with author). Jeff Klotz is an attorney at the Tucson Public Defender's Office. *Id.*

92. Diversion in domestic violence cases is specifically provided for under Arizona Revised Statute section 13-3601, subsection (M). ARIZ. REV. STAT. § 13-3601(M) (2003). The primary difference between diversion and the plea bargain is that under diversion, successful completion of the terms of probation prevents the entry of a finding of guilt against the defendant, and the case is dismissed. With respect to trial, defendants charged with misdemeanor domestic violence offenses are not entitled to a jury trial. See *State ex rel. McDougal v. Strohsen*, 945 P.2d 1251,



Therefore, despite the fact that mandatory laws and policies were put into place to aid victims of domestic violence, they can prove to be a rigid trap for women unable to successfully navigate the system. An argument can be made that Rosa's actions did, in fact, constitute assault and not an act of self-defense. However, no serious doubt can exist about the fact that Rosa is a victim of domestic violence at the hands of Francisco. She is a victim/defendant.<sup>93</sup> Yet, assuming that her actions were unlawful, mandatory prosecution policies that provide a one-size-fits-all solution for all offenders will not result in the reduction of domestic violence tactics used by Francisco against Rosa. Instead, it is likely that Rosa will be deterred from seeking assistance from the state in any future domestic violence circumstance. Even more disturbing, Francisco has no incentive to alter his behavior. In fact, mandatory policies that do not allow for prosecutorial discretion in these types of cases result in the state's unwitting enhancement of an abuser's ability to exert control over his victim.

*B. The Availability of VAWA Relief for Rosa*

Any final case disposition short of total acquittal or dismissal of the criminal charges against Rosa may result in grave immigration consequences. In Rosa's case, Francisco did eventually file a spouse application form with the local USCIS office, and Rosa was granted conditional residency to remain in the country. She was also granted employment authorization, which allowed her legally to obtain employment.<sup>94</sup>

However, Rosa, as a victim of domestic violence married to a United States citizen, may be eligible to file her own request for citizenship with the USCIS based on revisions to the immigration law enacted pursuant to the Violence Against Women Act of 1994.<sup>95</sup> The sweeping legislation wrestled control over the acquisition of legal citizenship status away from the abuser and placed power squarely in the hands of the victim.<sup>96</sup> Like mandatory

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1258 (Ariz. 1997) (holding that under Arizona law an offender is not entitled to a jury trial for a misdemeanor assault charge).

93. The term "victim/defendant" will be used throughout the remainder of this article to describe victims of domestic violence who find themselves as defendants in criminal court facing charges of domestic violence wherein their abuser is the state's victim. The term has been used by other authors to describe a similar set of circumstances. See Cecelia M. Espenoza, *Crimes of Violence by Non-Citizens and the Immigration Consequences*, COLO. LAW., Oct. 1997, at 89-90.

94. For a detailed discussion of the process by which a United States citizen spouse can petition for citizenship status on behalf of his immigrant spouse, see Espenoza, *supra* note 6, at 213-14.

95. See Immigration and Nationality Act § 204(a), 8 U.S.C. § 1154(a) (2000) [hereinafter INA].

96. *Id.* The revisions allow an alien spouse to file her own request for citizenship if she can demonstrate to the Attorney General that she has been battered. *Id.*

intervention laws and policies, the changes to immigration laws providing protections to victims of domestic violence is the type of legal response for which anti-domestic violence advocates lobbied for years.<sup>97</sup>

A successful VAWA petition with the USCIS requires the victim to prove three essential elements: (1) good faith marriage to U.S. citizen or legal permanent resident; (2) battery or extreme cruelty; and (3) good moral character.<sup>98</sup> Once a VAWA application is approved, the applicant may be granted employment authorization and will be allowed to remain in the country until filing the necessary documents with the USCIS to adjust her status to legal permanent resident (“LPR”).<sup>99</sup> In order to achieve the coveted LPR status, Rosa will have to prove to the USCIS that she is not otherwise “inadmissible.”<sup>100</sup>

If Rosa accepts a diversion plea offer, a standard plea offer, or if she is convicted of the domestic violence charge, she then faces two potential hurdles with the USCIS in her application for citizenship. First, she will likely be unable to prove to the USCIS that she is of “good moral character,” a necessary element in the first stage of a successful VAWA application. Second, she may be found inadmissible by the USCIS and, therefore, be unable to achieve LPR status.

#### 1. VAWA Application Requirements: Good Moral Character and Aggravated Felony Convictions

Rosa will have to show that she has good moral character in order for the USCIS to approve her VAWA petition. The domestic violence assault charges will effect this determination. Good moral character is not specifically defined under the Immigration and Nationality Act (“INA”), but the Act lists offenses, conduct, and behavior that can prevent an applicant from being found to have good moral character.<sup>101</sup> In Rosa’s case, it can be argued that if she receives a sentence of confinement for more than one year she cannot be found to have good moral character because she has been convicted of an “aggravated felony,” despite the charge as a state-defined misdemeanor.<sup>102</sup> The result is the same if she accepts diversion or a standard plea offer or if she is found guilty at trial. The only way that she can be certain to prevent such a finding is by being acquitted after trial or otherwise having the case dismissed by the state.

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97. See Rivera, *supra* note 1, at 464.

98. See Espenosa, *supra* note 6, at 167-69, 172-73.

99. See NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 4:63 (3d ed. 2003).

100. See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2000).

101. See *id.* § 1101(f).

102. See *infra* notes 107-11 and accompanying text.

The basis for such a harsh result is found in the definitions of “conviction” and “aggravated felony.” Under the INA, a “conviction” can include an admission to acts that constitute the essential elements of a crime, coupled with some restriction on one’s liberty.<sup>103</sup> Participation in a domestic violence diversion program will require Rosa to accept responsibility for the domestic violence assault, waive her right to trial, and subject herself to probation, eventually leading to dismissal of the charges.<sup>104</sup> However, her participation in the diversion program will be deemed a conviction by the USCIS.<sup>105</sup> Further, accepting responsibility for the assault pursuant to a standard plea offer by the state, where Rosa would be found guilty of the crime and a conviction entered in return for a lesser sentence of punishment or probationary terms, would be considered a conviction under immigration law. Finally, the uncertainty of an outcome at trial given the fact that Rosa cannot be assured an acquittal renders the decision to pursue a trial a disconcerting alternative. However, a trial is the best chance Rosa has of obtaining a result that will not be deemed a conviction pursuant to immigration laws.

Particularly problematic is the domestic violence assault charge. A state misdemeanor assault may fit the definition of an aggravated felony under federal law.<sup>106</sup> The INA states that an aggravated felony includes a crime of violence for which the sentence imposed is at least one year of confinement.<sup>107</sup> The term “crime of violence,” in turn, is defined to include the use of physical force against another person.<sup>108</sup> It can be argued that the definition of assault

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103. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2000).

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

*Id.*

104. ARIZ. REV. STAT. § 13-3601(M) (2003).

105. *See* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2000).

106. *See id.* § 101(a)(43), 8 U.S.C. § 1101(a)(43).

107. *See id.* § 101(a)(43)(F) Also, under Arizona law, a person convicted of a class one misdemeanor can receive punishment of up to three years of court monitored probation. *See* ARIZ. REV. STAT. § 13-902 (2003).

108. 18 U.S.C. § 16 (2003).

A crime of violence means –

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

*Id.*

in Arizona includes the use of force against another person.<sup>109</sup> Thus, if Rosa is convicted of assault and sentenced to a term of imprisonment for at least one year, even if the sentence is suspended, she is barred from establishing good moral character for VAWA purposes. The saving grace for Rosa in this scenario may be the fact that under Arizona law the maximum term of imprisonment for a class one misdemeanor is six months.<sup>110</sup>

Additionally, changes to the INA as a result of VAWA II now allow the Attorney General to find that an applicant has good moral character despite a criminal conviction, if it is determined that the conviction is connected to the applicant having been battered or subject to extreme cruelty.<sup>111</sup>

## 2. Inadmissibility for Crimes of Moral Turpitude

If we assume that Rosa had been able to file a VAWA application with the USCIS that was approved prior to her arrest and prosecution, then she may still face great difficulty in attempting to adjust her status to LPR. The reason for the difficulty is the requirement that persons seeking LPR status must prove that they are not inadmissible based on a conviction for a crime of moral turpitude.<sup>112</sup> The essential question in determining whether a crime involves moral turpitude is whether the proscribed act, as defined by the law of the appropriate jurisdiction in which the act was committed, “includes elements which necessarily demonstrate the baseness, vileness, and depravity of the perpetrator.”<sup>113</sup> Rosa was charged with three separate crimes – assault, disorderly conduct, and contributing to the delinquency of a minor. An individual assessment of each charge is required.

In Arizona, the analysis of whether a crime is one of moral turpitude has been most commonly addressed on appeal when a defendant has been denied a jury trial for a misdemeanor offense.<sup>114</sup>

With respect to the assault charge, it is unlikely that a conviction for a class one misdemeanor assault, designated domestic violence, will qualify as a crime of moral turpitude under the INA.<sup>115</sup> The Supreme Court of Arizona has found

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109. See ARIZ. REV. STAT. § 13-1203(A)(1) (2003).

110. *Id.* § 13-707(A)(1).

111. INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C) (2000).

112. *Id.* § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).

113. 3B AM. JUR. 2D *Aliens and Citizens* § 1829 (1998).

114. See, e.g., *State ex rel. McDougal v. Stohson*, 945 P.2d 1251 (Ariz. 1997); *State ex rel. Baumert v. Superior Court*, 618 P.2d 1078 (Ariz. 1980); *Bazzanella v. Tucson City Court*, 988 P.2d 157 (Ariz. Ct. App. 1999).

115. Simple assault crimes are generally not considered crimes of moral turpitude. See 3B AM. JUR. 2D *Aliens and Citizens* § 1830 (1998).

that an assault is not a crime of moral turpitude in its analysis of whether a defendant convicted of domestic violence assault was entitled to a jury trial.<sup>116</sup>

Second, the Supreme Court of Arizona has reached the conclusion that disorderly conduct is not a crime involving moral turpitude in today's modern culture.<sup>117</sup> Therefore, even if Rosa is found guilty of committing the crime of disorderly conduct, and it is designated as a domestic violence offense, she should not be found inadmissible on the basis of a conviction for a crime of moral turpitude.

Finally, Rosa has been charged with contributing to delinquency and dependency of a minor. The statute provides that a person who acts, causes, encourages, or contributes to the delinquency or dependency of a child under the age of eighteen years can be found guilty of a class one misdemeanor.<sup>118</sup> Delinquency is defined as "any act which tends to debase or injure the morals, health or welfare of a child."<sup>119</sup> The definition of a dependent person includes a child "whose home, by reason of neglect, cruelty or depravity of his parents, or either of them, or on the part of his guardian, or on the part of the person in whose custody or care he may be, is an unfit place for such person."<sup>120</sup> In Tucson, victim/defendants similar to Rosa have been charged with contributory dependency or contributory delinquency where the alleged facts assert that a child was present in the home and witnessed the domestic violence incident.<sup>121</sup> In Rosa's case, the fact that she was holding her child in her arms when she scratched Francisco could serve as the basis for the charge. Remarkably, the Arizona Supreme Court has found that misdemeanor child abuse is not a crime of moral turpitude.<sup>122</sup>

### 3. Removal/Deportation for Crimes of Domestic Violence

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116. See *State ex rel. McDougal*, 945 P.2d at 1253-54. The case involved a designated domestic violence assault wherein the defendant sought a jury trial because a conviction for the crime would have prohibited the defendant from possessing firearms. *Id.* at 1252. The request was denied because the offense was not one involving moral turpitude. *Id.* at 1258.

117. See *State ex rel. Baumert*, 618 P.2d at 1080.

118. ARIZ. REV. STAT. §§ 13-3612 – 13-3613 (2003).

119. *Id.* § 13-3612(1).

120. *Id.* § 13-3612(3)(g).

121. See *id.* § 13-3613(C).

122. See *Bazzanella v. Tucson City Court*, 988 P.2d 157, 160 (Ariz. Ct. App. 1999). The defendant in the case sought a jury trial on the charges of misdemeanor child abuse because a conviction would jeopardize her employment and carry other collateral consequences. *Id.* at 160-61. The court denied the defendant's request. *Id.* at 161. The court found that misdemeanor child abuse is not an act of moral turpitude because the act involved a simple failure to perceive and act reasonably under the circumstances and did not involve a serious risk of physical injury to the child. *Id.* at 160.

For the purposes of this section, assume that Rosa had been able to achieve LPR status. She nonetheless will be at risk of removal from the country by the USCIS if she is convicted of a “crime of domestic violence.”<sup>123</sup> The inclusion of domestic violence as grounds for removal/deportation was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>124</sup> It is significant to note that the provision was not enacted as part of the anti-domestic violence advocate sponsored VAWA I or VAWA II legislation.<sup>125</sup>

A “crime of domestic violence” under the INA is a crime of violence committed against a person that stands in a specifically defined relationship to the offender.<sup>126</sup> The spousal relationship between Rosa and Francisco qualifies as a type of relationship covered by the INA provision. A crime of violence is not specifically defined in the INA. Instead, the INA makes specific reference to the federal criminal code for the definition of a crime of violence.<sup>127</sup> The federal definition of a crime of violence includes “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”<sup>128</sup> The class one misdemeanor assault charge faced by Rosa qualifies as a crime of violence because an argument can be made that the use of physical force is a necessary element of the offense.<sup>129</sup>

Turning next to the crime of disorderly conduct, it is less likely that a conviction for this offense will render Rosa deportable. The reason for the outcome can be found in the definition of disorderly conduct which does not require the use of physical force as an element.<sup>130</sup> The result will turn on

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123. INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (2000).

124. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 350, 110 Stat. 279 (1996).

125. *See generally* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 (1994); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, tit. V, 114 Stat. 1464 (2000).

126. INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (2000).

127. *Id.*

128. *See* 18 U.S.C. § 16(a) (2000).

129. Lynn Marcus, Director of the Immigration Law Clinic, James E. Rogers College of Law, The University of Arizona, informed the author that in her practice she has found that Tucson immigration judges do perceive a conviction for a class one misdemeanor assault as a grounds for removal/deportation under the INA (October, 2002) (on file with author).

130. Arizona’s statute regarding disorderly conduct provides:

- A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:
1. Engages in fighting, violent or seriously disruptive behavior; or
  2. Makes unreasonable noise; or
  3. Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person; or

whether Rosa is found guilty of the crime by engaging in fighting.<sup>131</sup> Again, it can be argued that the act of fighting with another person requires the use of physical force rendering it a crime of violence.

Finally, Rosa could be found deportable based on a conviction for a crime of child abuse.<sup>132</sup> The crime of contributory dependency or contributory delinquency is designated a family offense in Arizona along with other similar crimes, including child abuse.<sup>133</sup> It may be argued that a conviction for contributory dependency or delinquency falls within the child abuse grounds for deportability under the INA.

Ultimately, given the above analysis, if Rosa participates in diversion, accepts a standard plea bargain, or is found guilty at trial on any of the charges, she will most likely be found deportable by the USCIS. Fortunately, legislation enacted pursuant to VAWA II may provide relief for Rosa should she find herself in deportation proceedings.<sup>134</sup> However, it would be a poor

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4. Makes any protracted commotion, utterance or display with the intent to prevent the transaction of the business of a lawful meeting, gathering or procession; or
  5. Refuses to obey a lawful order to disperse issued to maintain public safety in dangerous proximity to a fire, a hazard or any other emergency; or
  6. Recklessly handles, displays or discharges a deadly weapon or dangerous instrument.

B. Disorderly conduct under subsection A, paragraph six is a class six felony. Disorderly conduct under subsection A, paragraph 1, 2, 3, 4 or 5 is a class one misdemeanor.

ARIZ. REV. STAT. § 13-2904 (2003).

131. *Id.* § 13-2904(A)(1).

132. INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (1998).

133. *See* ARIZ. REV. STAT. §§ 13-3601 to 13-3625 (2003).

134. INA section 237(a)(7) provides:

Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship—

(i) upon a determination that—

(I) the alien was acting in self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime—

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence

legal strategy to advise Rosa to participate in diversion or accept a standard plea bargain to the charges and then seek at best uncertain relief from deportation.

### C. *Child Custody Implications*

Once Rosa navigates her way out of the criminal justice system with any result short of acquittal or dismissal of the charges, she then faces the imposition of mandatory policies in place in domestic relations law should Francisco challenge her for custody of their two children.<sup>135</sup> Under Arizona law, there exists a presumption against awarding custody to domestic violence offenders.<sup>136</sup> The domestic violence offender can rebut the presumption at a hearing on the merits.<sup>137</sup> The presumption does not apply if the court finds that both parents have committed an act of domestic violence.<sup>138</sup> However, Rosa would be at a disadvantage if she has a conviction for domestic violence as compared to no record of conviction against Francisco. Rosa will have to show that she has proof of rehabilitation (i.e. completion of the domestic violence offender treatment program) to rebut the presumption against her receiving custody of the children.<sup>139</sup> Additionally, she will have to testify regarding the past acts of domestic violence that Francisco has committed against her. The net result may be the refusal of the court to impose the presumption against either party. However, Rosa will remain at a disadvantage compared to Francisco who has greater access to resources (e.g., citizenship, employment, family support, housing). It is inconceivable that the same advocates who sought the imposition of mandatory prosecution of domestic violence offenders contemplated the complicated web of harmful consequences in which Rosa, the victim/defendant, has been ensnared.

### D. *Economic Independence*

One of the factors that can prevent some women from leaving an abusive relationship is the inability to support themselves and their children

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is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

INA § 237(a)(7), 8 U.S.C. § 1227(a)(7) (2000) (footnote omitted).

135. Fathers who batter mothers are two times more likely to seek sole physical custody of their children than are non-violent fathers. See American Bar Association Commission on Domestic Violence, *Prevalence*, at <http://www.abanet.org/domviol/stats.html> (last visited Jan. 6, 2004).

136. ARIZ. REV. STAT. § 25-403(N) (2003).

137. *Id.* § 25-403(O).

138. *Id.* § 25-403(N).

139. *Id.* § 25-403(O).



independent of the abuser.<sup>140</sup> Thus, the ability of domestic violence victims to obtain employment outside of the home is critical in the fight against abuse. However, here too we find unintended consequences for Rosa resulting from her mandatory prosecution on the domestic violence charges. Recall that Rosa had found a job as a childcare worker. It is not uncommon for women similarly situated to Rosa in Southern Arizona to find employment in this field.<sup>141</sup>

Rosa will lose her position as a childcare worker as a result of the mandatory arrest and prosecution. The result is dictated by the regulatory scheme that requires childcare workers to obtain a valid fingerprint clearance card through the state Department of Public Safety.<sup>142</sup> The law requires that child care personnel submit two items to their employer: (1) a certification form; and (2) a valid class one or class two fingerprint clearance card.<sup>143</sup> The fact that Rosa has been arrested and is awaiting trial for the charge of contributing to the delinquency or dependency of a minor, which is a charge of child abuse,<sup>144</sup> will preclude Rosa from being issued a class one or class two fingerprint clearance card by the Department of Public Safety.<sup>145</sup> The child abuse charge will also prevent Rosa from being able to submit the certification form which requires her to certify that she is not awaiting trial on child abuse charges.<sup>146</sup>

Even if contributing to the delinquency and dependency of a minor was not a crime of child abuse, the charge of assault and the domestic violence designation of all of the offenses would preclude Rosa from obtaining the requisite fingerprint clearance, unless she can prove a good cause exception.<sup>147</sup> A good cause exception can include consideration of any mitigating circumstances.<sup>148</sup> In theory, Rosa could ask for a good cause hearing before the board and present evidence of the prior abuse by her husband and her actions of self-defense in an effort to prove mitigation.<sup>149</sup> However, Rosa has no financial ability to hire legal counsel to represent her before the board. She has limited education, training, and English language proficiency. It is

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140. See Dutton et al., *supra* note 87, at 269-71.

141. See generally INSTITUTE FOR WOMEN'S POLICY RESEARCH, THE STATUS OF WOMEN IN ARIZONA: POLITICS, ECONOMICS, HEALTH, DEMOGRAPHICS (2000).

142. ARIZ. REV. STAT. §§ 36-883.02(A), 41-1758.03 (2003).

143. *Id.* § 36-883.02(A).

144. The term "dependency" as defined under section 13-3612, the statute under which Rosa has been charged, mirrors the definition of "dependent child" pursuant to the state juvenile court and child abuse provisions. ARIZ. REV. STAT. §§ 8-201(13), 13-3612(3)(g) (2003).

145. *Id.* §§ 41-1758.03(B)(11, 14).

146. *Id.* § 36-883.02(C)(1).

147. *Id.* §§ 41-1758.03(C)(4), (C)(58).

148. *Id.* § 41-619.55(E)(4).

149. *Id.* § 41-619.55(B).

difficult to imagine how she would be able to successfully obtain a good cause exception for the issuance of a class one or class two fingerprint clearance card.

### VIII. VAWA DIVERSION AND OTHER CONSIDERATIONS

Rather than a wholesale elimination of all mandatory policies and laws outlined in this article, I propose the implementation of discretionary prosecution under select circumstances as warranted by identified case facts. The approach necessarily requires a level of trust by and between criminal justice system actors, anti-domestic violence advocates, and members of historically oppressed groups that has heretofore been unrealized. The alternative leaves victims like Rosa in the cross hairs of intersecting policies enacted to address domestic violence as a serious public concern without regard to the consequences that leave devastated victims their wake. I argue for the imposition of this discretionary model for immigrant victims of domestic violence who are also facing charges of misdemeanor domestic violence. The proposal attempts to address two concerns: (1) that victims of domestic violence are identified as early as possible by the prosecutor's office, even when the victims enter the system as defendants; and (2) that victim/defendants in domestic violence cases progress through the criminal justice system in a manner that renders them more capable of ending the violence in their lives rather than keeping them trapped in a cycle of violence.

#### A. *Individualized Case Assessment by Prosecutorial Staff Specifically Trained in Identification of Domestic Violence Victims*

To the extent that agreement exists between advocates and state actors that domestic violence is a crime requiring particular attention, resources should be devoted to specially train prosecutors to identify and recognize the particular forms of coercive control that abusive spouses use against immigrant victims of domestic violence.<sup>150</sup> Early identification of these cases will allow for the provision of appropriate case disposition alternatives that do not yield the unintended consequences discussed above.

#### B. *VAWA Diversion and Other Case Disposition Options for Victim/Defendants in Domestic Violence Cases*

Once identified, prosecutors should be given discretion to offer an array of case disposition alternatives that will allow the victim/defendant to address the

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150. Advocates may argue that it is inappropriate and not legally required that prosecutors inquire into the citizenship status of defendants. However, by the time the case is assessed by the prosecutor's office, the citizenship status of the defendant would likely have been discovered through processing at the municipal detention center or county jail.

violence in her life in a safe and responsible manner, but do not render her deported, childless, and unemployed. An alternative that has proved successful in the Clinic service area is commonly referred to as VAWA diversion.<sup>151</sup> The VAWA diversion alternative is really a misnomer because the victim/defendant is not required to admit facts sufficient to sustain a conviction for a domestic violence offense.<sup>152</sup> Instead, the case is held open in the pre-trial phase while the victim/defendant completes counseling.<sup>153</sup> The number of hours of counseling required is determined by the prosecutor, and the counseling must be obtained through a program that is appropriate for the needs of a victim of domestic violence.<sup>154</sup> After the requisite number of counseling hours has been completed, the case is voluntarily dismissed by the prosecutor, and the victim/defendant is allowed to exit the system without a conviction or the resulting negative immigration law consequences.<sup>155</sup> Any concerns about repeat offenders can be relieved by the official recognition of the VAWA diversion as a legitimate case disposition. Accordingly, the prosecutor's office may want to implement a policy that a defendant may only participate in one VAWA diversion program in her lifetime.

Other options such as creative plea bargaining should be explored. Creative approaches to plea bargaining may include carefully drafted plea agreements that reduce the charge to a non-domestic violence offense and a non-violent offense with a maximum term of probation that does not exceed one year.

In Rosa's case, a reduction of the assault charge to a class three misdemeanor would provide greater assurance against deportation on the grounds of conviction for a crime of violence.<sup>156</sup> Similarly, basing the disorderly conduct charge on something other than fighting (i.e., unreasonable noise) could aid in preventing deportation.<sup>157</sup> Accordingly, an attractive prosecution offer for Rosa might include an outright dismissal of the contributing to the delinquency or dependency of a minor charge and a plea of guilty to the reduced charges of assault and disorderly conduct.<sup>158</sup>

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151. See discussion at *supra* note 78.

152. See ARIZ. REV. STAT. § 13-3601(M) (2003).

153. *Id.*

154. *Id.*

155. *Id.* § 13-3601(N)(1) (2003).

156. A class three misdemeanor assault in Arizona does not require the use of force as a necessary element of the offense. See ARIZ. REV. STAT. § 13-1203(A)(2) (2003).

157. See *id.* § 13-2904(A)(2). A disorderly conduct charge can be based on acts which do not require force as a necessary element of the offense. *Id.*

158. It is the position of this author that although greater disposition alternatives should be available, participation in a diversion program or acceptance of a plea bargain should not be recommended when the defendant has a strong and credible defense and is likely to prevail at trial (i.e. self defense).

C. *Referral to Immigration Legal Assistance Programs and Appointment of Public Defense Counsel*

Immigrant victim/defendants involved in domestic violence cases should be provided with referrals to immigration legal assistance programs so that appropriate remedies may be sought under the VAWA provisions of the INA.<sup>159</sup> Further, resources must be made available so that victim/defendants can be afforded representation through the public defender's office as the case outcome can have a substantial impact on their immigration status and rights in this country.

D. *Referral to Culturally-Specific Advocacy and Counseling Services*

Immigrant victim/defendants should be identified early and referred immediately to culturally-sensitive, anti-domestic violence advocacy service providers. These agencies can provide counseling and other supportive services in a manner that recognizes the multiple identities of race, gender, and national origin of victim/defendants like Rosa.<sup>160</sup>

E. *Community Education and "Rosa's Rights"*

The above-suggested proposals contemplate action after the initiation of a prosecution. However, community education could lessen the potential for cases similar to Rosa's from being referred for prosecution in the first instance. Agencies providing services to recently immigrated women are in a unique position to educate potential victim/defendants about their rights. In Tucson, social service providers routinely hand out a card, in English and Spanish, which lists community resources available to victims of domestic violence. A similar card can be created and distributed to the same population of victims informing them of their rights upon state intervention in a case of domestic violence. The rights, "Rosa's Rights," should include: (1) the right to request a language interpreter at the scene; (2) the right to assert self-defense; (3) the right to report prior abuse; (4) the right to request medical attention; and (5) the right to request documentation of injuries.

## IX. CONCLUSION

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159. In the Clinic service area, Southern Arizona Legal Aid, Inc. [hereinafter SALA] provides legal assistance to victims of domestic violence that are eligible to file a self-petition for citizenship under the VAWA and VAWA II mechanisms. It is common for SALA to refer their VAWA clients to the Clinic for criminal defense representation prior to filing the self-petition.

160. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); M. Joan McDermott, *On Moral Enterprises, Pragmatism, and Feminist Criminology*, 48 CRIME & DELINQ. 283 (2002).

Overall, both anti-domestic violence advocates and state actors are seeking a reduction in the incidence of domestic violence in the community. However, prosecuting agencies require additional and ongoing training by advocates on the particular concerns facing immigrant victims of domestic violence who may become criminal defendants in misdemeanor court. Further, advocates need to trust that the exercise of discretion by prosecutors in offering disposition alternatives will not diminish progress made in getting state actors to treat domestic violence as a serious criminal offense.

